THE INDIAN LIMITATION ACT

(IX OF 1908)

DONATED
BY
SHRI AMAR NATH RAINA
(191[illegible]-19[illegible])
Former Advocate General,
Jammu and Kashmir.

THE

INDIAN LIMITATION ACT

(IX OF 1908)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. Controversies are limited to a fixed period of time lest they should be immortal while men are mortal —*Ne autem lites immortales essent, dum litigantes mortales sunt.* (STORY'S *Conflict of Laws.*)

A statute of limitation instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it what it was intended emphatically to be, a statute of repose. (JUSTICE STORY in *Beli* v. *Morrison.*)

TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

PREFACE TO THE SECOND EDITION.

THE fact that a SECOND EDITION of this work has been called for within three years of the publication of its first edition is ample testimony to the cordiality of the reception accorded to the first edition and the Authors wish to thank the legal profession for this encouragement. During the three years that have elapsed since the publication of the first edition hundreds of decisions bearing on the law of limitation including some important pronouncements by the Privy Council have been reported and there have also been some changes in the statute. All these have been considered and incorporated in this edition. Opportunity has also been taken to revise the book thoroughly and to check all the references. Special attention is drawn to the foot-notes. They do not contain merely the references of the cases relied on in support of the propositions in the body of the work but often include critical notes on cases and other matters which could not conveniently be given in the body.

The law of limitation is a very tough branch of the law and the Indian Limitation Act is an Act which requires revision and amendment in several places. That supreme desideratum in any system of law, namely, certainty, is greatly lacking in its provisions, giving rise to numerous doubts and conflicts. The task of interpreting and explaining the provisions of the Act has by no means been an easy one. The Authors have, however, endeavoured to take a comprehensive view of the subject and present it in a systematic way, combining the ideal of exhaustiveness with that of a scientific exposition of the underlying principles.

A fresh General Index has been specially prepared for this edition. The addition of a Table of Cases is a feature which, it is hoped, will enhance the usefulness of the book.

The Authors wish to thank the following gentlemen for their valuable assistance in the preparation of this edition: Messrs. S. Appu Rao, B.A., B.L., Advocate of the Madras High Court, V. S. Balkundi, B.A., LL.B., K. S. Bakre, B.SC., LL.B., V. R. Buche, B.A., LL.B., W. N. Gadgil, B.SC., LL.B., and G. B. Shidhaye, B.A., LL.B., Pleader, Nagpur.

V. V. C.
K. N. A.

PREFACE TO THE FIRST EDITION

THE CORDIAL RECEPTION accorded to their Commentaries on the Civil Procedure Code and the Criminal Procedure Code, has induced the authors to venture again before the legal public with this Commentary on the LIMITATION ACT.

The authors have, in the plan and execution of this work, followed the same method as that adopted in the two previous publications. All the decisions of their Lordships of the Privy Council and the Superior Courts of India and Burma, bearing on the Limitation Act, have been collected, studied carefully and analytically and endeavour has been made to enunciate with clarity and precision the basic principles of law underlying them. To unravel the huge mass of case-law that has gathered on the subject and to deduce the principles has by no means been an easy task. But no pains have been spared to do so and to classify the principles so deduced under appropriate headings and present them in a logical and cogent manner. The aim has been to make the commentary as useful as possible to the Bench and the Bar and the authors have therefore attempted to discuss all the various questions arising in practice under this Act, by reference to fundamental principles, illustrated by the decisions of the Courts. It cannot be gainsaid that the hackneyed method of merely digesting cases under each section has ceased to appeal to the profession as being of no real help or guidance in appreciating the decisions.

Wherever there is a conflict of decisions, attempt has been made to resolve the conflict by discussing the question on first principles and the authors have not shrunk from the task of criticising decisions which, on applying the basic principles of law, are found to be open to such criticism. In the foot-notes, special care has been taken to explain the decisions cited and to indicate the applicability of the principles illustrated by them.

In order to facilitate reference, the full text of the Act has been given all in one place. The synopsis and the grouping of other important and useful subjects given under the heading "other topics" will, it is hoped, be of help to the reader to find out the particular subject required with facility and ease.

Corresponding sections of the earlier Limitation Acts have been given in the foot-notes under each section, to enable the reader to appreciate the decisions on such enactments in the light of the language of those enactments.

The authors trust that this work will receive the same generous support from the Bench and the Bar as was accorded to their Commentaries on the Civil Procedure Code and the Criminal Procedure Code.

The authors desire to express their indebtedness to Messrs. D. D. Datar, B.SC., LL.B. and R. K. Manohar, B.A., LL.B. Advocates and D. V. Chitaley, B.A., LL.B., Pleader, Nagpur; Messrs. S. Appu Rao, B.A., B.L., C. Srinivasa Rao, M.A., B.L., and V. Srinivasa Iyer, B.A., B.L., Advocates; Messrs. T. R. Ananthasubramania Iyer, B.A., B.L., K. G. Subramania Iyer, M.A., B.L., N. Balasubramania Iyer, M.A., M.L., and E. R. Gopinatha Rao, B.A., B.L., Pleaders, Coimbatore; Mr. V. S. Balkundi, B.A., LL.B., Pleader, Nagpur and Mr. B. S. Panisuff, B.A., LL.B., Advocate, Bombay, for the very valuable help rendered by them in compiling and bringing out this work.

March 15,
1938.

V. V. C.
K. N. A.

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ABBREVIATIONS

A. O.	Government of India (Adaptation of Indian Laws) Order, 1937 as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.
A.I.R. 1921 All., Bom., etc.	All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
All. or I. L. R. All.	Indian Law Reports, Allahabad Series.
Agra.	Agra High Court Reports.
All. L. Jour.	Allahabad Law Journal.
All. W. N.	Allahabad Weekly Notes.
All. W. R.	Allahabad Weekly Reporter.
App. Cas.	Law Reports, Appeal Cases (England).
Beng. L. R.	Bengal Law Reports.
B. R.	Bihar Reports.
Bom. or I. L. R. Bom.	Indian Law Reports, Bombay Series.
Bom. H. C. R.	Bombay High Court Reports.
Bom. L. R.	Bombay Law Reporter.
Bom. P. J.	Bombay Printed Judgments.
Bourke	Bourke's Reports.
Bur. L. Jour.	Burma Law Journal.
Bur. L. R.	Burma Law Reports.
Bur. L. Tim.	Burma Law Times.
Cal. or I. L. R. Cal.	Indian Law Reports, Calcutta Series.
Cal. L. Jour.	Calcutta Law Journal.
Cal. L. R.	Calcutta Law Reports.
Cal. W. N.	Calcutta Weekly Notes.
C. P. L. R.	Central Provinces Law Reports.
Cor.	Coryton's Reports.
Cr. L. J.	Criminal Law Journal.
E. R.	English Reports (England.)
Hay	Hay's Reports.
Hyde	Hyde's Reports.
Ind. App.	Law Reports, Indian Appeals.
Ind. Cas.	Indian Cases.
Ind. Jur. (N.S.)	Indian Jurist (New Series).
Ind. Jur. (O.S.)	Indian Jurist (Old Series).
Ind. Rul.	Indian Rulings.
Kar. (I. L. R.)	Indian Law Reports, Karachi Series.
K. B.	Law Reports, King's Bench (England).
Knapp	Knapp's Reports.

Lah. or I. L. R. Lah.	...	Indian Law Reports, Lahore Series.
Lah. L. Jour.	...	Lahore Law Journal.
L. J.	...	Law Journal (England).
L. R.	...	Law Reports (England).
L. R. A.	...	Law Reporter, Allahabad.
L. T.	...	Law Times (England).
Low. Bur. Rul.	...	Lower Burma Rulings.
Luck. or I. L. R. Luck.	...	Indian Law Reports, Lucknow Series.
Luck. Cas.	...	Lucknow Cases.
Mad. or I. L. R. Mad.	...	Indian Law Reports, Madras Series.
Mad. H. C. R.	...	Madras High Court Reports.
Mad. Jur.	...	Madras Jurist.
Mad. L. Jour.	...	Madras Law Journal.
Mad. L. Tim.	...	Madras Law Times.
Mad. L. W.	...	Madras Law Weekly.
Mad. W. N.	...	Madras Weekly Notes.
Marsh.	...	Marshall's Reports.
Moo. Ind. App.	...	Moore's Indian Appeals.
Moo. P. C. C.	...	Moore's Privy Council Cases.
Nag. (I. L. R.)	...	Indian Law Reports, Nagpur Series.
Nag. L. Jour.	...	Nagpur Law Journal.
Nag. L. R.	...	Nagpur Law Reports.
N.-W. P. H. C. R.	...	North-West Provinces High Court Reports.
Oudh Cas.	...	Oudh Cases.
Oudh L. Jour.	...	Oudh Law Journal.
Oudh L. R.	...	Oudh Law Reports.
Oudh S. C.	...	Oudh Select Cases.
Oudh W. N.	...	Oudh Weekly Notes.
Pat. or I. L. R. Pat.	...	Indian Law Reports, Patna Series.
Pat. H. C. C.	...	Patna High Court Cases.
Pat. L. Jour.	...	Patna Law Journal.
Pat. L. Tim.	...	Patna Law Times.
Pat. L. R.	...	Patna Law Reporter.
Pat. L. W.	...	Patna Law Weekly.
Pat. W. N.	...	Patna Weekly Notes.
Pun. L. R.	...	Punjab Law Reporter.
Pun. Re.	...	Punjab Records.
Pun. W. R.	...	Punjab Weekly Reporter.
Q. B.	...	Law Reports, Queen's Bench (England).
R. & J.s'	...	Rafique and Jackson's Oudh Privy Council Decisions.
Rang.	...	Indian Law Reports, Rangoon Series
Rang. L. R.	...	Rangoon Law Reports.
R. R.	...	Revised Reports (England).
R. S. C.	...	Rules of the Supreme Court of England.

Sar.	... Saraswati's Privy Council Judgments.
Shome L. R.	... Shome's Law Reports.
Sind L. R.	... Sind Law Reporter.
Suther.	... Sutherland's Privy Council Judgments.
Suth. W. R.	... Sutherland's Weekly Reporter.
Times L. R.	... Times Law Reports (England).
U. P. B. R.	... United Provinces Board of Revenue.
U. P. L. R.	... United Provinces Law Reports.
Upp. Bur. Rul	... Upper Burma Rulings.
Weir	... Weir's Criminal Rulings.
W. R. (Eng.)	... Weekly Reporter (England).

Art.	... Article.
C. A.	... Court of Appeal.
Cl.	... Clause.
Cr.	... Criminal.
D. B.	... Division Bench.
F. B.	... Full Bench.
F. C.	... Federal Court.
F.-N.	... Foot-Note.
G. I.	... Government of India Act, 1935.
Jour.	... Journal.
L. P.	... Letters Patent.
N.	... Note.
O.	... Order.
P.	... Page.
P. C.	... Privy Council.
Pre.	... Preamble.
R.	... Rule.
S.	... Section.
S. B.	... Special Bench.

IN FOOT-NOTES— ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

Full year reference is given prior to 1866, like (1818) and *not* ('18). (1865) and *not* ('65) and so on and to all English cases.

The figure preceding the A. I. R. reference denotes the *Volume* Number of All India Reporter. Thus, in ('40) *27* A. I. R. 1940 Oudh 441, the figure *27* denotes the 27th Volume of the All India Reporter, "1914" being the 1st Volume.

IMPORTANT NOTE

References to Official Reports are invariably given in all cases found in the Official Reports.

THE (ENGLISH) PRESCRIPTION ACT

(1832, 2 & 3 Will. IV, Ch. 71.)

AN ACT FOR SHORTENING THE TIME OF PRESCRIPTION IN CERTAIN CASES.

Lord Tenterden's Act, 1st August, 1832.

Claims to Right of Common and other *profits a prendre*, not to be defeated after Thirty Years' enjoyment by showing the Commencement.

1. WHEREAS the expression "Time immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the Title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many Cases productive of Inconvenience and Injustice; for Remedy thereof be it enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same. That no claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Right of Common or other Profit or Benefit to be taken and enjoyed from or upon any Land of our Sovereign Lord the King, his heirs or successors, or any land being Parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any Ecclesiastical or Lay Person or Body Corporate, except such matters and things as are herein specially provided for, and except Tithes, Rent, and Services, shall, where such Right, Profit, or Benefit shall have been actually taken and enjoyed by any person claiming right thereto without Interruption for the full period of Thirty years, be defeated or destroyed by showing only that such Right, Profit, or Benefit was first taken or enjoyed at any time prior to such period of Thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such Right, Profit, or Benefit shall have been so taken and enjoyed as aforesaid for the Full Period of Sixty years the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing.

After Sixty years' enjoyment the Right to be absolute unless had by Consent or Agreement.

In Claims of Right of Way or other Easement the Period to be Twenty years and Forty years.

2. And be it further enacted, that no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant to any way or other easement, or to any Water-course, or the use of any Water, to be enjoyed or derived upon, over or from any Land or Water of our said Lord the King, his heirs or successors, or being Parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any Ecclesiastical or Lay Person, or Body Corporate when such Way or other Matter as herein last before mentioned shall have been actually enjoyed by any person claiming Right thereto without Interruption for a full period of Twenty years, but nevertheless such Claim may be defeated in any other way by which the same is now liable to be defeated; and where such Way or other Matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of Forty years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that purpose by Deed or Writing.

Claim to the Use of Light enjoyed for Twenty years indefeasible unless shown to have been by Consent or Agreement in Writing.

3. And be it further enacted, that when the Access and Use of Light to and for any Dwelling house, Workshop, or other Building shall have been actually enjoyed therewith for the full period of Twenty years without Interruption, the Right thereto shall be deemed absolute and indefeasible, any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing.

The Periods to be Periods before action. "Interruption."

4. And be it further enacted, that each of the respective Periods of Years hereinbefore mentioned shall be deemed and taken to be the Period next before some Suit or Matter, to which such Period may relate, shall have been or shall be brought into question, and that no Act or other Matter shall be deemed to be an Interruption within the meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the Party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

Pleadings.

5. And be it further enacted, that in all Actions upon the case and other pleadings, wherein the Party, claiming may now by law allege his Right generally, without averring the existence of such Right from Time immemorial, such general Allegation shall still be deemed sufficient, and if the same shall be denied all and every, the Matters in that Act mentioned and provided, which shall be applicable to the Case, shall be admissible in Evidence to sustain or rebut such allegation; and that in all pleadings to Actions of trespass, and in all other pleadings wherein, before the passing of this Act, it would have been necessary to allege the Right to have existed from Time immemorial, it shall be sufficient to allege the Enjoyment thereof as of Right by the Occupiers of the Tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the Case, and without claiming in the Name or Right of the Owner of the Fee, as is now usually done; and if the other Party shall intend to rely on any Proviso, Exception, Incapacity, Disability, Contract, Agreement, or other Matter hereinbefore mentioned, or on any Cause or Matter of Fact or of Law not inconsistent with the simple Fact of Enjoyment, the same shall be specially alleged and set forth in answer to the Allegation of the Party claiming, and shall not be received in evidence on any general Traverse of Denial of such Allegation.

Presumption not to be allowed in claims herein provided for.

6. And be it further enacted, that in the several Cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any Claim, upon Proof of the Exercise or Enjoyment of the Right or Matter claimed for any less Period of Time or Number of Years than for such Period or number mentioned in this Act as may be applicable to the Case and to the Nature of the Claim.

Proviso for Infants, etc.

7. Provided also, that the time during which any Person, otherwise capable of resisting any Claim to any of the Matters before mentioned, shall have been or shall be an Infant, Idiot, *Non compos mentis*, *Feme Covert*, or Tenant for life, or during which any Action or Suit shall have been pending and which shall have been diligently prosecuted, until abated by the Death of any Party or Parties thereto, shall be excluded in the Computation of the Periods hereinbefore mentioned, except only in Cases where the Right or Claim is hereby declared to be absolute and indefeasible.

What time to be excluded in computing the Term of Forty Years appointed by this Act.

8. Provided always, and be it further enacted, that when any Land or Water upon, over or from which any such way or other convenient Watercourse or Use of Water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any Term of Life, or any Term of Years exceeding Three Years from the granting thereof the Time of the Enjoyment of any such Way or other Matter as herein last before mentioned, during the continuance of such term shall be excluded in the computation of the said Period of Forty Years, in case the Claim shall within Three Years next after the end or sooner Determination of such Term be resisted by any Person entitled to any Reversion expectant on the Determination thereof.

Not to extend to Scotland or Ireland.

9. And be it further enacted, that this Act shall not extend to Scotland or (Ireland).

Commencement of Act.

10. And be it further enacted, that this Act shall commence and take effect on the First Day of Michaelmas Term now next ensuing.

Act may be Amended.

11. And be it further enacted, that this Act may be amended, altered, or repealed during the present Session of Parliament.

THE INDIAN EASEMENTS ACT, 1882.

ACT NO. V OF 1882.

[17th February, 1882.]

AN ACT TO DEFINE AND AMEND THE LAW RELATING TO EASEMENTS AND LICENSES.

Preamble.

[1]WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows :—

PRELIMINARY.

Short title.

1. This Act may be called the Indian Easements Act, 1882.

Local extent.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioner of the Central Provinces and Coorg;[1a]

Commencement.

and it shall come into force on the first day of July, 1882.

Savings.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from —

(a) any right of the [2][Crown] to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

---

[1] For Statement of Objects and Reasons, see Gazette of India, 1880, Pt. V, p. 494; for Report of the Select Committee, see *ibid*, 1881, Pt. V, p. 1021.

[1a] Act V of 1882 was extended to the territories administered by the Governor of Bombay in Council, the Lieutenant Governor of the North Western Provinces and the Chief Commissioner of Oudh by Act VIII of 1891.

[2] Substituted for "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

(b) any customary or other right (not being a license) in or over immovable property with the [1][Crown], the public or any person may possess irrespective of other immovable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

Construction of certain references to Act XV of 1877 and Act IX of 1871.

3. [2][All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1877, or to sections 27 and 28 of Act No. IX of 1871, shall, in the territories to which this Act extends, be read as made to sections 15 and 16 of this Act.]

CHAPTER I.

OF EASEMENTS GENERALLY.

"Easement" defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth: the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations.

(a) *A*, as the owner of a certain house, has a right of way thither over his neighbour *B*'s land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) *A*, as the owner of a certain house, has the right to go on his neighbour *B*'s land and to take water for the purposes of his household out of a spring therein. This is an easement.

(c) *A*, as the owner of a certain house, has the right to conduct water from *B*'s stream to supply the fountains in the garden attached to the house. This is an easement.

(d) *A*, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on *B*'s field, or to take, for the purposes of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of *C*'s tank, or timber out of *D*'s wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on *E*'s land. These are easements.

(e) *A* dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) *A* is bound to cleanse a water-course running through his land and keep it free from obstruction for the benefit of *B*, a lower riparian owner. This is not an easement.

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

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1. Substituted for "Government" by A. O.
2. This section was substituted for the original Section 3 by the Repealing and Amending Act (X of 1914), S. 2 and Sch. I.

177763

Illustrations.

(a) A right annexed to *B's* house to receive light by the windows without obstruction by his neighbour *A*. This is a continuous easement.

(b) A right of way annexed to *A's* house over *B's* land. This is a discontinuous easement.

(c) Rights annexed to *A's* land to lead water thither across *B's* land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to *A's* house to prevent *B* from building on his own land. This is a non-apparent easement.

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easement restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely): —

Exclusive right to enjoy.

(a) The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Rights to advantages arising from situation.

(b) The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the rights above referred to.

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation. — Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and the adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling, on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land and for the purposes of any manufactory situate thereon : Provided that he does not thereby cause material injury to other like owners.

Explanation. — A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations.

(a) *A* is tenant of *B*'s land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. *A* may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B*'s consent, impose an easement thereon which will continue after the determination of his life-interest.

(c) *A*, *B* and *C* are co-owners of certain land. *A* cannot, without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(d) *A* and *B* are lessees of the same lessor, *A* of a field X for a term of five years, and *B* of a field Y for a term of ten years. *A*'s interest under his lease is transferable; *B*'s is not. *A* may impose on X, in favour of *B*, a right of way terminable with *A*'s lease.

Servient owners.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(a) *A* has, in respect of his mill, a right to the uninterrupted flow thereto from sunrise to noon of the water of *B*'s stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset : Provided that *A*'s supply is not thereby diminished.

(b) *A* has, in respect of his house, a right of way over *B*'s land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way : Provided that *A*'s right of way is not thereby obstructed.

Lessor and mortgagor.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and *quasi* easements.

13. Where one person transfers or bequeaths immovable property to another,—

(a) if an easement in another immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or,

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied be entitled to such easement.

The easements mentioned in this section, clauses *(a)*, *(c)* and *(e)*, are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(a) A sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A's* adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A's* adjoining land to the field sold.

(b) A, the owner of two fields, sells one to *B*, and retains the other. The field retained was, at the date of the sale, used for agricultural purposes only, and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B's* field to the field retained.

(c) A sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land.

(d) A sells *B* a house with windows overlooking *A's* land. The light passing over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A's* hands.

(e) A is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light.

(f) A is the owner of a house and adjoining land. The house has windows overlooking the land. *A*, retaining the house, sells the land to *B*, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light.

(g) A, the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) A, the owner of two adjoining houses, Y and Z, sells Y to *B* and retains Z. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(i) *A*, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled to a right to lateral support from *A's* building, and *A* is entitled to a right to lateral support from *B's* building.

(j) *A*, the owner of two adjoining buildings, sells one to *B* and the other to *C*. *C* is entitled to lateral support from *B's* building, and *B* is entitled to lateral support from *C's* building.

(k) *A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A's* land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1870,[1] a Railway Company compulsorily acquires a portion of *B's* land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B's* adjoining land as is essential for the safety of the siding.

(m) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of the portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B's* portion as is essential for the safety of the upper room.

(n) *A* lets a house and grounds to *B* for a particular business. *B* has no access to them other than by crossing *A's* land. *B* is entitled to a right of way over that land suitable to the business to be carried on by *B* in the house and grounds.

Direction of way of necessity.

14. When [2][a right] to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

Acquisition by prescription.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I. — Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III. — Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

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[1] Now Act I of 1894.

[2] Substituted by the Amending Act, 1891 (XII of 1891), for "right."

Explanation IV.— In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to [1][Crown], this section shall be read as if, for the words "twenty years" the words "sixty years" were substituted.

Illustrations.

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not as of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

Exclusion in favour of reversioner of servient heritage.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B's* land. *A* proves that he has enjoyed the right of twenty-five years; but *B* shows that during ten of these years *C* had a life-interest in the land; that on *C's* death *B* became entitled to the land; and that within two years after *C's* death he contested *A's* claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;

(b) a right to the free passage of light or air to an open space of ground ;

(c) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise ;

(d) a right to underground water not passing in a defined channel.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. *A*, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. *A* builds a house in the town near *B's* house. *A* thereupon acquires an easement that *B* shall not open new windows in his house so as to command a view of the portions of *A's* house which are ordinarily excluded from observation, and *B* acquires a like easement with respect to *A's* house.

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[1] Substituted for 'Government' by Government of India (Adaptation of Indian Laws) Order, 1937.

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration.

A has certain land to which a right of way is annexed. *A* lets the land to *B* for twenty years. The right of way vests in *B* and his legal representative so long as the lease continues.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(a) A, as owner of a farm Y, has a right of way over *B's* land to Y. Lying beyond Y, *A* has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by *A*, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if *A* lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Exercise of easement. Confinement of exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations.

(a) A has a right of way over *B's* fields. *A* must enter the way at either end and not at any intermediate point.

(b) A has a right annexed to his house to cut thatching grass in *B's* swamp. *A*, when exercising his easement, must cut the grass so that the plants may not be destroyed.

Right to alter mode of enjoyment.

23. Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception. — The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(b) A has a right to discharge on *B's* land the rain-water from the eaves of *A's* house. This does not entitle *A* to advance his eaves if, by so doing, he imposes a greater burden on *B's* land.

(c) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring

in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(d) *A*, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle *A* to pollute the stream by discharging into it poisonous liquor.

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement, but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations.

(a) *A* has an easement to lay pipes in *B's* land to convey water to *A's* cistern. *A* may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(b) *A* has an easement of a drain through *B's* land. The sewer with which the drain communicates is altered. *A* may enter upon *B's* land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on *B's* land.

(c) *A*, as owner of a certain house, has a right of way over *B's* land. The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B's* land and repair the way or remove the tree from it.

(d) *A*, as owner of a certain field, has a right of way over *B's* land. *B* renders the way impassable. *A* may deviate from the way and pass over the adjoining land of *B*, provided that the deviation is reasonable.

(e) *A*, as owner of a certain house, has a right of way over *B's* field. *A* may remove rocks to make the way.

(f) *A* has an easement of support from *B's* wall. The wall gives way. *A* may enter upon *B's* land and repair the wall.

(g) *A* has an easement to have his land flooded by means of a dam in *B's* stream. The dam is half swept away by an inundation. *A* may enter upon *B's* land and repair the dam.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations.

(a) *A*, as owner of a house, has a right to lead water and send sewage through *B's* land. *B* is not bound, as servient owner, to clear the water-course or scour the sewer.

(b) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on grass growing on the way, provided that *B's* right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) *A*, in respect of his house, is entitled to an easement of support from *B's* wall. *B* is not bound, as servient owner, to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) *A*, in respect of his mill, is entitled to a water-course through *B's* land. *B* must not drive stakes so as to obstruct the water-course.

(e) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B's* land. *B* must not plant trees so as to obstruct the passage to *A's* windows of that quantity of light.

Extent of easements.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Easement of necessity.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose —

Right of way.

(a) right of way of any one kind does not include a right of way of any other kind :

Right to light or air acquired by grant.

(b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made :

Prescriptive right to light or air.

(c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive right to pollute air or water.

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

Other prescriptive rights.

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Increase of easement.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and, if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(a) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. *A* alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. *A* extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(c) *A*, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on *B*'s land. *A* buys a field and unites it to his farm. *A* is not thereby entitled to take leaves to manure this field.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden of the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to *B*. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: Provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over *B's* land of light to four windows, six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive user.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A, as owner of a house, has a right of way over *B's* land. *C* unlawfully enters on *B's* land and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I. — The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(a) *A* places a permanent obstruction in a path over which *B*, as tenant of *C's* house, has a right of way. This is substantial damage to *C*, for it may affect the evidence of his reversionary right to the easement.

(b) *A*, as owner of a house, has a right to walk along one side of *B's* house. *B* builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to *A*.

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement —

(a) if the easement is actually disturbed — when compensation for such disturbance might be recovered under this chapter:

(b) if the disturbance is only threatened or intended — when the act threatened or intended must necessarily, if performed, disturb the easement.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

Extinction by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations.

(a) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B's* interest in Sultanpur ends, and with it the easement is extinguished.

(b) *A*, in 1860, let Sultanpur to *B* for thirty years from the date of the lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. *B's* interest in Sultanpur then ends, and with it *C's* easement.

(c) *A* and *B*, tenants of *C*, have permanent transferable interests in their respective holdings. *A* imposes on his holding an easement to draw water from a tank for the purpose of irrigating *B's* land. *B* enjoys the easement for twenty years. Then *A's* rent falls into arrear and his interest is sold. *B's* easement is extinguished.

(d) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the land in favour of *C* in accordance with the provisions of section 10. The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I. — An easement is impliedly released —

(a) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(b) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II. — Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(a) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A* without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(b) *A* grants *B* an easement over *A's* land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(c) A, having the right to discharge his eavesdroppings into *B's* yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A's* easement is extinguished to the extent of the interference.

(d) A, having an easement of right to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on *B's* land, permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C's* land. The easement is impliedly released.

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants *B* a field inaccessible except by passing over *A's* adjoining land. *B* afterwards purchases a part of that land over which he can pass to his field. The right of way over *A's* land which *B* had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless —

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage and the provisions of section 14 apply to such way.

Illustrations.

(a) A grants to *B*, as the owner of a certain house, a right to fish in a river running through *A's* land. The river changes its course permanently and runs through *C's* land. *B's* easement is extinguished.

(b) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A's* right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. *A's* easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations.

(a) *A*, as the owner of a house, has a right of way over *B's* field. *A* mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 41.

(c) The servient owner acquires the dominant heritage in connexion with a third person: the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g) *A* has a right of way over *B's* road. *B* dedicates the road to the public. *A's* right of way is not extinguished.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877,[1] a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section —

(a) where the cessation is in pursuance of a contract between the dominant and servient owners;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

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[1] Act III of 1877 was repealed and re-enacted by the Indian Registration Act, 1908 (XVI of 1908).

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, *A* exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has an easement to draw water from *B*'s well. As accessory thereto, he has a right of way over *B*'s land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment or suspension.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of *B*'s stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. *A* then abandons his easement, and restores the stream to its ancient course. *B*'s land is consequently flooded. *B* sues *A* for compensation for the damage caused by the flooding. It is proved that *A* gave *B* a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable *B*, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Revival of easements.

51. An easement extinguished under section 45 revives *(a)* when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; *(b)* when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and *(c)* when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over *B*'s field Z. *A* obtains from *B* a lease of Z for twenty years. The easement is suspended so long as *A* remains lessee of Z. But when *A* assigns the lease to *C*, or surrenders it to *B*, the right of way revives.

CHAPTER VI.

LICENSES.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Who may grant license.

53. A license may be granted by anyone in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Grant may be expressed or implied.

54. The grant of a license may be expressed or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to *B*. *B* is entitled to go on the land and take away the trees.

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforsaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

Illustrations.

(a) *A* grants *B* a right to walk over *A's* field whenever he pleases. The right is not annexed to any immovable property of *B*. The right cannot be transferred.

(b) The Government grant *B* a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, *B's* servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

License when revocable.

60. A license may be revoked by the grantor, unless —

(a) it is coupled with a transfer of property and such transfer is in force :

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

Revocation express or implied.

61. The revocation of a license may be express or implied.

Illustrations.

(a) *A*, the owner of a field, grants a licence to *B*, to use a path across it. *A*, with intent to revoke the license, locks a gate across the path. The license is revoked.

(b) *A*, the owner of a field, grants a license to *B* to stack hay on the field. *A* lets or sells the field to *C*. The license is revoked.

License when deemed revoked.

62. A license is deemed to be revoked —

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:

(b) when the licensee releases it, expressly or impliedly, to the grantor or his representative:

(c) where it has been granted for limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled:

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right:

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license:

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable:

(g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist:

(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee:

(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

* * *

THE INDIAN LIMITATION BILL (1908).

STATEMENT OF OBJECTS AND REASONS.*

1. One immediate circumstance which has moved the Government of India to undertake legislation in connexion with the Indian Limitation Act, 1877, is the hardship which has been caused to the holders of mortgages of immovable property, in forms other than what is known as the English form, over a large part of India, by reason of the recent decision of the Judicial Committee of the Privy Council in the case of *Vasudeva* v. *Srinivasa*, (11 C W N 1005). In that case their Lordships, overruling the decisions of the High Courts of Bombay, Madras and Allahabad, have advised that the period of limitation prescribed by the Indian Limitation Act, 1877, for suits to enforce payment of money secured by such mortgages, is twelve years as provided in article 132 of the second schedule of that Act, and not the longer period of sixty years prescribed by article 147. In the opinion of the Privy Council the latter article applies only to the class of mortgages in which a suit may be brought for "foreclosure or sale," that is, only to English mortgages. Previous to this decision, for nearly a quarter of a century, the law had been held by the High Courts of Bombay and of Allahabad to be that every suit by a mortgagee either for foreclosure or for sale was governed by the sixty years' rule of limitation enacted in article 147, and the same view of the law had been accepted by the High Court of Madras and by some other High Courts. The effect of the decision of the Privy Council has been that in the territories within the jurisdiction of the above High Courts a number of suits for the enforcement of mortgages, which, before the decision of the Privy Council, would have been within time, have been and must be dismissed by the Courts on the grounds that they are barred by limitation, and that the claims under a still larger number of mortgages have become unenforceable owing to the construction thus put on the Statute of Limitation. This result is undoubtedly hard on mortgagees who have relied on the view of the law taken by the High Courts of their Provinces and now find themselves debarred of all remedy because that view has been decided to be incorrect. The Government of India are of opinion that some provision should be made to meet these cases, and it is accordingly proposed in the Bill to allow to these mortgagees a period of two years within which to bring their suits, provided that the whole period from the date when the money secured by the mortgage became due does not exceed sixty years in all. Provision is also made for the continuance of pending suits and for the restoration of suits which have been dismissed on the ground of limitation since the date of the Privy Council decision.

2. Legislation is also necessary to give effect to the recommendations of the Committee on the Code of Civil Procedure. These have been incorporated in the present Bill.

3. It seems desirable also to take this opportunity of setting at rest some doubts on other provisions of the Limitation Act which have been caused by conflicting decisions of the different High Courts. These relate for the most part to matters of detail rather than to questions of principle, and a sufficient account of the amendments proposed in respect of them will be found in the Notes on Clauses annexed to this statement.

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* Gazette of India, 1908, Part V, page 22.

4. It would be possible to enact the proposed alterations by an amending Act. But the Limitation Act of 1877, has been already amended by no less than eleven different enactments. It is clearly desirable to have the whole of the statutory law on the subject dealt with in one Act and to clear the Statute-book of these scattered enactments. It is proposed for this reason to introduce an amending and consolidating Bill, embodying the alterations to which attention has been called, re-enacting the present Act in other respects and repealing the various Acts and provisions in which the law is now contained.

The 2nd January 1908. H. ERLE RICHARDS.

NOTES ON CLAUSES.

The sections and schedules of the Act have been re-arranged, the saving and repealing provisions being placed at the end.

In the Act various suits, appeals and applications are described by reference to the number of the particular section of any Act under which the suit, appeal or application in question may be instituted, preferred or made. Most of these references are to sections of the Code of Civil Procedure, and as the majority of these sections have, in the Civil Procedure Code Bill now before the Legislature, been relegated to Rules which may from time to time be altered and may be different in different Provinces, it has been considered advisable in framing the clauses and articles in the Bill to avoid these references and to render the provisions of the Bill self-contained as far as possible.

CLAUSES OF BILL.

Clause 1.—It is proposed that section 33, which provides for suits on mortgages affected by the Privy Council case, should take effect on the passing of the Bill, and that the rest of the Act should come into force simultaneously with the Code of Civil Procedure now before the Legislature.

Clause 2.—The definitions have been re-arranged in alphabetical order.

No. (6) has been added to make the term "moveable property" include growing crops in accordance with the amendment proposed in the Civil Procedure Code Bill. This is for consideration. It was approved by the Select Committee on the Code of Civil Procedure of 1903 and was inserted in their Draft Bill (Schedule IV).

Clause 5.—Words have been inserted in this clause to include applications to which the clause may be made applicable by the Code of Civil Procedure. This amendment has the approval of the Special Committee on the Code of Civil Procedure of 1907.

Clauses 7 and 8.—The last clause of section 7 with some verbal modifications has been placed as a separate clause after clause 8 so as to make it clear that its provisions are applicable to cases governed by either of the clauses 7 or 8.

Cases of a person entitled to institute a suit or make an application being under any legal disability are dealt with by sections 7 and 8 of the Act.

It has been held in a series of decisions of the Madras High Court that section 7 applies only to cases where the right to bring a suit or to make an application is vested either—

(i) in a single individual who is under a disability, or

(ii) in a number of individuals, all of whom are under a disability.

These cases are, *Seshan* v. *Rajagopala*, I L R 13 Mad 236, where there was a decree in favour of three persons of whom two only were minors, and it was held that section 7 did not apply to an application for the execution of the decree; *Vigneswara* v. *Bapayya*, I L R 16 Mad 436, and *Moidin* v. *Beevi*, I L R 18 Mad 38, which were cases of suits where some only of several persons entitled to institute them were under disability, and it was held, following the case in I L R 13 Mad 236, that the suits were not governed by section 7; *Ahinsa* v. *Abdul*, I L R 25 Mad 26, where Benson and Bhashyam Ayyangar, JJ., adopted the same construction of section 7 and held that, apart from section 8, the protection afforded by section 7 would extend only to cases where each and all of the persons jointly entitled to sue were affected by disability at the time from which the period of limitation was to be reckoned, and that if any one of them was then free from disability, section 7 cannot be availed of by all or any of them; and *Periasami* v. *Krishna*, I L R 25 Mad 431, where a Full Bench of the Madras High Court upheld the same view.

On the construction put upon section 7 by the Madras High Court, cases in which the right is vested jointly in a number of persons of whom some only are under any disability must be left to be governed by section 8 alone, and under the latter part of that section, if there is no one among these persons who can give a discharge without the concurrence of those who are under disability, time would commence to run only from the date when the last of them becomes free from disability and then, apparently, they would have in every case the full period prescribed for the suit or application in question, there being nothing in section 8, corresponding to the last clause of section 7, to limit the period to three years from the cessation of disability or to exclude suits for pre-emption from its scope.

Clause 8.—There is conflict between the Calcutta, Bombay and Allahabad High Courts on the one hand and the Madras High Court on the other on the question, whether an application for the execution of a decree can be saved from limitation by the fact of some only of the decree-holders being under a disability. In *Anando* v. *Anando*, I L R 14 Cal 50; *Surja* v. *Arun*, I L R 28 Cal 465; *Govindram* v. *Tatia*, I L R 20 Bom 383 and *Zamir* v. *Sundar*, I L R 22 ALL 199 (FB), it has been held that a disability of some only of several joint decree-holders would save an application for the execution of the decree from being barred; while the Madras High Court, in *Seshan* v. *Rajagopala*, I L R 13 Mad 236, and in *Periasami* v. *Krishna*, I L R 25 Mad 431 (F B), has held the contrary. The High Courts of Calcutta, Bombay and Allahabad hold that the case comes under section 7, but the Madras High Court holds that it comes neither under section 7 nor under section 8. If the right view of section 7 is that it deals only with cases, where the person, or all the persons if there are more than one, entitled to bring a suit or make an application, is or are under disability, the case in question should properly be dealt with by section 8; all the High Courts are agreed that one of several joint decree-holders cannot give a valid discharge without the concurrence of the others; but the Madras High Court in the Full Bench case felt a difficulty in bringing the case under section 8, for the reason that applications are not mentioned in that section while they are in section 7. In the course of his judgment in the case Bhashyam Ayyangar, J., observed that the addition of words suggested in this amendment would bring the case in question within the operation of section 8 (I L R 25 Mad 431 at p. 442).

Clause 9.—This is the last paragraph of section 7.

Clause 11.—The proposed amendment is intended to remove certain doubts.

It has been held in some cases that this section does not include a suit for an account of the trust property.

In *Saroda* v. *Brojo*, I L R 5 Cal 910, property had been vested in the defendant upon trust to manage it and maintain the plaintiff out of the profits during his minority and to make it over to the plaintiff on his attaining the age of majority; the suit was for a decree directing the defendant to account for all such property, and the profits, receipts and disbursements connected therewith. It was held by White and Maclean, JJ., that the object of the suit not being to recover any property in specie, section 10 did not apply. A similar view was adopted in *Advocate-General* v. *Bai Punjabai*, I L R 18 Bom 551 (at pp. 566, 567), where the claim was against a trustee for an account of income and disbursements in respect of trust property and for the balance if any. In *Hurro* v. *Tarini*, I L R 8 Cal 766, however, Wilson, J., directed an account and in a manner doubted the correctness of the rule laid down in I L R 5 Cal 910, and in *Nistarini* v. *Nundo Lal*, I L R 30 Cal 369 (at p. 384), a trustee was directed to render accounts irrespective of any question of limitation. In *Ranga* v. *Baba*, I L R 20 Mad 398, the question whether section 10 applied to a suit charging breaches of trust and claiming an account was regarded as a somewhat doubtful question and was left open.

Section 8, clause 1 of the Trustee Act, 1888 (51 & 52, Vict., c. 59), saves from the bar of limitation a claim against a trustee "to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by him and converted to his use." It has been held that actions against express trustees claiming an account of such property cannot be barred by the Statute of Limitations: *Rochefoucauld* v. *Boustead*, (1897) 1 Ch 196 at p. 208; *North American Co.* v. *Watkins*, (1904) 1 Ch 242.

Clause 15. — This is section 14 of the Act. The second paragraph of this section is omitted as it is proposed in the Civil Procedure Code Bill to leave out the provision relating to staying proceedings contained in section 20 of the present Code of Civil Procedure.

Clause 16. — Words are proposed to be inserted in the clause so as to make its provisions applicable to cases where the execution of a decree has been stayed by injunction or order.

This section is not applicable to cases of applications for execution of decrees: *Rungiah* v. *Nanjappa*, I L R 26 Mad 780, 782, although in *Beni* v. *Sarju*, I L R 26 ALL 140, the High Court of Allahabad in computing the period of limitation for an application for execution of a decree allowed the period, during which an injunction staying the execution was in force, to be excluded; it is not, however, clear upon the judgment under what provision of the Act this exclusion was allowed.

The Courts have in many cases, where the execution of a decree has been stayed by an injunction or order relieved the decree-holder from the bar of limitation by treating the application made after the withdrawal of the injunction or order as an application to revive or continue some previous application: *Kalyanbhai* v. *Ghanashamlal*, I L R 5 Bom 29, p. 34 *et seq.*; *Narayan* v. *Sono*, I L R 24 Bom 345; *Issuree* v. *Abdool*, I L R 4 Cal 415; *Hurronath* v. *Chuni*, I L R 4 Cal 877; *Ashraf* v. *Bepin*, I L R 30 Cal 407 at pp. 411, 413; *Gurudeo* v. *Amrit*, I L R 33 Cal 689; *Lakhmi* v. *Ballam*, I L R 17 ALL 425, and *Qamaruddin* v. *Jawahir*, I L R 27 ALL 334 (P C), may be cited as instances.

But it is not always possible by this method to relieve an applicant for execution, in cases where execution has been stayed by reason of an order of Court, from the bar of limitation; as for instance in cases where there was no pending application for execution at the date of the injunction or order (*Sarup* v. *Watson*, 6 C W N 735); or where the previous application had been dismissed after the removal of the bar but before the date of the fresh application (*Dukhiram* v. *Jogendra*, 5 C W N 347).

In the course of their judgment in *Rungiah* v. *Nanjappa*, I L R 26 Mad 780, Benson and Bhashyam Ayyangar, JJ., observed as follows: "It is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the attaching decree-holder prosecutes a suit under section 283, or during which execution of the decree or a portion of it has been stayed by injunction or otherwise, should be excluded." (At p. 783).

Clause 18. — The addition of this clause was recommended in the Civil Procedure Bill of 1903. In their report the Select Committee observed as follows:

"In proposing an additional section (16A) we have acted on the view that the purpose of clause 424 (section 424 of the Code of Civil Procedure) is to give notice and facilitate compromise, but not to shorten the period of limitation. Where, for example, the period of limitation is only thirty days, the deduction of two months on account of notice negatives the right of suit."

Clause 21. — There is a conflict between the Madras High Court and the other High Courts on the question whether the provisions of section 19 apply to applications for execution of decrees; the Madras High Court has answered the question in the negative: *Rama* v. *Venkatesa*, I L R 5 Mad 171 (F B); *Sreenivasa* v. *Ponnusawmy*, I L R 28 Mad 40; and the other High Courts have answered it in the affirmative : *Trimbak* v. *Kashinath*, I L R 22 Bom 722, 727; *Venkatrav* v. *Bijesing*, I L R 10 Bom 108; *Ram* v. *Jakur*, I L R 8 Cal 716; *Toree* v. *Mahomed*, I L R 9 Cal 730; *Norendra* v. *Bhupendra*, I L R 23 Cal 374, 387; *Ramhit* v. *Satgur*, I L R 3 ALL 247 (F B); *Janki* v. *Ghulam*, I L R 5 ALL 201; *Fateh* v. *Gopal*, I L R 7 ALL 424; *Muhammad* v. *Payag*, I L R 16 ALL 228; *Bhagat* v. *Chint*, Punj. Record No. 28 of 1885; *Bhagabutty* v. *Ashutosh*, 8 C W N 470.

It may be observed that under section 8, 37 & 38 Vict., c. 57, the right to take proceedings to enforce a judgment may be saved by acknowledgment or payment : *Jay* v. *Johnstone*, (1893) 1 Q B, p. 25 on appeal, p. 189, where at p. 190, Lindley, L. J., opened his judgment with the following remark : "The question raised by this appeal is a very important one, namely whether proceedings can be taken to enforce a judgment after twelve years, there having been no payment or acknowledgment in the meantime."

The proposed amendment is intended to make it clear that the provisions of the clause apply to applications for the execution of decrees.

Clause 22. — The expression "produce of land" may not include rent paid by tenants in occupation of the land. (See *Ummer* v. *Abdul*, I L R 2 Mad 165.) The proposed amendment will remove the doubt.

There is a conflict between the Calcutta and the Madras High Courts on the one hand and the Allahabad High Court on the other on the question whether the word "debt" in this section includes what may be called a judgment-debt; the Calcutta and the Madras High Courts answering the question in the negative: *Kader Buksh* v. *Gour*, 6 C W N 766; *Periasami* v. *Krishna*, I L R 25 Mad 431 (FB) at p. 442; *Kuppu* v. *Renga*, I L R 27 Mad 608; *Srinivasa* v. *Ponnu*, I L R 28 Mad 40 and the cases of *Kally* v. *Heera*, I L R 2 Cal 468 and *Mungol* v. *Shama*, I L R 4 Cal 708, decided under sections 20 and 21 of Act IX of 1871; and the Allahabad High Court answering it in the affirmative : *Roshan* v. *Mata*, I L R 26 ALL 36; *Janki* v. *Ghulam*, I L R 5 ALL 201; *Ramhit* v. *Satgur*, I L R 3 ALL 247; *Muhammad* v. *Payag*, I L R 16 ALL 228; *Ashanullah* v. *Dakkhini*, I L R 27 ALL 575. It seems that acknowledgments and payments should in this respect have the same effect, and it may be observed that under section 8, 37 & 38 Vict c. 57, a payment would save the right to take proceedings to enforce a judgment: *Jay* v. *Johnstone*, (1893) 1 Q B 189.

The explanation is added to remove this conflict.

Clause 23 (I). — There is a conflict of authority on the question whether a guardian of a minor is an agent within the meaning of these sections. In *Tilak* v. *Chhutta*, I L R 26 ALL 598, it was held that a payment made by a natural guardian of certain minors of interest due on a bond executed by their deceased father did not meet the requirements of section 20; in *Wajibun* v. *Kadir*, I L R 13 Cal 292, it was held that an acknowledgment given by the natural guardian of a minor was not enough to give the creditor a fresh period of limitation, and the same view was taken in *Maharana* v. *Vadilal*, I L R 20 Bom 61. On the other hand, in *Annapagauda* v. *Sanga*, I L R 26 Bom 221 (F B), it was held that a payment made or acknowledgment given by a guardian appointed under Act VIII of 1890, if it was within the powers of the guardian under section 27 of the Act, would be sufficient; payment made by such a guardian who had borrowed money on a bond for the benefit of the minor was held to be a good payment under section 20 : *Narendra* v. *Rai Charan*, I L R 29 Cal 647; and an acknowledgment made in the course of certain execution proceedings by the pleader of a minor judgment-debtor was held to be within the requirements of section 19 in *Norendra* v. *Bhupendra*, I L R 23 Cal 374 at p. 387; and in *Sobhanadri* v. *Sriramulu*, I L R 17 Mad 221, an acknowledgment made by a natural guardian was held to meet the requirements of section 19. In *Beti Maharani* v. *Collector of Etawah*, I L R 17 ALL 198 (P C), an acknowledgment made by the Court of Wards on behalf of a person who had been declared disqualified on her own application was held to be sufficient; it may be doubted, however, whether such a disqualified proprietor is a person under disability in the same sense as a minor or an idiot or an insane person.

It may be observed that acknowledgments and payments made by guardians and managers are almost always made for some benefit to the estate of the person under disability, *e. g.*, to avert an impending suit; it would be manifestly unfair after a creditor has, at the request of the guardian, accepted a payment or an acknowledgment and refrained from suing at once, to allow the minor afterwards to say that the creditor's remedy has become barred.

The addition of this sub-clause will remove the conflict.

Clause 24.—The proposed amendment is recommended in the fourth schedule annexed to the Civil Procedure Code Bill, 1907. In the notes annexed to their report, the Special Committee made the following observation with reference to this amendment:

"The Committee have amended section 22 of the Limitation Act to supply an omission which has been noticed by the High Courts, namely, the absence of any provision with regard to a devolution of interest *pendente lite* where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place *pendente lite* owing to death but also other cases in which such devolution occurs."

It is also proposed to save cases where plaintiff has been made a defendant or *vice versa* from the operation of this clause : *Jibanti* v. *Gokool*, I L R 19 Cal 760 ; *Khadir* v. *Rama*, I L R 17 Mad 12.

Clause 28.—A clause has been added to provide a rule for the acquisition of easements against the Government.

It is the last clause of section 15 of the Indian Easements Act, V of 1882. There is a conflict on the question whether section 26 applies against the Government. In *Arzan* v. *Rakhal*, I L R 10 Cal 214, 219, Garth, C. J., went on the assumption that it did; whereas in *Secretary of State* v. *Mathurabhai*, I L R 14 Bom 213, and *Viresa* v. *Tataya*, I L R 8 Mad 467, it has been held that it does not.

Sixty years is the period of limitation applicable against the Government.

Illustration *(b)* has been omitted as it has been pointed out that it goes beyond the terms of the section which does not require "actual user" : *Koylash* v. *Sonatun*, I L R 7 Cal 132.

This illustration does not occur under section 15 of the Indian Easements Act, V of 1882.

Clause 31.—Portions of section 2 have been omitted as unnecessary, having regard to the provisions of the General Clauses Act, 1897, section 6 *(a)*, *(c)* and section 8.

Sub-clause (2) (b). — The Madras Regulation, VI of 1831, has been repealed except as to the scheduled districts in Madras by the Madras Hereditary Village-offices Act (Mad. Act III), 1895. This Act, however, clearly provides special rules of limitation for suits, appeals and applications, making certain sections of the Limitation Act applicable thereto. Sub-clause *(1) (b)* will therefore save the periods prescribed by this Act from being altered or affected by anything herein contained and it need not be specifically mentioned.

Sub-clause (3).—The sections of the Act corresponding to clauses 28 and 29 of the Bill were repealed by the Indian Easements Act, V of 1882, in the Provinces to which it applies; this sub-clause is added to provide that these provisions of the Bill shall not affect the Easements Act.

Clause 32. — This clause provides for cases in respect of which the period of limitation has been shortened by the Bill. It proceeds on the lines of the last clause in section 2 of the Act (now repealed by the Repealing and Amending Act, 1891).

Clause 33 (1). — The Privy Council has held in the recent case of *Vasudeva* v. *Srinivasa*, 11 C W N 1005, that article 147 (providing a period of sixty years) is applicable only to suits on English mortgages, and that suits on all other mortgages are governed by the twelve years' rule contained in article 132. Previous to this decision, the law, as laid down in the decisions of the High Courts of Bombay, Madras and Allahabad, was that article 147 applied to every suit by a mortgagee in which he asked either for foreclosure or for sale: *Motiram* v. *Vitai*, I L R 13 Bom 90 (F B); *Datto* v. *Vithu*, I L R 20 Bom 408 (F B); *Narayana* v. *Venkata*, I L R 25 Mad 220 (F B); *Shib* v. *Ganga*, I L R 6 ALL 551 (F B).

The result has been that in the said territories a large number of mortgage suits for which the period of limitation had hitherto been believed to be sixty years would be found to be barred by limitation.

This sub-clause is meant to provide for these suits, as also for the continuance of pending suits.

Clause 33 (2). — This sub-clause is supposed to provide for the restoration of suits of the description mentioned above which have been dismissed on the ground of limitation since the date of the Privy Council decision. It proceeds on the lines of section 12, Act XXIII of 1861.

Clause 34 and Schedule III. — The Indian Limitation Act, 1877, and the several general enactments amending it are proposed to be repealed.

NOTES ON SCHEDULES.

SCHEDULE I.

This is Schedule II of the Act. The existing numbering has been retained as far as possible.

Article 5.—This amendment has been proposed in the fourth schedule of the Civil Procedure Code Bill, 1907. Clause 128 *(f)* of the Civil Procedure Code Bill proposes to authorise the framing of rules extending the summary procedure to the trial of suits other than suits on negotiable instruments.

Article 11.—The article is proposed to be amended so as to provide for all cases in which the Civil Procedure Code Bill proposes to give a right of suit to challenge orders passed in proceedings relating to resistance and obstruction to the delivery of possession of property to a decree-holder or to a purchaser of property sold in execution of a decree and to dispossession in such delivery of possession.

Article 33 has been divided in order to preserve the numbering of the present Act.

Article 34 of the Act is proposed to be omitted.

A wife, even if a minor, should not be looked upon by the law as a chattel and an object of possession. The Civil Procedure Code Bill of 1907, has left out the provision relating to decree for the recovery of a wife (O. XXI, R. 32).

Article 35 of the Act is also proposed to be omitted.

The scope of this article is very limited. It does not apply to cases arising under the Indian Divorce Act. The Allahabad High Court has held that it does not apply to Hindus or Muhammadans, as their personal law does not require an antecedent demand to sustain a suit for restitution of conjugal rights, nor make restitution unenforceable against a minor, and it has further held that the withholding of conjugal rights by either party is a continuing wrong, and that a claim for restitution cannot be barred by limitation: *Binda* v. *Kaunsilia*, I L R 13 ALL 126, 146. The same view was taken in *Bai Sari* v. *Sankla*, I L R 16 Bom 714. These views have been so far modified by the rulings of the Calcutta and Madras High Courts and by the later rulings of the Bombay High Court as to make the article applicable to Hindus and Muhammadans in cases of suits preceded by demand and refusal as mentioned in the third column: *Dhanjibhoy* v. *Hirabai*, I L R 25 Bom 644 (F B); *Asirunnessa* v. *Buzloo*, I L R 34 Cal 79; *Saravanai* v. *Poovayi*, I L R 28 Mad 436. The operation of the article may be easily avoided by a party if he simply refrains from making a demand which, it may be noted, is not under the Hindu or Muhammadan law necessary to give rise to a cause of action. It is a very usual thing in Hindu and Muhammadan families for a wife to go and stay with her parents or brothers and the effect of this article is that if owing to any domestic quarrel the wife should in a fit of temper refuse to return, the husband would be compelled to take the matter into Court within two years.

Article 44.—The article is proposed to be amended so as to be applicable to all transfers of property.

It has been held in one case that the word "sale" does not include a mortgage or a lease: *Ramausar* v. *Raghubar*, I L R 5 ALL 490.

Article 60.—There is conflict on the question whether money deposited with a banker is a loan or a deposit.

In *Ishur* v. *Jibun*, I L R 16 Cal 25, Wilson, J., held that it is a deposit and not a loan within the meaning of article 59.

In *Ichha* v. *Natha*, I L R 13 Bom 338, it was held that a deposit with a banker is ordinarily a loan.

In *Dharam* v. *Ganga*, 4 Allahabad Law Journal 628, it has been held that ordinary dealings between native bankers and their customers are matters of loan within the meaning of article 59.

In *Muncherji* v. *Dorabji*, I L R 19 Bom 775, and *Perundevi* v. *Nammalvar*, I L R 18 Mad 390 at p. 394, it was held that whether a particular transaction was a loan or a deposit would depend on the facts of each case.

The amendment suggested would bring the law into conformity with the view taken by ordinary men of business in this country.

Article 99. — It was held in *Pattabhi* v. *Ramayya*, I L R 20 Mad 23 that this article could not apply to a case where not the *whole* but only a *part* of the money due under a joint decree was realized from the plaintiff by the sale of his property by the Court and that it was doubtful whether such a case fell under article 61 or under the general article 120.

In *Rajah of Vizianagram* v. *Rajah Setrucherla*, I L R 26 Mad 686 at p. 716, Bhashyam Ayyangar, J., pointed out that a strictly grammatical and literal interpretation of this article would lead to anomalous, if not absurd, consequences, and observed that he would be strongly inclined to read the section as if after the words "had paid" there were the words "on account of." He held that each time that an amount is paid by or levied from the party seeking contribution in excess of his share, he has a right of suit for contribution in respect of such payment. Referring to this case Stanley, C. J., in *Ibn Hasan* v. *Brijbhukan*, I L R 26 ALL 407, observed as follows: "It seems to me very questionable whether the learned Judge has not taken too great a liberty of interpolation with the article in question"—page 425.

The question whether the word 'paid' in article 100 of Act IX of 1871 (which corresponded to the present article 99) covered a case where money was realized by the sale of plaintiff's property was left in doubt by Mitter and Maclean, JJ., in *Fuckoruddeen* v. *Mohima*, I L R 4 Cal 529.

The amendments proposed would meet the points indicated above.

Article 111. — The amendment proposed will make it clear that this article is applicable only to suits to enforce the personal liability of the purchaser.

It has been held by the High Courts of Bombay, Madras and Allahabad that a suit by an unpaid vendor to enforce his charge on the land for the unpaid purchase-money is governed by article 132 and not by this article: *Chunilal* v. *Bai Jethi*, I L R 22 Bom 846; *Virachand* v. *Kumaji*, I L R 18 Bom 48; *Har* v. *Muhamdi*, I L R 21 ALL 454; *Ramakrishna* v. *Subrahmania*, I L R 29 Mad 305 (FB), overruling *Natesan* v. *Soundra*, I L R 21 Mad 141 and *Aruthala* v. *Dayumma*, I L R 24 Mad 233.

Article 116. — It is proposed to amend this article so as to exclude from its operation suits for arrears of rent payable under a registered lease.

There is conflict on the question whether a suit for arrears of rent due under a registered lease is governed by this article or by article 110 which provides three years for suits for arrears of rent. The Calcutta High Court has held that such suits, if not governed by the Bengal Tenancy Act (that is, if the rent is not due in respect of agricultural lands) would come under article 116 and not under article 110: *Umesh* v. *Adarmoni*, I L R 15 Cal 221; *Raniganj Coal Company* v. *Jadunath*, I L R 19 Cal 489; suits for rent due under a registered contract are also held to be governed by article 116 by the Madras High Court: *Vythilinga* v. *Thetchana*, I L R 3 Mad 76. The Allahabad High Court has, however, held that such suits are governed by article 110, which specifically deals with suits for arrears of rent: *Ram Narain* v. *Kamta*, I L R 26 ALL 138.

The ruling of the Calcutta and Madras High Courts would reduce the scope of article 110 to cases of tenancies for a term not exceeding one year and monthly tenancies, as all other tenancies must be created by registered instrument.

Article 118.—The amendment is proposed to remove a conflict of authority, and it adopts the view taken by Bhashyam Ayyangar, J.

In a suit to set aside an adoption where but for the adoption the estate would be in a Hindu female, a remote reversioner has been held to claim through the presumptive reversioner in the following cases: *Ayyadorai* v. *Solai*, I L R 24 Mad 405; *Chiruvolu* v. *Chiruvolu*, I L R 29 Mad 390 (F B); *Harnath* v. *Mandil*, I L R 27 Cal 379 at p. 403; *Srinivasa* v. *Hanmant*, I L R 24 Bom 260 at p. 266; *Siddhessar* v. *Sham Chand*, 23 W R 285 (decided under Act IX of 1871); *Mrino Moyee* v. *Bhoobun*, 23 W R 42 (decided under Act XIV of 1859).

The contrary view has been taken in the following cases: *Abinash* v. *Harinath*, I L R 32 Cal 62 at p. 71; *Bagwanta* v. *Sukhi*, I L R 22 ALL 33 at pp. 44, 45.

In the case of *Chiruvolu* v. *Chiruvolu*, I L R 29 Mad 390 (F B), however, the Court observed that in suits relating to the alienations by a qualified owner (such as a Hindu widow) the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners (at p. 411). The conflict, therefore, is limited to suits relating to adoption.

Article 163.—The amendment is recommended by the Special Committee on the Civil Procedure Code Bill, 1907.

Article 166.—The amendment is recommended by the same Committee. In the Notes on Schedules annexed to their report they observe as follows:

"The Code [s. 312] contemplates the confirmation of a sale of immovable property immediately on the expiration of the thirty days allowed by article 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment-debtor had no saleable interest therein is sixty days [article 172]. The result is that in some Provinces the confirmation of a sale is delayed for sixty days; whilst in other Provinces, sales, which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under section 313, should be brought into line with an application under section 312, and they therefore propose to repeal article 172 and to amend article 166 so as to include application under section 313."

Articles 171, 172.—Article 171 of the Act has been broken up into these two articles. References to the sections have been omitted and words have been added to describe the order of dismissal referred to.

Article 172 of the Act is omitted from the Bill.

Article 174 of the Act is omitted as it has been repealed by the Provincial Insolvency Act, 1907, with effect from the 1st January, 1908.

Articles 176, 177.—These two articles have been substituted for the three articles in the Act. Article 177 is recommended by the Special Committee of 1907.

Article 179.—In article 177 of the Act the description of the application intended to be governed by it does not seem to be accurate.

Section 598 of the Code deals with the application to be made by an intending appellant; section 603 deals with the admission of the appeal. Section 598 requires that the application should pray for a certificate that the case is a fit one for appeal; section 603 does not require that any application should be made for the admission of the appeal.

It may be noted that the word *may* in section 603 of the present Code has been replaced by the word *shall* in O. XLIV, R. 8 of the Code of Civil Procedure Bill, 1907.

Article 181, third column, clause 2.—There is conflict on the question whether, where an appeal has been withdrawn, time would run from the date of withdrawal of the appeal or from the date of the original decree.

In *Peria* v. *Lakshmi*, I L R 30 Mad 1, (F B), it has been held by the Madras High Court that in case of an appeal which has been withdrawn, time should run from the date of the order of the Appellate Court dismissing the appeal on such withdrawal.

The Bombay High Court has on the other hand held that when an appeal is withdrawn time would run from the date of the original decree: *Abdul* v. *Maidin*, I L R 22 Bom 500 at p. 506.

Article 181, third column, clause 4. — There is conflict on the question whether when a decree has been amended, time for an application for execution would run from the date of the decree or from the date of the amendment.

In *Kali Prosunno* v. *Lal Mohun*, I L R 25 Cal 258, the application for amendment (to include in the decree certain costs which had been awarded by the judgment) was regarded as an application for review; the same view was taken in *Venkata* v. *Venkata*, I L R 24 Mad 25, where the application was to amend the amount of costs entered in decree; and in *Amar* v. *Asad*, I L R 32 Cal 908, it was held that time would run from the date of amendment as the amended decree was the final decree to be executed.

The Allahabad High Court on the other hand has held that an application under section 206 of the Code of Civil Procedure to amend a decree so as to bring it into conformity with the judgment is not an application for review, and that time will run from the date of the decree as originally drawn up: *Ahsanullah* v. *Dakkhini*, I L R 27 ALL 575; *Kallu* v. *Fahiman*, I L R 13 ALL 124; *Muhammad* v. *Muhammad*, I L R 17 ALL 89 and *Daya* v. *Nanhi*, I L R 20 ALL 304.

Article 181, third column, clause 6. — There is conflict on the question whether the date referred to in this clause is the date of the order of the Court directing notice to issue or the date on which the notice actually issues from the Court, some time being usually taken in the drawing up and signing of the notice.

The Calcutta and the Madras High Courts have held that the date of actual issue is meant: *Kedaressur* v. *Mohim*, 6 C W N 656; *Ratan* v. *Deb*, 10 C W N 303; *Cheruvath* v. *Nerath*, I L R 30 Mad 30.

The Bombay and the Allahabad High Courts have held that where notice has been issued time would run from the date of the Court's order to issue the notice: *Govind* v. *Dada*, I L R 28 Bom 416; *Damodar* v. *Sonaji*, I L R 27 Bom 622; *Udit* v. *Rampertab*, (1881) 1 ALL W N 120.

SCHEDULE II.

This schedule specifies the territories in which previous to the recent decision of the Privy Council (11 C W N 1005) the law was held to be that the period of limitation for every suit by a mortgagee, whether he asked for foreclosure or for sale, was sixty years as provided by article 147 and not twelve years as provided by article 132.

The list is not exhaustive as it is not definitely known whether there are not other Provinces or Districts where the same view of the law prevailed.

SCHEDULE III.

The enactments proposed to be repealed are specified in this schedule.

THE SELECT COMMITTEE'S REPORT.*

The following Report of the Select Committee on the Bill to consolidate and amend the law for the limitation of Suits, and for other purposes, was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 20th March, 1908:—

LEGISLATIVE DEPARTMENT.

WE, the undersigned, Members of the Select Committee to which the Bill to consolidate and amend the Law for the Limitation of Suits, and for other purposes was referred, have considered the Bill and the papers noted in the appendix, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. This Bill does not purport to be a general amendment of the Law of Limitation and we have not treated it in that sense. The objects of it are to consolidate the law, which at present is scattered throughout a series of enactments, to clear up some points of doubt on which conflicts exist between the various High Courts, to make some amendments which are ancillary to the Code of Civil Procedure Bill lately passed by Council, and to remove the hardship caused by a recent decision of the Privy Council in regard to the period of limitation for certain suits on mortgages. The criticisms on the Bill raise a number of other points and make various suggestions for wider reforms, but we have rejected these criticisms and confined ourselves to the objects stated.

3. In the *Notes on Clauses* in the following paragraph we have dealt with the amendment of the law contained in the Bill as circulated for opinion, but there are two points on which after the fullest consideration we suggest further amendment and to them we desire to invite particular attention. The first of them relates to clause 6 of the Bill, which corresponds with section 7 of the existing Act. Under that clause a minor is entitled to claim the benefit of his minority in respect of any application and he can make an application on attaining his majority in any matter whatever. In our opinion this provision leads to great hardship. It is possible for a minor to make an application to set aside a sale in execution of a decree or an order for abatement twenty years after the occurrence and this although he has been represented by a guardian *ad litem* at the

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* Gazette of India, 1908, Part V, page 223.

time of the sale or abatement. We think that this clause should be limited to applications for the execution of decrees, and that in regard to other applications the minor should be bound by the acts of his representatives. The same observation applies to clause 7. We desire to point out in this connection that in regard to those applications which are now governed by periods of limitation enacted in the Code of Civil Procedure, minors cannot at the present time claim the benefit of this section. These provisions have now been removed from the Code of Civil Procedure to this Bill. It is clear that in regard to those applications the minor ought not to have the benefit of this clause and we can see no distinction between applications in this respect. The second point arises in regard to clause 14. There is a conflict of opinion as to whether misjoinder of parties or of causes of action is a "cause of a like nature" with defect of jurisdiction within the meaning of this clause. There is much to be said for the view that there is a distinction between defects of jurisdiction and misjoinder of parties or of causes of action; but on the whole we think that the clause should be extended to cover these latter cases, and we have inserted an explanation for that purpose.

4. We have somewhat re-arranged the clauses in order to preserve the existing numbering.

NOTES ON CLAUSES.

Clause 2. — We have omitted sub-clause 6; the definition of moveable property contained in it has been objected to, and we think on the whole that it should be omitted.

Clause 3. — The illustrations have been omitted. We think that they are not necessary, and are liable to misconstruction.

Clause 5. — It has been suggested that the scope of clause 5 should be enlarged, and a doubt has been expressed by high authority as to whether the expression "Code of Civil Procedure" would include rules which may be made under it. We have accordingly altered this clause so as to make its provisions extend to applications for leave to appeal and to all applications to which it may be made applicable by "any enactment or rule for the time being in force."

Clause 6 of the Bill as introduced is, in our opinion, merely explanatory of clause 5; we have accordingly omitted the former and embodied its purport in an explanation to the latter clause.

Clauses 6, 7 and 8. — We have already referred to the principal alteration we have made in clauses 6 and 7.

Adopting a suggestion of the Chief Justice of Bombay we have slightly altered the language of clause 7 so as to bring it more into conformity with that of clause 6.

Clause 12 (2). — We have struck out the words "as a pauper" from this sub-clause so as to make its provisions applicable to all applications for leave to appeal.

Clause 14. — We have re-drafted sub-clause (2) so to bring it into line with sub-clause (1), and have made Explanation II more comprehensive.

We have added Explanation III to remove the conflict to which we have referred to above.

Clause 15. — We have altered clause 18 of the Bill as introduced so as to allow the period of notice to be excluded in the case of all suits of which notice is required to be given by any enactment for the time being in force, and we have brought it up as sub-clause (2) to clause 15.

Clause 16.—We have enlarged the scope of this clause. The right to apply to set aside an execution sale is not limited to the judgment-debtor.

Clause 19. — We have struck out the words in *italics*; we think that the object with which they were inserted would be better carried out by the explanation which we have added.

We have struck out the words "according to the nature of the original liability" in sub-clause (1) as unnecessary and added the words "subject to the provisions of the Indian Evidence Act, 1872" in sub-clause (2) to remove a conflict.

Clause 20.—We have omitted the words "according to the nature of the original liability."

Clause 24.—We have struck out illustration *(b).*

Clause 31.—We have re-drafted this clause so as to make its provisions of wider application. We think it will now be found to provide for all the classes of cases which have been brought to our notice.

SCHEDULE I.

We approve of the proposal to omit Articles 34 and 35 of the Second Schedule of the Indian Limitation Act, 1877.

Article 34 provides for suits for the recovery of a wife; we fully agree in the opinion expressed by the Special Committee on the Civil Procedure Code that there can be under the law no such decree as a decree for the recovery of a wife, and there would be no point in providing a period of limitation for a suit for that purpose.

Article 35 provides for suits for the restitution of conjugal rights.

After giving the matter our best consideration we have arrived at the conclusion that this article should also be omitted. The High Court of Allahabad and the Chief Court of the Punjab hold that these suits are not subject to any rule of limitation on the ground, amongst others, that the withholding of conjugal rights is to be regarded as a continuing wrong within the meaning of section 23 of the Act, while the Bombay High Court, whose view has been adopted by the High Courts of Calcutta and Madras, has applied the bar of limitation on the ground that the specific provisions of this article must be taken to override the general provisions of section 23. The omission of the article would remove this conflict.

Suits for the restitution of conjugal rights brought under the Indian Divorce Act are not governed by any rule of limitation, and we can see no reason why similar suits brought under any other law should be differently treated in this respect.

Article 99.—We have omitted the explanation.

Article 109.—We have struck out from the third column all the words except "when the profits are received." Those words refer to suits for restitution consequential on the reversal of a decree and would no longer be needed, as the Code of Civil Procedure, 1908, provides that no suit would lie to claim such restitution.

Article 116.—We have restored the article of the present Act.

Article 118.—We have not attempted to remove the conflict which exists as to the construction of this article, and we have thought it right not to make any alteration in it. We have accordingly struck out the words proposed to be added in the third column.

Article 134.—The word "purchase" in this article has been held to include mortgages and leases. We have used the general word "transfer" in its place.

Article 138.—We think that the starting point for the running of time should be the date when the sale becomes absolute; the purchaser would not be in a position to sue for possession before that date.

Article 153.—This article has been re-drafted so as to include certain provisions relating to limitation which have been removed from the Code of Civil Procedure, 1908.

Article 163.—We understand that an application for a certificate that a case is a fit one for appeal to His Majesty in Council is in ordinary legal language spoken of as an application for leave to appeal. We have used the expression leave to appeal in this article and elsewhere to include this meaning.

Articles 164, 169.—In these two articles we have altered the time from which the period would begin to run.

Under the Code of Civil Procedure a defendant or a respondent against whom a decree has been passed *ex parte* may have it set aside either on the ground that the summons in the suit or the notice of appeal had not been duly served on him or on the ground that he had sufficient cause for not appearing on the day fixed for trial. We think that in cases where a person claims to have a decree passed against him set aside notwithstanding that summons or notice was duly served on him, time should run against him from the date of the decree and that where there has been no due service of summons or notice, time ought not to run against him until he has knowledge of the decree.

We have added a new article NO. 180 incorporating certain provisions as to limitation which have been removed from the Code of Civil Procedure Bill.

Acts Amending the Limitation Act, IX of 1908.

ACT NO. XVII OF 1914.

The Second Repealing and Amending Act, 1914.

(16th September 1914.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain formal amendments should be made in the enactments specified in the First Schedule;

AND whereas it is also expedient that certain enactments specified in the second schedule, which are spent, or have ceased to be in force otherwise than by express specific repeal, or have by lapse of time or otherwise become unnecessary, should be expressly and specifically repealed;

It is hereby enacted as follows:—

* * * * * * *

Repeal of certain enactments. 3. The enactments specified in the second schedule are hereby repealed to the extent mentioned in the fourth column thereof.

* * * * * * *

THE SECOND SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	Section 32 and the third schedule.

* * * * * * *

ACT NO. XVIII OF 1919.

The Repealing and Amending Act, 1919.

(17th September 1919.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain formal amendments should be made in the enactments specified in the first schedule;

AND whereas it is also expedient that certain enactments specified in the second schedule, which are spent, or have ceased to be in force otherwise than by express specific repeal, or have by lapse of time or otherwise become unnecessary, should be expressly and specifically repealed:

It is hereby enacted as follows:—

Short title. **1.** This Act may be called the Repealing and Amending Act, 1919.

Amendment of certain enactments. **2.** The enactments specified in the first schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

THE FIRST SCHEDULE.

Amendments

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In Art. 158 of the first schedule, for the entry in the third column the following shall be substituted, namely: — "When the award is filed in Court and notice of the filing has been given to the parties."

* * * * * * *

ACT NO. XXVI OF 1920.

The Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920.

(2nd September 1920.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908, AND THE CODE OF CIVIL PROCEDURE, 1908.

* * * * * * *

[1] [**2.** In the third division of the first schedule to the Indian Limitation Act, 1908, in Arts. 176, 177 and 179, for each of the entries in the second column the entry "ninety days" shall be substituted, and in Art. 178, for the entry in the second column the entry "six months" shall be substituted.]

* * * * * * *

ACT NO. X OF 1922.

The Indian Limitation (Amendment) Act, 1922.

(5th March 1922.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908; It is hereby enacted as follows:—

Short title. **1.** This Act may be called the Indian Limitation (Amendment) Act, 1922.

Amendment of section 5, Act IX of 1908. **2.** In section 5 of the Indian Limitation Act, 1908 (hereinafter referred to as the said Act), for the words "by any enactment or rule" the words "by or under any enactment" shall be substituted.

---

[1] This section was substituted by Act XI of 1923. The original section was as follows:—

Amendment of Arts. 176, 178 and 179 of First Schedule to Act IX, 1908. 2. In the third division of the First Schedule to the Indian Limitation Act, 1908, in Arts. 176, 178 and 179 for the word "Ditto" in the second column the words "ninety days," "six months" and "ninety days," respectively, shall be substituted.

Amendment of section 29, Act IX of 1908.

3. In section 29 of the said Act, —

(a) for sub-section (1) the following sub-sections shall be substituted, namely :—

Savings.

"*(1)* Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law —

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply"; and

(b) sub-sections (2) and (3) shall be re-numbered (3) and (4), respectively.

ACT NO. XI OF 1923.

The Repealing and Amending Act, 1923.

(5th March 1923.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the first schedule ;

* * * * * * *

Amendment of certain enactments.

2. The enactments specified in the first schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

THE FIRST SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908	In the second column of the first schedule,— (1) For each of the entries in Arts. 4 and 5 the entry "six months" shall be substituted. (2) For each of the entries in Arts. 7 to 31 the entry "one year" shall be substituted. (3) For each of the entries in Arts. 33 to 36 the entry "two years" shall be substituted. (4) For each of the entries in Arts. 38 to 115 and for the entry in Art. 181 the entry "three years" shall be substituted. (5) For each of the entries in Arts. 117 to 120 the entry "six years" shall be substituted. (6) For each of the entries in Arts. 122 to 144 the entry "twelve years" shall be substituted. (7) For each of the entries in Arts. 146 and 146-A the entry "thirty years" shall be substituted.

			(8) For each of the entries in Arts. 148 and 149 the entry "sixty years" shall be substituted. (9) For each of the entries in Arts. 153, 154 and Arts. 164 to 170 the entry "thirty days" shall be substituted. (10) For the entry in Art. 159 the entry "ten days" shall be substituted. (11) For the entry in Art. 161 the entry "fifteen days" shall be substituted. (12) For the entry in Art. 172 the entry "sixty days" shall be substituted. (13) For each of the entries in Arts. 174 and 177 the entry "ninety days" shall be substituted.

* * * * * * *

1920	XXVI	The Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920.	For section 2 the following section shall be substituted, namely :— "2. In the third division of the first schedule to the Indian Limitation Act, 1908, in Arts. 176, 177 and 179, for each of the entries in the second column the entry "ninety days" shall be substituted, and in Art. 178, for the entry in the second column the entry "six months" shall be substituted."

* * * * * * *

ACT NO. XII OF 1923.

The Criminal Law Amendment Act, 1923.

(16th March 1923.)

* * * * * * *

Short title and commencement. 1. (1) This Act may be called the Criminal Law Amendment Act, 1923.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India*, appoint.

* * * * * * *

Amendment of First Schedule to Act IX of 1908. 42. In the first schedule to the Indian Limitation Act, 1908, the following item shall be inserted after item 150, namely :—

"150A.	Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days.	The date of the finding."

* * * * * * *

ACT NO. XXX OF 1925.

The Indian Limitation (Amendment) Act, 1925.

(23rd September 1925.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purposes hereinafter appearing; It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called the Indian Limitation (Amendment) Act, 1925.

(2) It shall come into force on the first day of April 1926.

Amendment of Article 5 of First Schedule to Act IX of 1908.

2. In the first division of the first schedule to the Indian Limitation Act, 1908 (hereinafter called the said Act),—

(a) after article 4 the heading "*Part IV.—One year,*" shall be inserted;

(b) in article 5:—

(i) to the entry in the first column the following shall be added, namely:—"where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under Order 37 of the said Code";

(ii) for the entry in the second column the entry "One year" shall be substituted; and

(c) the heading "*Part IV—One year*" after article 5 shall be omitted.

Amendment of Article 159 of First Schedule to Act IX of 1908.

3. In the third division of the first schedule to the said Act, in the entry in the first column of article 159, after the figures and letter "128 (2) *(f)*" the words and figures "or under Order 37" shall be inserted.

ACT NO. XXXIV OF 1926.

The Sind Courts (Supplementary) Act, 1926.

AN ACT TO SUPPLEMENT THE SIND COURTS ACT, 1926, FOR CERTAIN PURPOSES.

WHEREAS it is expedient to supplement the Sind Courts Act, 1926, for purposes hereinafter appearing; It is hereby enacted as follows:—

1. (1) This Act may be called the Sind Courts (Supplementary) Act, 1926.

(2) It shall come into force on the commencement of the Sind Courts Act, 1926.[*]

2. The enactments specified in the schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

THE SCHEDULE.

ENACTMENTS AMENDED.

(*See* Section 2)

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In the first schedule, third division, in article 162 after the word "Bombay" the words "or the Chief Court of Sind" shall be inserted.

ACT NO. I OF 1927.

The Indian Limitation (Amendment) Act, 1927.

(18th February 1927.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908, FOR CERTAIN PURPOSES.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for certain purposes hereinafter appearing; It is hereby enacted as follows:—

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[*] The Sind Courts Act, 1926, came into force on the 15th April 1940. See Sind Government Gazette, Notification (Home Department, Political) No. 1499 H/39, dated 28th March 1940.

Short title and commencement.

1. (1) This Act may be called the Indian Limitation (Amendment) Act, 1927.

(2) It shall come into force on the 1st day of January, 1928.

Amendment of Section 20, Act IX of 1908.

2. For the proviso to sub-section (1) of section 20 of the Indian Limitation Act, 1908 (hereinafter referred to as the said Act), the following shall be substituted, namely:—

"Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

Amendment of Section 21, Act IX of 1908.

3. To section 21 of the said Act the following sub-section shall be added, namely:—

"(3) for the purposes of the said sections—

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorized agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

Amendment of First Schedule to Act IX of 1908.

4. (1) In article No. 132 in the first division of the first schedule to the said Act, for the *Explanation* in the first column the following *Explanation* shall be substituted, namely:—

"*Explanation.*—For the purposes of this article—

(a) the allowance and fees respectively called *malikana* and *haqqs*, and

(b) the value of any agricultural or other produce the right to receive which is secured by a charge upon immovable property,

shall be deemed to be money charged upon immovable property."

(2) In article No. 166 in the third division of the same schedule, to the entry in the first column the following shall be added, namely:—

"including any such application by a judgment-debtor."

ACT NO. IX OF 1927.

The Indian Limitation (Second Amendment) Act, 1927.

(3rd and 16th April 1927.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908, FOR A CERTAIN PURPOSE.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the Indian Limitation (Second Amendment) Act, 1927.

(2) It shall come into force on the 1st day of January, 1928.

Amendment of Article 182, Schedule I, Act IX of 1908.

2. In the third division of the first schedule to the Indian Limitation Act, 1908, in article No. 182—

(a) in clause 5 of the entry in the third column, for the word "applying" the words "the final order passed on an application made" shall be substituted; and

(b) for clause 6 of the same entry the following shall be substituted namely:—

"6. (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal."

ACT NO. X OF 1927.

The Repealing and Amending Act, 1927.

(4th April 1927.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

* * * * * * *

Amendment of certain enactments.

2. The enactments specified in the First Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

THE FIRST SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In the first schedule, article 162, after the words "by any of" the words "the following Courts, namely," shall be inserted, and for the words "and Bombay or the Chief Court of Sind, or the Chief Court of the Punjab or the Chief Court of Lower Burma" the words "Bombay, Lahore and Rangoon and the Chief Court of Sind" shall be substituted.

ACT NO. I OF 1929.

The Indian Limitation (Amendment) Act, 1929.

(20th February 1929.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purposes hereinafter appearing; It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called the Indian Limitation (Amendment) Act, 1929.

(2) It shall come into force on the 1st day of January 1929.

Amendment of Section 10, Act IX of 1908.

2. In section 10 of the Indian Limitation Act, 1908 (hereinafter referred to as the said Act), the following paragraph shall be inserted, namely :—

"For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

Amendment of First Schedule to Act IX of 1908.

3. In the first division of the first schedule to the said Act :—

(a) after article 48, the following articles shall be inserted, namely :—

"48A.	To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.
48B.	To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff."

(b) Article 133 shall be omitted ;

(c) in article 134, in the third column, for the words "The date of the transfer" the words "When the transfer becomes known to the plaintiff" shall be substituted; and

(d) after article 134, the following articles shall be inserted, namely :—

"134A.	To set aside a transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
134B.	By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.
134C.	By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the seller."

ACT NO. XXI OF 1929.

The Transfer of Property (Amendment) Supplementary Act, 1929.

(4th October 1929.)

AN ACT TO SUPPLEMENT THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 1929.

* * * * * *

Short title and commencement.

1. (1) This Act may be called the Transfer of Property (Amendment) Supplementary Act, 1929.

(2) It shall come into force on the 1st day of April, 1930.

* * * * * *

Amendment of Act IX of 1908.

9. In article No. 132 in the first division of the first schedule to the Indian Limitation Act, 1908, the following clause shall be added after clause *(b)* of the Explanation, namely :—

"and

(c) advances secured by mortgage by deposit of title-deeds."

* * * * * *

ACT NO. VIII OF 1930.

The Repealing and Amending Act, 1930.

(16th March 1930.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the first schedule;

* * * * * * *

Amendment of certain enactments. 2. The enactments specified in the first schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

Repeal of certain enactments. 3. The enactments specified in the second schedule are hereby repealed to the extent mentioned in the fourth column thereof.

* * * * * * *

THE FIRST SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In Art. 43 of the first schedule, for the words and figures "Indian Succession Act, 1865, section 320 or section 321, or under the Probate and Administration Act, 1881, section 139 or section 140" the words and figures "Indian Succession Act, 1925, section 360 or section 361" shall be substituted. In Art. 151 of the first schedule, for the words "Madras and Bombay or the Chief Court of the Punjab or the Chief Court of Lower Burma" the words "Madras, Bombay, Lahore and Rangoon" shall be substituted.

* * * * * * *

THE SECOND SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	Sections 30 and 31 and the second schedule.

* * * * * * *

ACT NO. VIII OF 1935.

The Central Provinces Courts (Supplementary) Act, 1935.

(28th September 1935.)

AN ACT TO SUPPLEMENT THE CENTRAL PROVINCES COURTS ACT, 1917.

WHEREAS it is expedient to supplement the Central Provinces Courts Act I of 1917; It is hereby enacted as follows:—

Short title and commencement. 1. *(1)* This Act may be called the Central Provinces Courts (Supplementary) Act, 1935.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Amendment of certain enactments. 2. The enactments specified in the schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

THE SCHEDULE.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In Art. 162 of the third division of the first schedule for the words "Lahore and Rangoon" the words "Lahore, Rangoon and Nagpur" shall be substituted.

* * * * * * *

ACT NO. XIV OF 1937.

The Indian Limitation (Amendment) Act, 1937.

(13th March 1937.)

AN ACT FURTHER TO AMEND THE INDIAN LIMITATION ACT, 1908, FOR A CERTAIN PURPOSE.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purpose hereinafter appearing; It is hereby enacted as follows:

Short title.

1. This Act may be called the Indian Limitation (Amendment) Act, 1937.

Amendment of Article 149, First Schedule to Act IX of 1908.

2. In article 149 in the first division of the first schedule to the Indian Limitation Act, 1908, to the entry in the first column the following words shall be added, namely:—

"except a suit before the Federal Court in the exercise of its original jurisdiction."

ACT NO. XX OF 1937.

The Repealing and Amending Act, 1937.

(14th April 1937.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the first schedule;

AND whereas it is also expedient that the enactments specified in the second schedule, which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the Repealing and Amending Act, 1937.

* * * * * * *

Repeal of certain enactments.

3. The enactments specified in the second schedule are hereby repealed to the extent mentioned in the fourth column thereof.

* * * * * * *

THE SECOND SCHEDULE.

Repeals.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	Article 4 of Schedule I.

THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

[As modified by the Government of India (Adaptation of Indian Laws) Supplementary Order 1937.]

AT THE COURT AT BUCKINGHAM PALACE.

(The 18th day of March 1937.)

* * * * * * *

1. This Order may be cited as the Government of India (Adaptation of Indian Laws) Order, 1937, and shall come into operation on the First day of April Nineteen hundred and thirty seven.

* * * * * * *

3. The Indian Laws mentioned in the schedules to this order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those schedules to be made therein or, if it is so directed, shall cease to have effect.

* * * * * * *

FIRST SCHEDULE.

Central Acts.

* * * * * * *

1908	IX	The Indian Limitation Act, 1908.	S. 13.—For "the Government" substitute "the Central Government or the Crown Representative." S. 26.—For "Government" substitute "the Crown." The first schedule.—In article 149 after "India in Council" insert "the Secretary of State, the Crown Representative, the Central Government or any Provincial Government"; in article 151 for "Lahore and Rangoon" substitute "and Lahore"; and in article 162 omit "Rangoon."

ACT NO. IV OF 1938.

The Insurance Act, 1938.

(26th February 1938.)

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO THE BUSINESS OF INSURANCE.

WHEREAS it is expedient to consolidate and amend the law relating to the business of insurance; It is hereby enacted as follows :—

* * * * * * *

Amendment of Schedule I of Act IX of 1908.

122. In the first schedule to the Indian Limitation Act, IX of 1908, for the entry in the third column relating to article 86, the following entry shall be substituted, namely :—

" The date of the death of the deceased . . . ."

ACT NO. XI OF 1939.

The Insurance (Amendment) Act, 1939.

(28th March 1939.)

AN ACT TO AMEND THE INSURANCE ACT, 1938.

WHEREAS it is expedient to amend the Insurance Act, IV of 1938, for the purposes hereinafter appearing: It is hereby enacted as follows :—

* * * * * * *

Repeal of section 122 of Act IV of 1938 and saving of Article 86 in First Schedule to Act IX of 1908.

34. Section 122 of the said Act (Insurance Act, IV of 1938) is hereby repealed and article 86 in the first schedule to the Indian Limitation Act, 1908, shall have effect as if the said section had never been enacted.

ACT NO. XXXIV OF 1939.

The Repealing and Amending Act, 1939.

(28th September 1939.)

AN ACT TO AMEND CERTAIN ENACTMENTS AND TO REPEAL CERTAIN OTHER ENACTMENTS.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the first schedule;

* * * * * * *

It is hereby enacted as follows:—

1. This Act may be called the Repealing and Amending Act, 1939.

2. The enactments specified in the first schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

* * * * * * *

THE FIRST SCHEDULE.

Amendments.

(*See* Section 2.)

1908	IX	The Indian Limitation Act, 1908.	In article 7 of the first schedule the words and figure "not provided for by this schedule, Article 4," shall be omitted.

ACT NO. X OF 1940.

The Arbitration Act, 1940.

(11th March 1940.)

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO ARBITRATION.

WHEREAS it is expedient to consolidate and amend the law relating to arbitration in British India; It is hereby enacted as follows:—

* * * * * * *

49. * * * * * *

(2) The enactments specified in the fourth schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

* * * * * * *

THE FOURTH SCHEDULE.

(*See* Section 49 (2).)

1908	IX	The Indian Limitation Act, 1908.	In the first schedule — (i) for article 158 the following shall be substituted, namely :—		
			"158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration.	Thirty days.	The date of service of the notice of filing of the award."

(ii) in Arts. 159 and 179, for the words "same Code" in the first column, the words and figure "Code of Civil Procedure, 1908," shall be substituted;

(iii) for article 178 the following shall be substituted, namely :—

"178. Under the Arbitration Act, 1940, for the filing in Court of an award.	Ninety days.	The date of service of the notice of the making of the award."

ACT NO. IV OF 1941.

The Berar Laws Act, 1941.

(17th March 1941.)

AN ACT TO EXTEND CERTAIN ACTS TO BERAR.

* * * * * * * *

2. * * * * * * * *

(2) The Acts specified in the third schedule shall be amended in the manner set forth in the second column of that schedule.

* * * * * * * *

THE THIRD SCHEDULE.

(*See* Section 2 (2).)

Acts Amended

* * * * * * * *

1908	IX	The Indian Limitation Act, 1908.	In article 161 of the first schedule, the word " Provincial " in both places where it occurs, shall be omitted and after the words "Small Causes" where they occur for the first time, the brackets and words, "(other than a Presidency Small Cause Court)" shall be inserted.

ACT NO. XIII OF 1941.

The Insurance (Amendment) Act, 1941.

(8th April, 1941.)

AN ACT FURTHER TO AMEND THE INSURANCE ACT, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

* * * * * * * *

Insertion of new section 122 in Act, IV of 1938.

68. After section 121 of the said Act (Insurance Act, IV of 1938), the following section shall be inserted namely :—

Amendment of Schedule I, Act IX of 1908.

"122. In Item No. 86 in the first schedule to the Indian Limitation Act, 1908,—

(a) for the entry in the first column the following shall be substituted, namely :—

(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.

(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers;

(b) for the entry in the third column, the following shall be substituted, namely :—

(a) The date of the death of the deceased.

(b) The date of the occurrence causing the loss."

THE INDIAN LIMITATION ACT, IX OF 1908.

CHRONOLOGICAL TABLE OF ENACTMENTS.

Year	No. of Act.	Short title.	How affected.
		English Statute of Limitations, 21 Jac. 1, cap. 16	Repealed by Act 9 of 1871.
1793	III	Bengal Regulation	
1795	VII	〃 〃	
1803	II	〃 〃	
1805	II	〃 〃	
1831	VIII	〃 〃	
1800	I	Bombay Regulation	
1827	V	〃 〃	
1802	II	Madras Regulation	
1859	**XIV**	**An Act to provide for Limitation of Suits**	Amended by Act 11 of 1861.
			〃 〃 〃 32 of 1861.
			〃 〃 〃 14 of 1862.
			Repealed by Act 9 of 1871.
1871	**IX**	**The Indian Limitation Act**	Repealed by Act 15 of 1877.
1877	**XV**	**The Indian Limitation Act**	Amended by Act 17 of 1877.
			〃 〃 〃 12 of 1879.
			〃 〃 〃 8 of 1880.
			〃 〃 〃 5 of 1881.
			〃 〃 〃 5 of 1882.
			〃 〃 〃 9 of 1887.
			〃 〃 〃 7 of 1888.
			〃 〃 〃 8 of 1891.
			〃 〃 〃 12 of 1891.
			〃 〃 〃 6 of 1892.
			〃 〃 〃 10 of 1899.
			〃 〃 〃 6 of 1900.
			〃 〃 〃 11 of 1900.
			〃 〃 〃 4 of 1906.
			〃 〃 〃 3 of 1907.
			Repealed by 〃 9 of 1908.
1908	**IX**	**The Indian Limitation Act**	
1914	XVII	Second Repealing and Amending Act	Repealing S. 32 and Sch. III.
1919	XVIII	Repealing and Amending Act	Amending Art. 158.
1920	XXVI	Indian Limitation and Code of Civil Procedure (Amendment) Act	Amending Articles 176, 178, 179.
1922	X	Indian Limitation (Amendment) Act	Amending S. 5 and S. 29.

Year.	No. of Act.	Short title.	How affected.
1923	XI	Repealing and Amending Act	Amending Articles 4, 5, 7 to 31, 33 to 36, 38 to 115, 117 to 120, 122 to 144, 146, 146A, 148, 149, 153, 154, 159, 161, 164 to 170, 172, 174, 177, 181.
1923	XII	Criminal Law Amendment Act	Adding Art. 150A.
1925	XXX	Indian Limitation (Amendment) Act	Amending Articles 5, 159.
1926	XXXIV	Sind Courts (Supplementary) Act	Amending Art. 162.
1927	I	Indian Limitation (Amendment) Act	Amending S. 20, S. 21 and Articles 132, 166.
1927	IX	Indian Limitation (Second Amendment) Act	Amending Art. 182.
1927	X	Repealing and Amending Act	Amending Art. 162.
1929	I	Indian Limitation (Amendment) Act	Amending S. 10 and Art. 134. Inserting Articles 48A, 48B, 134A, 134B, 134C. Omitting Art. 133.
1929	XXI	Transfer of Property (Amendment) Supplementary Act	Amending Art. 132.
1930	VIII	Repealing and Amending Act	Amending Articles 43, 151. Repealing S. 30, S. 31 and Sch. II.
1935	VIII	Central Provinces Courts (Supplementary) Act	Amending Art. 162.
1937	XIV	Indian Limitation (Amendment) Act	Amending Art. 149.
1937	XX	Repealing and Amending Act	Repealing Art. 4.
1937		Government of India (Adaptation of Indian Laws) Order	Amending S. 13, S. 26 and Articles 149, 151, 162.
1938	IV	Insurance Act	Amending Art. 86.
1939	XI	Insurance (Amendment) Act	Amending Art. 86.
1939	XXXIV	Repealing and Amending Act	Amending Art. 7.
1940	X	Arbitration Act	Amending Articles 159 and 179. Substituting new Articles for Articles 158 and 178.
1941	IV	Berar Laws Act	Amending Art. 161.
1941	XIII	Insurance (Amendment) Act	Amending Art. 86.

INDIAN LIMITATION ACT, IX OF 1908.

STATEMENT OF AMENDMENTS AND REPEALS.

SECTIONS.

Sections.	Amending Act.		How affected.
	No. of Act.	Short title.	
5	10 of 1922	Indian Limitation (Amendment) Act	Words "by or under any enactment" *substituted* for the words "by any enactment or rule".
10	1 of 1929	Indian Limitation (Amendment) Act	The paragraph "For the purposes .... trustee thereof" *inserted*.
13	(1937)	Government of India (Adaptation of Indian Laws) Order, 1937	Words "the Central Government or the Crown Representative" *substituted* for the words "the Government".
20	1 of 1927	Indian Limitation (Amendment) Act	The proviso to sub-section (1) *substituted*.
21	1 of 1927	Indian Limitation (Amendment) Act	Sub-section (3) *added*.
26	(1937)	Government of India (Adaptation of Indian Laws) Order, 1937	Words "the Crown" *substituted* for the word "Government" in sub-section (2).
29	10 of 1922	Indian Limitation (Amendment) Act	Sub-sections (1) and (2) *substituted* for the original sub-section (1), and original sub-sections (2) and (3) were *renumbered* as (3) and (4) respectively.
30 & 31	8 of 1930	Repealing and Amending Act	*Repealed*.
32	17 of 1914	Second Repealing and Amending Act	*Repealed*.

SCHEDULE I (Articles).

Articles.			
4	11 of 1923	Repealing and Amending Act	Words "Six months" *substituted* for the word "Ditto".
	20 of 1937	Repealing and Amending Act	*Repealed*.
5	11 of 1923	Repealing and Amending Act	Words "Six months" *substituted* for the word "Ditto".
	30 of 1925	Indian Limitation (Amendment) Act	Words "One year" *substituted* for the words "Six months".
7	11 of 1923	Repealing and Amending Act	Words "One year" *substituted* for the word "Ditto".
	34 of 1939	Repealing and Amending Act	Words "not provided for by this schedule, Art. 4" *omitted*.

SCHEDULE I (Articles).

Articles.	Amending Act		How affected.
	No. of Act.	Short title.	
8 to 31	11 of 1923	Repealing and Amending Act	Words "One year" *substituted* for the word "Ditto".
33 to 36	11 of 1923	Repealing and Amending Act	Words "Two years" *substituted* for the word "Ditto".
38 to 42	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
43	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
	8 of 1930	Repealing and Amending Act	Words and figures "Indian Succession Act, 1925, s. 360 or s. 361" *substituted* for "Indian Succession Act, 1865, s. 320 or s. 321 or under the Probate and Administration Act, 1881, s. 139 or s. 140".
44 to 48	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
48A & 48B	1 of 1929	Indian Limitation (Amendment) Act	*Inserted.*
49 to 85	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
86	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
	4 of 1938	The Insurance Act	By s. 122 of the said Act, the following entry was *substituted* for the original entry in column 3 of Art. 86: "The date of the death of the deceased. . ."
	11 of 1939	Insurance (Amendment) Act	S. 34 of this Act *repealed* s. 122 of the Insurance Act 4 of 1938 and further provided that Art. 86 shall have effect as if the said s. 122 had never been enacted.
	13 of 1941	The Insurance (Amendment) Act	New s. 122 was *inserted* in the Insurance Act, 1938, which amended Art. 86 by *substituting* the present new entries in columns 1 and 3 thereof for the original entries.
87 to 115	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
117 to 120	11 of 1923	Repealing and Amending Act	Words "Six years" *substituted* for the word "Ditto".

SCHEDULE I (Articles).

Articles.	Amending Act.		How affected.
	No. of Act.	Short title.	
122 to 131	11 of 1923	Repealing and Amending Act	Words "Twelve years" *substituted* for the word "Ditto".
132	11 of 1923	Repealing and Amending Act	Words "Twelve years" *substituted* for the word "Ditto."
	1 of 1927	Indian Limitation (Amendment) Act	In column 1 after the Article the Explanation was *substituted* for the words "Explanation.—The allowance . . . . immoveable property."
	21 of 1929	Transfer of Property (Amendment) Supplementary Act	Clause (c) *added* to the Explanation.
133	11 of 1923	Repealing and Amending Act	Words "Twelve years" *substituted* for the word "Ditto".
	1 of 1929	Indian Limitation (Amendment) Act	*Omitted.*
134	11 of 1923	Repealing and Amending Act	Words "Twelve years" *substituted* for the word "Ditto."
	1 of 1929	Indian Limitation (Amendment) Act	Words "when the transfer . . . . . to the plaintiff" *substituted* in column 3 for the words "the date of the transfer."
134A 134B 134C	1 of 1929	Indian Limitation (Amendment) Act	*Inserted.*
135 to 144	11 of 1923	Repealing and Amending Act	Words "Twelve years" *substituted* for the word "Ditto."
146	11 of 1923	Repealing and Amending Act	Words "Thirty years" *substituted* for the word "Ditto".
146A	11 of 1923	Repealing and Amending Act	Words "Thirty years" *substituted* for the word "Ditto".
148	11 of 1923	Repealing and Amending Act.	Words "Sixty years" *substituted* for the word "Ditto".
149	11 of 1923	Repealing and Amending Act.	Words "Sixty years" *substituted* for the word "Ditto".
	14 of 1937	Indian Limitation (Amendment) Act.	Words "Except a suit . . . . . . original jurisdiction" *added* in column 1.
	(1937)	Government of India (Adaptation of Indian Laws) Order, 1937.	Words "the Secretary of State, the Crown Representative, the Central Government or any Provincial Government" *inserted* in column 1.
150A	12 of 1923	Criminal Law Amendment Act.	*Added.*

SCHEDULE I (Articles).

Articles.	Amending Act.		How affected.
	No. of Act.	Short title.	
151	8 of 1930	Repealing and Amending Act.	Words "Madras, Bombay, Lahore and Rangoon" *substituted* for the words "Madras and Bombay or the Chief Court of the Punjab or the Chief Court of Lower Burma" in column 1.
	(1937)	Government of India (Adaptation of Indian Laws) Order, 1937.	Word "and" *inserted* before "Lahore" and words "and Rangoon" *omitted* after it, in column 1.
153	11 of 1923	Repealing and Amending Act.	Words "Thirty days" *substituted* for the word "Ditto".
154	11 of 1923	Repealing and Amending Act.	Words "Thirty days" *substituted* for the word "Ditto".
158	18 of 1919	Repealing and Amending Act.	Words "When the award . . . . . to the parties" *substituted* in column 3.
	10 of 1940	Arbitration Act.	New article 158 *substituted* for original.
159	11 of 1923	Repealing and Amending Act.	Words "Ten days" *substituted* for the word "Ditto".
	10 of 1940	Arbitration Act.	Words "Code of Civil Procedure, 1908" *substituted* for the words "same Code".
	30 of 1925	Indian Limitation (Amendment) Act.	Words "or under Order 37" *inserted* in column 1.
161	11 of 1923	Repealing and Amending Act.	Words "Fifteen days" *substituted* for the word "Ditto".
	4 of 1941	Berar Laws Act.	Word "Provincial" at both places where it occurred was *omitted* and after the words "Small Causes" where they occur for the first time the brackets and words "(other than a Presidency Small Cause Court)" were *inserted*.
162	34 of 1926	Sind Courts (Supplementary) Act	Words "or the Chief Court of Sind" were *inserted*.
	10 of 1927	Repealing and Amending Act	Words "the following Courts, namely," *inserted* in column 1.
			Words "Bombay, Lahore, and Rangoon and the Chief Court of Sind" *substituted* for the words "and Bombay or the Chief Court of Sind, or the Chief Court of the Punjab or the Chief Court of Lower Burma."
	8 of 1935	Central Provinces Courts (Supplementary) Act	Words "Lahore, Rangoon and Nagpur" *substituted* for words "Lahore and Rangoon" in column 1.
	(1937)	Government of India (Adaptation of Indian Laws) Order, 1937	Words "and Rangoon" *omitted* in column 1.

SCHEDULE I (Articles).

Articles.	Amending Act.		How affected.
	No. of Act.	Short title.	
164 & 165	11 of 1923	Repealing and Amending Act	Words "Thirty days" *substituted* for the word "Ditto".
166	11 of 1923	Repealing and Amending Act	Words "Thirty days" *substituted* for the word "Ditto".
	1 of 1927	Indian Limitation (Amendment) Act	Words "including any . . . . judgment-debtor" *added* in column 1.
167 to 170	11 of 1923	Repealing and Amending Act	Words "Thirty days" *substituted* for the word "Ditto".
172	11 of 1923	Repealing and Amending Act	Words "Sixty days" *substituted* for the word "Ditto".
174	11 of 1923	Repealing and Amending Act	Words "Ninety days" *substituted* for the word "Ditto".
176	26 of 1920	Indian Limitation and Code of Civil Procedure (Amendment) Act	Words "Ninety days" *substituted* for the word "Ditto".
177	11 of 1923	Repealing and Amending Act	Words "Ninety days" *substituted* for the word "Ditto".
178	26 of 1920	Indian Limitation and Code of Civil Procedure (Amendment) Act	Words "Six months" *substituted* for the word "Ditto".
	10 of 1940	Arbitration Act	New article 178 *substituted* for original.
179	26 of 1920	Indian Limitation and Code of Civil Procedure (Amendment) Act	Words "Ninety days" *substituted* for the word "Ditto".
	10 of 1940	Arbitration Act	Words "Code of Civil Procedure, 1908" *substituted* for the words "same Code."
181	11 of 1923	Repealing and Amending Act	Words "Three years" *substituted* for the word "Ditto".
182	9 of 1927	Indian Limitation (Second Amendment) Act	Words "the final order passed on an application made" *substituted* for the word "applying" in clause 5 column 3. New clause "6. (in respect of . . . .) . . . . . of the appeal", *substituted* for the old clause 6 in column 3.

SCHEDULE II.

Sch. II	8 of 1930	Repealing and Amending Act	*Repealed.*

SCHEDULE III.

Sch. III	17 of 1914	Second Repealing and Amending Act	*Repealed.*

THE

INDIAN LIMITATION ACT, 1908.

(IX OF 1908)

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ACT No. IX of 1908.[1]

(As modified up to the 8th April, 1941.)

[*7th August, 1908.*]

AN ACT TO CONSOLIDATE AND AMEND THE LAW FOR THE LIMITATION OF SUITS, AND FOR OTHER PURPOSES.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. *(1)* This Act may be called the Indian Limitation Act, 1908.

(2) It extends to the whole of British India; and

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "applicant" includes any person from or through whom an applicant derives his right to apply:

(2) "bill of exchange" includes a hundi and a cheque:

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued:

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[1] For Statement of Objects and Reasons, *see* pages 36 to 46, *supra*; for Report of Select Committee, *see* pages 46 to 49, *supra*; and for Proceedings in Council, *see* Gazette of India, 1908, Pt. VI, pages 2, 13, 37 and 145.

This Act has been declared to be in force in the Sonthal Parganas by notification under section 3 of the Sonthal Parganas Settlement Regulation (III of 1872), *see* Calcutta Gazette, 1909, Part I, page 649; in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (II of 1913), section 3; and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), section 3 and Schedule.

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another:

(6) "foreign country" means any country other than British India:

(7) "good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention:

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue:

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

(10) "suit" does not include an appeal or an application: and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

Dismissal of suit etc., instituted, etc., after period of limitation.

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation. — A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Where Court is closed when period expires.

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

Extension of period in certain cases.

5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable [1][by or under any enactment] for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

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[1] These words were substituted for the words "by any enactment or rule" by S. 2 of the Indian Limitation (Amendment) Act, 1922 (X of 1922).

Explanation. — The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

Legal disability.

[a]**6.** *(1)* Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections *(1)* and *(2)* shall apply.

Illustrations.

(a) The right to sue for the hire of a boat accrues to *A* during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(b) A right to sue accrues to *Z* during his minority. After the accruer, but while *Z* is still a minor, he becomes insane. Time runs against *Z* from the date when his insanity and minority cease.

(c) A right to sue accrues to *X* during his minority. *X* dies before attaining majority, and is succeeded by *Y*, his minor son. Time runs against *Y* from the date of his attaining majority.

Disability of one of several plaintiffs or applicants.

[a]**7.** Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes

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[a] Sections 6 to 9 have been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913).

capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Illustrations.

(*a*) *A* incurs a debt to a firm of which *B*, *C* and *D* are partners. *B* is insane, and *C* is a minor. *D* can give a discharge of the debt without the concurrence of *B* and *C*. Time runs against *B*, *C* and *D*.

(*b*) *A* incurs a debt to a firm of which *E*, *F* and *G* are partners. *E* and *F* are insane, and *G* is a minor. Time will not run against any of them until either *E* or *F* becomes sane, or *G* attains majority.

Special exceptions.

[a]**8.** Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(*a*) *A*, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. *A* has, under the ordinary law, only one year remaining within which to sue. But under section 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(*b*) A right to sue for an hereditary office accrues to *A* who at the time is insane. Six years after the accruer *A* recovers his reason. *A* has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under section 6 read with this section.

(*c*) A right to sue as landlord to recover possession from a tenant accrues to *A*, who is an idiot. *A* dies three years after the accruer, his idiocy continuing up to the date of his death. *A*'s representative in interest has, under the ordinary law, nine years from the date of *A*'s death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Continuous running of time.

[a]**9.** Where once time has begun to run, no subsequent disability or inability to sue stops it :

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

[1][For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific

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[a] See foot-note to section 6.

[1] This paragraph was inserted by S. 2 of the Indian Limitation (Amendment) Act, 1929 (I of 1929).

purpose, and the manager of any such property shall be deemed to be the trustee thereof.]

Suits on foreign contracts.

11. *(1)* Suits instituted in British India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

(2) No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of time in legal proceedings.

12. *(1)* In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Exclusion of time of defendant's absence from British India and certain other territories.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of [1][the Central Government or the Crown Representative] shall be excluded.

Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

14. *(1)* In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

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[1] Substituted for the words "the Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I. — In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III. — For the purposes of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Exclusion of time during which proceedings are suspended.

15. *(1)* In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

Exclusion of time during which proceedings to set aside execution-sale are pending.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Effect of death before right to sue accrues.

17. *(1)* Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections *(1)* and *(2)* applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

18. Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

Effect of fraud.

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

19. *(1)* Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Effect of acknowledgment in writing.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, 1 of 1872, oral evidence of its contents shall not be received.

Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II. — For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III. — For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

Effect of payment of interest as such or of part payment of principal.

20. *(1)* Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made:

[1][Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.]

Effect of receipt of produce of mortgaged land.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section *(1)*.

Explanation.—Debt includes money payable under a decree or order of Court.

Agent of person under disability.

21. *(1)* The expression "agent duly authorized in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment.

Acknowledgment or payment by one of several joint contractors, etc.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

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[1] This proviso was substituted by S. 2 of the Indian Limitation (Amendment) Act, 1927 (I of 1927). The old proviso was as follows :—

"Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

[1][(3) for the purposes of the said sections —

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorized agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.]

Effect of substituting or adding new plaintiff or defendant.

22. (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

Continuing breaches and wrongs.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field. *B* owns the sub-soil. *B* digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by *A* against B runs from the time of the subsidence.

Computation of time mentioned in instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(a) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after date computed according to the Gregorian calendar.

(b) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar.

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[1] This sub-section was added by S. 3 of the Indian Limitation (Amendment) Act, 1927 (I of 1927).

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easements.

26. *(1)* Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section *(1)* belongs to [1][the Crown], that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Explanation. — Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in favour of reversioner of servient tenement.

27. Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

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[1] Substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B*'s land. *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that during ten of these years *C*, a Hindu widow, had a life interest in the land, that on *C*'s death *B* became entitled to the land, and that within two years after *C*'s death, he contested *A*'s claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Extinguishment of right to property.

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

PART V.

SAVINGS AND REPEALS.

Savings.

29. [1][*(1)* Nothing in this Act shall affect section 25 of the Indian Contract Act, IX of 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.]

[2][*(3)*] Nothing in this Act shall apply to suits under the Indian Divorce Act, IV of 1869.

[*(4)*] Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Indian Easements Act, V of 1882 may for the time being extend.

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1. Sub-sections *(1)* and *(2)* were substituted for the original sub-section *(1)* of S. 29 by S. 3 of the Indian Limitation (Amendment) Act, 1922 (X of 1922). The original sub-section *(1)* was as follows :—

   29. *(1)* Nothing in this Act shall :—

   Savings. *(a)* affect the Indian Contract Act, 1872, section 25;

   (b) affect or alter any period of limitation specifically prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.

2. The original sub-sections *(2)* and *(3)* were re-numbered as *(3)* and *(4)* respectively by S. 3 of the Indian Limitation (Amendment) Act, 1922 (X of 1922).

[1]**30.** *Repealed by the Repealing and Amending Act, 1930 (VIII of 1930).*

[2]**31.** *Repealed by the Repealing and Amending Act, 1930 (VIII of 1930).*

[3]**32.** *Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914).*

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1. The original section 30 was as follows :—

Provision for suits for which the period prescribed is shorter than that prescribed by the Indian Limitation Act, 1877.

30. Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first.

2. The original section 31 was as follows :—

Provision for suits by certain mortgagees in territories mentioned in the second schedule.

31. *(1)* Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule, a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable.

(2) Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of first instance or of appeal on the ground that a twelve years' rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act : and on such restoration, the provisions of sub-section (1) shall apply.

3. The original section 32 was as follows :—

Repeals.

32. The enactments mentioned in the third schedule are repealed to the extent specified in the fourth column thereof.

THE FIRST SCHEDULE

(See section 3.*)*

FIRST DIVISION : SUITS.

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part I.—Thirty days.	
1. To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, 1863.	Thirty days .	When notice of the award is delivered to the plaintiff.
	Part II.—Ninety days.	
2. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.	Ninety days .	When the act or omission takes place.
	Part III.—Six months.	
3. Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property.	Six months .	When the dispossession occurs.
4. [1][* * * * * *	* * *	* * * *]
	[2]*[Part IV.—One year.]*	
[3]5. Under the summary procedure referred to in section 128 (2) *(f)* of the Code of Civil Procedure, 1908, [2][where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under Order 37 of the said Code.]	[4][One year] .	When the debt or liquidated demand becomes payable or when the property becomes recoverable.
	[5]* * * *	
6. Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture.	One year . .	When the penalty or forfeiture is incurred.

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[1] **Repealed by Repealing and Amending Act, XX of 1937. The original Article 4 was as follows : —**

4. Under the Employers and Workmen (Disputes) Act, 1860, section 1.	**Six months.**	**When the wages, hire or price of work claimed accrue or accrues due.**

[2] **These words were inserted by S. 2 of the Indian Limitation (Amendment) Act, 1925 (XXX of 1925).**

[3] **Article 5 has been repealed so far as Province of Bombay is concerned by the Indian Limitation (Bombay Amendment) Act, 1937 (Bombay Act VI of 1937). (See Article 64A.)**

[4] **These words were substituted for the words "six months," by S. 2 of the Indian Limitation (Amendment) Act, 1925 (XXX of 1925).**

[5] **The heading "*Part IV.—One year*" was omitted *ibid*.**

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART IV — ONE YEAR *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
7. For the wages of a house-hold servant, artisan or labourer [1] [* * * *].	[2] [One year] .	When the wages accrue due.
8. For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	[2] [One year] .	When the food or drink is delivered.
9. For the price of lodging.	[2] [One year] .	When the price becomes payable.
10. To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	[2] [One year] .	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.
11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order; (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree; (2) Order under section 28 of the Presidency Small Cause Courts Act, 1882.	[2] [One year] .	The date of the order.
11A. By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution	[2] [One year] .	Ditto.

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[1] The words "not provided for by this schedule, article 4," were omitted by the Repealing and Amending Act, 1939 (XXXIV of 1939).

[2] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART IV—ONE YEAR *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.		
12. To set aside any of the following sales :— *(a)* sale in execution of a decree of a Civil Court; *(b)* sale in pursuance of a decree or order of a Collector or other officer of revenue; *(c)* sale for arrears of Government revenue, or for any demand recoverable as such arrears; *(d)* sale of a patni taluq sold for current arrears of rent. *Explanation.* — In this article "patni" includes any intermediate tenure saleable for current arrears of rent.	[1] [One year] .	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.
13. To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	[1] [One year] .	The date of the final decision or order in the case by a Court competent to determine it finally.
14. To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	[1] [One year] .	The date of the act or order.
15. Against Government to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue.	[1] [One year] .	When the attachment, lease or transfer is made.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART IV — ONE YEAR *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
16. Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	[1] [One year] .	When the payment is made.
17. Against Government for compensation for land acquired for public purposes.	[1] [One year] .	The date of determining the amount of the compensation.
18. Like suit for compensation when the acquisition is not completed.	[1] [One year] .	The date of the refusal to complete.
19. For compensation for false imprisonment.	[1] [One year] .	When the imprisonment ends.
20. By executors, administrators, or representatives under the Legal Representatives' Suits Act, 1855.	[1] [One year] .	The date of the death of the person wronged.
21. By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.	[1] [One year] .	The date of the death of the person killed.
22. For compensation for any other injury to the person.	[1] [One year] .	When the injury is committed.
23. For compensation for a malicious prosecution.	[1] [One year] .	When the plaintiff is acquitted, or the prosecution is otherwise terminated.
24. For compensation for libel.	[1] [One year] .	When the libel is published.
25. For compensation for slander.	[1] [One year] .	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.
26. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	[1] [One year] .	When the loss occurs.
27. For compensation for inducing a person to break a contract with the plaintiff.	[1] [One year] .	The date of the breach.
28. For compensation for an illegal, irregular or excessive distress.	[1] [One year] .	The date of the distress.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART IV — ONE YEAR *(concld.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
29. For compensation for wrongful seizure of moveable property under legal process.	[1] [One year] .	The date of the seizure.
30. Against a carrier for compensation for losing or injuring goods.	[1] [One year] .	When the loss or injury occurs.
31. Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	[1] [One year] .	When the goods ought to be delivered.
	Part V.—Two years.	
32. Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years . .	When the perversion first becomes known to the person injured thereby.
33. Under the Legal Representatives' Suits Act, 1855, against an executor.	[1] [Two years] .	When the wrong complained of is done.
34. Under the same Act against an administrator.	[1] [Two years] .	Ditto.
35. Under the same Act against any other representative.	[1] [Two years] .	Ditto.
36. For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.	[1] [Two years] .	When the malfeasance, misfeasance or nonfeasance takes place.
	Part VI.—Three years.	
37. For compensation for obstructing a way or a watercourse.	Three years	The date of the obstruction.
38. For compensation for diverting a watercourse.	[1] [Three years] .	The date of the diversion.
39. For compensation for trespass upon immoveable property.	[1] [Three years] .	The date of the trespass.
40. For compensation for infringing copyright or any other exclusive privilege.	[1] [Three years] .	The date of the infringement.
41. To restrain waste.	[1] [Three years] .	When the waste begins.
42. For compensation for injury caused by an injunction wrongfully obtained.	[1] [Three years] .	When the injunction ceases.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
43. Under the [1][Indian Succession Act, 1925, section 360 or section 361] to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	[2][Three years] .	The date of the payment or distribution.
44. By a ward who has attained majority, to set aside a transfer of property by his guardian.	[2][Three years] .	When the ward attains majority.
45. To contest an award under any of the following Regulations of the Bengal Code :— The Bengal Land-revenue Settlement Regulation, 1822. The Bengal Land-revenue Settlement Regulation, 1825. The Bengal Land-revenue (Settlement and Deputy Collectors) Regulation, 1833.	[2][Three years] .	The date of the final award or order in the case.
46. By a party bound by such award to recover any property comprised therein.	[2][Three years] .	The date of the final award or order in the case.
47. By any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by any one claiming under such person, to recover the property comprised in such order.	[2][Three years] .	The date of the final order in the case.
48. For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	[2][Three years] .	When the person having the right to the possession of the property first learns in whose possession it is.

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[1] These words and figures were substituted by S. 2 and Sch. I of the Repealing and Amending Act, 1930 (VIII of 1930), for the words "Indian Succession Act, 1865, S. 320 or S. 321, or under the Probate and Administration Act, 1881, S. 139 or S. 140."

[2] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
[1] [48A. To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Three years .	When the sale becomes known to the plaintiff.
48B. To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years .	When the sale becomes known to the plaintiff.]
49. For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	[2] [Three years] .	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
50. For the hire of animals, vehicles, boats or house-hold furniture.	[2] [Three years] .	When the hire becomes payable.
51. For the balance of money advanced in payment of goods to be delivered.	[2] [Three years] .	When the goods ought to be delivered.
[a] 52. For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	[2] [Three years] .	The date of the delivery of the goods.
[a] 53. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	[2] [Three years] .	When the period of credit expires.
54. For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	[2] [Three years] .	When the period of the proposed bill elapses.

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1. These Articles were inserted by S. 3 of the Indian Limitation (Amendment) Act, 1929 (I of 1929).
2. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

a. For period of limitation for these and certain other suits in the province of the Punjab, see the Punjab Loans Limitation Act, I of 1904 and S. 29 (1) (b) of this Act. (The Punjab Act, I of 1904, has been subsequently repealed by the Repealing (Punjab Loans Limitation) Act III of 1923, S. 2 and by virtue of S. 3 of the latter Act any suit falling under description of suits given in the schedule to the Punjab Loans Limitation Act shall be governed in so far as the point of limitation is concerned by the provisions of the Indian Limitation Act, 1908, and the provisions of the Indian Limitation Act shall apply accordingly.)

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
55. For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	[1] [Three years] .	The date of the sale.
56. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	[1] [Three years] .	When the work is done.
[a]57. For money payable for money lent.	[1] [Three years] .	When the loan is made.
58. Like suit when the lender has given a cheque for the money.	[1] [Three years] .	When the cheque is paid.
[a]59. For money lent under an agreement that it shall be payable on demand.	[1] [Three years] .	When the loan is made.
60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	[1] [Three years] .	When the demand is made.
[a]61. For money payable to the plaintiff for money paid for the defendant.	[1] [Three years] .	When the money is paid.
62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	[1] [Three years] .	When the money is received.
[a]63. For money payable for interest upon money due from the defendant to the plaintiff.	[1] [Three years] .	When the interest becomes due.
[a]64. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	[1] [Three years] .	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

[a] See foot-note under Article 52.

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
***64A.**		
65. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	[1][Three years]	When the time specified arrives or the contingency happens.
[a]66. On a single bond, where a day is specified for payment.	[1][Three years]	The day so specified.
[a]67. On a single bond, where no such day is specified.	[1][Three years]	The date of executing the bond.
[a]68. On a bond subject to a condition.	[1][Three years]	When the condition is broken.
[a]69. On a bill of exchange or promissory note payable at a fixed time after date.	[1][Three years]	When the bill or note falls due.
[a]70. On a bill of exchange payable at sight or after sight, but not at a fixed time.	[1][Three years]	When the bill is presented.
[a]71. On a bill of exchange accepted payable at a particular place.	[1][Three years]	When the bill is presented at that place.
[a]72. On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	[1][Three years]	When the fixed time expires.
[a]73. On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	[1][Three years]	The date of the bill or note.

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* *Bombay Amendment.*

64A. Under the summary procedure referred to in S. 128 (2) (f) of the Code of Civil Procedure, 1908, where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under O. 37 of the said Code.	Three years.	When the debt or liquidated demand becomes payable or when the property becomes recoverable.

(Article 64A was inserted, so far as the Province of Bombay is concerned, by the Indian Limitation (Bombay Amendment) Act, 1937, (Bombay Act VI of 1937), section 2. The Act came into force on the 15th January 1938.)

[1] These words were substituted for the word " Ditto " by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

[a] See foot-note under Article 52.

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
[a]74. On a promissory note or bond payable by instalments.	[1] [Three years] .	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
[a]75. On a promissory note or bond payable by instalments, which provides that if default be made in payment of one or more instalments, the whole shall be due.	[1] [Three years] .	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
[a]76. On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	[1] [Three years] .	The date of the delivery to the payee.
[a]77. On a dishonoured foreign bill, where protest has been made and notice given.	[1] [Three years] .	When the notice is given.
[a]78. By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	[1] [Three years] .	The date of the refusal to accept.
[a]79. By the acceptor of an accommodation-bill against the drawer.	[1] [Three years] .	When the acceptor pays the amount of the bill.
[a]80. Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	[1] [Three years] .	When the bill, note or bond becomes payable.
81. By a surety against the principal debtor.	[1] [Three years] .	When the surety pays the creditor.
82. By a surety against a co-surety.	[1] [Three years] .	When the surety pays anything in excess of his own share.
83. Upon any other contract to indemnify.	[1] [Three years] .	When the plaintiff is actually damnified.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

[a] See foot-note under Article 52.

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
84. By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	[1] [Three years]	The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.
85. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	[1] [Three years]	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
*[86. (a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	(a) The date of the death of the deceased.
(b) On a policy of insurance when the sum insured is payable after proof of loss has been given to or received by the insurers.		(b) The date of the occurrence causing the loss.]
87. By the assured to recover premia paid under a policy voidable at the election of the insurers.	[1] [Three years]	When the insurers elect to avoid the policy.
88. Against a factor for an account.	[1] [Three years]	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
89. By a principal against his agent for moveable property received by the latter and not accounted for.	[1] [Three years]	Ditto.
90. Other suits by principals against agents for neglect or misconduct.	[1] [Three years]	When the neglect or misconduct becomes known to the plaintiff.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923.)

* For Legislative History, see Note 1 under Art. 86, in the body of the Commentary.

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
91. To cancel or set aside an instrument not otherwise provided for.	[1] [Three years] .	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
92. To declare the forgery of an instrument issued or registered.	[1] [Three years] .	When the issue or registration becomes known to the plaintiff.
93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	[1] [Three years] .	The date of the attempt.
94. For property which the plaintiff has conveyed while insane.	[1] [Three years] .	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
95. To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	[1] [Three years] .	When the fraud becomes known to the party wronged.
96. For relief on the ground of mistake.	[1] [Three years] .	When the mistake becomes known to the plaintiff.
97. For money paid upon an existing consideration which afterwards fails.	[1] [Three years] .	The date of the failure.
98. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	[1] [Three years] .	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.
99. For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	[1] [Three years] .	The date of the payment in excess of the plaintiff's own share.
100. By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	[1] [Three years] .	When the right to contribution accrues.
101. For a seaman's wages.	[1] [Three years] .	The end of the voyage during which the wages are earned.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VI — THREE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
102. For wages not otherwise expressly provided for by this schedule.	[1] [Three years] .	When the wages accrue due.
103. By a Muhammadan for exigible dower *(mu'ajjal).*	[1] [Three years] .	When the dower is demanded and refused or (where, during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.
104. By a Muhammadan for deferred dower *(mu'wajjal).*	[1] [Three years] .	When the marriage is dissolved by death or divorce.
105. By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	[1] [Three years] .	When the mortgagor re-enters on the mortgaged property.
106. For an account and a share of the profits of a dissolved partnership.	[1] [Three years] .	The date of the dissolution.
107. By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	[1] [Three years] .	The date of the payment.
108. By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	[1] [Three years] .	When the trees are cut down.
109. For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	[1] [Three years] .	When the profits are received.
110. For arrears of rent.	[1] [Three years] .	When the arrears become due.
111. By a vendor of immoveable property for personal payment of unpaid purchase-money.	[1] [Three years] .	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VI — THREE YEARS *(concld.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
112. For a call by a company registered under any Statute or Act.	[1][Three years]	When the call is payable.
113. For specific performance of a contract.	[1][Three years]	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
114. For the rescission of a contract.	[1][Three years]	When the facts entitling the plaintiff to have the contract rescinded first become known to him.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	[1][Three years]	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
	Part VII.—Six years.	
116. For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
117. Upon a foreign judgment as defined in the Code of Civil Procedure, 1908.	[1][Six years]	The date of the judgment.
118. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	[1][Six years]	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	[1][Six years]	When the rights of the adopted son, as such, are interfered with.
120. Suit for which no period of limitation is provided elsewhere in this schedule.	[1][Six years]	When the right to sue accrues.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART VIII — TWELVE YEARS

Description of suit.	Period of limitation.	Time from which period begins to run.
	Part VIII.—Twelve years.	
121. To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a patni taluk or other saleable tenure sold for arrears of rent.	Twelve years .	When the sale becomes final and conclusive.
122. Upon a judgment obtained in British India, or a recognisance.	[1] [Twelve years].	The date of the judgment or recognisance.
123. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	[1] [Twelve years].	When the legacy or share becomes payable or deliverable.
124. For possession of an hereditary office.	[1] [Twelve years].	When the defendant takes possession of the office adversely to the plaintiff. *Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.
125. Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	[1] [Twelve years].	The date of the alienation.
126. By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	[1] [Twelve years].	When the alienee takes possession of the property.
127. By a person excluded from joint family property to enforce a right to share therein.	[1] [Twelve years].	When the exclusion becomes known to the plaintiff.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VIII — TWELVE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
128. By a Hindu for arrears of maintenance.	[1] [Twelve years].	When the arrears are payable.
129. By a Hindu for a declaration of his right to maintenance.	[1] [Twelve years].	When the right is denied.
130. For the resumption or assessment of rent-free land.	[1] [Twelve years].	When the right to resume or assess the land first accrues.
131. To establish a periodically recurring right.	[1] [Twelve years].	When the plaintiff is first refused the enjoyment of the right.
132. To enforce payment of money charged upon immoveable property. [2] [*Explanation.* — For the purposes of this article— *(a)* the allowance and fees respectively called *malikana* and *haqqs*, and *(b)* the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, [3](and *(c)* advances secured by mortgage by deposit of title-deeds) shall be deemed to be money charged upon immoveable property.]	[1] [Twelve years].	When the money sued for becomes due.
[4] * * * * *	* * * *	* * * * * *

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1. These words were substituted for the word " Ditto " by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

2. This Explanation was substituted by S. 4 (1) of the Indian Limitation (Amendment) Act, 1927 (I of 1927). The old Explanation was as follows :

   "*Explanation.*— The allowance and fees respectively called *malikana* and *haqqs* shall, for the purpose of this article, be deemed to be money charged upon immoveable property."

3. This clause was added by S. 9 of the Transfer of Property (Amendment) Supplementary Act, 1929, (XXI of 1929).

4. Article 133 was repealed by S. 3 of the Indian Limitation (Amendment) Act, 1929 (I of 1929). That article was as follows :

133. To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Twelve years.	The date of the purchase.

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VIII — TWELVE YEARS *(contd.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
134. To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	[1] [Twelve years].	[2] [When the transfer becomes known to the plaintiff.]
[3] [134A. To set aside a transfer of immoveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years .	When the transfer becomes known to the plaintiff.
134B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years .	The death, resignation or removal of the transferor.
134C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years .	The death, resignation or removal of the seller.]
135. Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	[1] [Twelve years].	When the mortgagor's right to possession determines.
136. By a purchaser at a private sale for possession of immoveable property sold when the vendor was out of possession at the date of the sale.	[1] [Twelve years].	When the vendor is first entitled to possession.

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1. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).
2. These words were substituted for the words "The date of the transfer" by S. 3 of the Indian Limitation (Amendment) Act, 1929 (I of 1929).
3. Articles 134A, 134B and 134C were inserted by S. 3, *ibid*.

THE FIRST SCHEDULE

FIRST DIVISION: SUITS.

PART VIII — TWELVE YEARS *(concld.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
137. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	[1] [Twelve years].	When the judgment-debtor is first entitled to possession.
138. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	[1] [Twelve years].	The date when the sale becomes absolute.
139. By a landlord to recover possession from a tenant.	[1] [Twelve years].	When the tenancy is determined.
140. By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immoveable property.	[1] [Twelve years].	When his estate falls into possession.
141. Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	[1] [Twelve years].	When the female dies.
142. For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	[1] [Twelve years].	The date of the dispossession or discontinuance.
143. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	[1] [Twelve years].	When the forfeiture is incurred or the condition is broken.
144. For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	[1] [Twelve years].	When the possession of the defendant becomes adverse to the plaintiff.
	Part IX.— Thirty years.	
145. Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years .	The date of the deposit or pawn.
146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the	[1] [Thirty years] .	When any part of the principal or interest was last paid on account of the mortgage-debt.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

FIRST DIVISION : SUITS.

PART IX — THIRTY YEARS *(concld.)*

Description of suit.	Period of limitation.	Time from which period begins to run.
mortgagor the possession of immoveable property mortgaged.		
146A. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	[1] [Thirty years] .	The date of the dispossession or discontinuance.
	Part X. — Sixty years.	
147. By a mortgagee for foreclosure or sale.	Sixty years.	When the money secured by the mortgage becomes due.
148. Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	[1] [Sixty years] .	When the right to redeem or to recover possession accrues: Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in Lower Burma which had been executed before the first day of May, 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.
149. Any suit by or on behalf of the Secretary of State for India in Council, [2] [the Secretary of State, the Crown Representative, the Central Government or any Provincial Government] [3] [except a suit before the Federal Court in the exercise of its original jurisdiction] .	[1] [Sixty years] .	When the period of limitation would begin to run under this Act against a like suit by a private person.

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[1] These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

[2] Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

[3] These words were added by S. 2 of the Indian Limitation (Amendment) Act, 1937 (XIV of 1937).

THE FIRST SCHEDULE

SECOND DIVISION : APPEALS.

Description of appeal.	Period of limitation.	Time from which period begins to run.
150. Under the Code of Criminal Procedure, 1898, from a sentence of death passed by a Court of Session.	Seven days	The date of the sentence.
[1] [150A. Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days	The date of the finding.]
151. From a decree or order of any of the High Courts of Judicature at Fort William, [2] [Madras, Bombay, [3](and) Lahore (* *)] in the exercise of its original jurisdiction.	Twenty days	The date of the decree or order.
152. Under the Code of Civil Procedure, 1908, to the Court of a District Judge.	Thirty days	The date of the decree or order appealed from.
153. Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council.	[4] [Thirty days]	The date of the order.
154. Under the Code of Criminal Procedure, 1898, to any Court other than a High Court.	[4] [Thirty days]	The date of the sentence or order appealed from.
155. Under the same Code to a High Court, except in the cases provided for by Art. 150 and Art. 157.	Sixty days	The date of the sentence or order appealed from.
156. Under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by Art. 151 and Art. 153.	Ninety days	The date of the decree or order appealed from.
157. Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months	The date of the order appealed from.

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1. This Article was inserted by S. 42 of the Criminal Law Amendment Act, 1923 (XII of 1923).
2. These words were substituted by S. 2 and Sch. I of the Repealing and Amending Act, 1930 (VIII of 1930) for the words "Madras and Bombay or of the Chief Court of the Punjab or the Chief Court of Lower Burma."
3. The word "and" was inserted before "Lahore" and words "and Rangoon" after "Lahore" were omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.
4. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

THE FIRST SCHEDULE

THIRD DIVISION: APPLICATIONS.

Description of application.	Period of limitation.	Time from which period begins to run.
[1]158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration.	Thirty days .	The date of the service of the notice of filing of the award.
159. For leave to appear and defend a suit under summary procedure referred to in section 128 *(2) (f)* [2][or under Order XXXVII] of the [3][Code of Civil Procedure, 1908].	[4][Ten days] .	When the summons is served.
160. For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days .	When the application for review is rejected.
161. For a review of judgment by a [5][* *] Court of Small Causes (other than a Presidency Small Cause Court) or by a Court invested with the jurisdiction of a [5][* *] Court of Small Causes when exercising that jurisdiction.	[4][Fifteen days] .	The date of the decree or order.
162. For a review of judgment by any of [6][the following Courts, namely,] the High Courts of Judicature at Fort William, Madras, [6][Bombay, Lahore, (* *) and Nagpur and the Chief Court of Sind] in the exercise of its original jurisdiction.	Twenty days .	The date of the decree or order.

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1. This Article was substituted for the original Art. 158 by the Arbitration Act, 1940 (X of 1940), Fourth Schedule.
2. These words and figures were inserted by S. 3 of the Indian Limitation (Amendment) Act, 1925 (XXX of 1925).
3. These words were substituted for the words "same Code" by the Arbitration Act, 1940 (X of 1940), Fourth Schedule.
4. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).
5. The word "Provincial" occurring at both places in the Article was omitted and after the words "Small Causes" where they occur for the first time, the words and brackets "(other than a Presidency Small Cause Court)" were inserted by the Berar Laws Act, 1941 (IV of 1941).
6. For Legislative History *see* Art. 162 Note 1 in the body of the Commentary.

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS *(contd.)*

Description of application.	Period of limitation.	Time from which period begins to run.
163. By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs.	Thirty days .	The date of the dismissal.
164. By a defendant, for an order to set aside a decree passed *ex parte*.	[1] [Thirty days] .	The date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.
165. Under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	[1] [Thirty days] .	The date of the dispossession.
166. Under the same Code to set aside a sale in execution of a decree [2] [including any such application by a judgment-debtor].	[1] [Thirty days] .	The date of the sale.
167. Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree.	[1] [Thirty days] .	The date of the resistance or obstruction.
168. For the re-admission of an appeal dismissed for want of prosecution.	[1] [Thirty days] .	The date of the dismissal.
169. For the re-hearing of an appeal heard *ex parte*.	[1] [Thirty days] .	The date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree.
170. For leave to appeal as a pauper.	[1] [Thirty days] .	The date of the decree appealed from.
171. Under the Code of Civil Procedure, 1908, for an order to set aside an abatement.	Sixty days .	The date of the abatement.

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1. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

2. These words were added by S. 4 of the Indian Limitation (Amendment) Act, 1927 (I of 1927).

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS *(contd.)*

Description of application.	Period of limitation.	Time from which period begins to run.
172. Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	[1] [Sixty days] .	The date of the order of dismissal.
173. For a review of judgment except in the cases provided for by article 161 and article 162.	Ninety days .	The date of the decree or order.
174. For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.	[1] [Ninety days] .	When the payment or adjustment is made.
175. For payment of the amount of a decree by instalments.	Six months .	The date of the decree.
176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	[2] [Ninety days] .	The date of the death of the deceased plaintiff or appellant.
177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	[1] [Ninety days] .	The date of the death of the deceased defendant or respondent.
[3]**178.** Under the Arbitration Act, 1940, for the filing in Court of an award.	Ninety days .	The date of service of the notice of the making of the award.
179. By a person desiring to appeal under the [4] [Code of Civil Procedure, 1908,] to His Majesty in Council for leave to appeal.	[2] [Ninety days] .	The date of the decree appealed from.
180. By a purchaser of immoveable property at a sale in execution of a decree for delivery of possession.	Three years .	When the sale becomes absolute.

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1. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

2. These words were substituted for the word "Ditto" by S. 2 of the Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920 (XXVI of 1920).

3. This Article was substituted for the original Art. 178 by the Arbitration Act, 1940 (X of 1940), Fourth Schedule.

4. Substituted by *ibid* for "same Code."

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS *(contd.)*

Description of application.	Period of limitation.	Time from which period begins to run.
181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.	[1] [Three years] .	When the right to apply accrues.
182. For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years; or, where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review, or 4. (where the decree has been amended) the date of amendment, or 5. (where the application next hereinafter mentioned has been made) the date of [2] [the final order passed on an application made] in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order, or [2] [6. (in respect of any amount, recovered by execution of the decree or order, which the

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1. These words were substituted for the word "Ditto" by S. 2 and Sch. I of the Repealing and Amending Act, 1923 (XI of 1923).

2. These words were substituted for the word "applying" in clause 5 ; and clause 6 was substituted by S. 2 of the Indian Limitation (Second Amendment) Act, 1927 (IX of 1927).

The original clause 6 was as follows :—

6. (where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908, or

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS *(contd.)*

Description of application.	Period of limitation.	Time from which period begins to run.
		decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal], or 7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date. *Explanation I.* — Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS (*contd.*)

Description of application.	Period of limitation.	Time from which period begins to run.
		Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all. *Explanation II.* — "Proper Court" means the Court whose duty it is to execute the decree or order.
183. To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years .	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person

THE FIRST SCHEDULE

THIRD DIVISION

APPLICATIONS *(concld.)*

Description of application.	Period of limitation.	Time from which period begins to run.
		liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

[1] THE SECOND SCHEDULE.—*(Territories referred to in S. 31.) Repealed by S. 3 and Second Schedule of the Repealing and Amending Act, 1930 (8 of 1930).*

[2] THE THIRD SCHEDULE.—*(Enactments repealed.) Repealed by S. 3 and Second Schedule of the Second Repealing and Amending Act, 1914 (17 of 1914).*

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1. *The Second Schedule was as follows :*

THE SECOND SCHEDULE.

TERRITORIES REFERRED TO IN SECTION 31.

(See section 31.*)*

The Presidency of Fort St. George.
The Presidency of Bombay.
The Sambalpur District of the Bengal Division of the Presidency of Fort William.
The United Provinces of Agra and Oudh.
Burma.
The Central Provinces.
Ajmer-Merwara.

2. *The Third Schedule was as follows :*

THE THIRD SCHEDULE.

ENACTMENTS REPEALED.

(See section 32.*)*

Year.	No.	Short title.	Extent of repeal.
1877	XV	The Indian Limitation Act, 1877.	The whole.
1877	XVII	The Punjab Courts Act, 1877.	So much as has not been repealed.
1879	XII	The Registration and Limitation Acts Amendment Act, 1879.	In the title the words "and the Limitation Act, 1877," and after section 107, from the words "and whereas" to the end of the Act.
1881	V	The Probate and Administration Act, 1881.	Section 156.
1887	IX	The Provincial Small Cause Courts Act, 1887.	Section 36.
1888	VII	The Civil Procedure Code Amendment Act, 1888.	In the title and in the preamble, the words "and the Indian Limitation Act, 1877," and of section 66 so much as has not been repealed.
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892.	In the title and in the preamble, the words "the Indian Limitation Act, 1877," and section 1.
1899	X	The Carriers Act, 1899.	Section 3.
1900	VI	The Lower Burma Courts Act, 1900.	So much of section 47 and the first schedule as relates to the Indian Limitation Act, 1877.
1900	XI	The Indian Limitation Amendment Act, 1900.	The whole.
1906	IV	The Presidency Small Cause Courts Act, 1906.	Section 5.

THE
INDIAN LIMITATION ACT
ACT IX of 1908

Volume I.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 7TH AUGUST 1908.

An Act to consolidate and amend the law for the limitation of suits, and for other purposes.

Preamble

*WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows: —

For general topics, see Authors' Commentaries on the Code of Civil Procedure.

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* **Act XV of 1877.**
Same as that in Act IX of 1908.

Act IX of 1871.

Preamble. WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring ownership by possession: It is hereby enacted as follows:

Act XIV of 1859.

Preamble. WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits: It is enacted as follows;

Synopsis

1. Preamble—General.
2. History of the law of limitation in British India.
3. Act deals with limitation and prescription.
4. Reason and object of the law of limitation and prescription.
5. Doctrine of limitation distinguished from the doctrine of laches.
6. Doctrine of limitation distinguished from the doctrine of acquiescence.

6a. Reference to English Law.

6b. Interpretation of statutes of limitation.

7. Acts in pari materia.
8. Technical terms.
9. Harmonious construction.
10. Construction in favour of right to sue.
11. Sections and Articles.
12. Residuary Article.
13. Where more than one provision applicable.
14. Columns of the Schedule.
15. Retrospective operation of the Act.
16. Limitation bars remedy but does not destroy right.
17. Limitation and defence. See Note 15 to S. 3.
18. "Consolidate and amend."
19. Act, if exhaustive.
20. "Certain applications to Courts."
21. Criminal proceedings and limitation.
22. Damdupat and the Limitation Act.
23. Application of periods of limitation to facts.
24. Applicability of the Act to arbitrations.
25. Applicability of the Act to special or local laws. See Note 6 to S. 29.
26. "Rules for acquiring by possession the ownership of easements and other property." See Notes to Ss. 26 and 28.

Other Topics (miscellaneous)

Applicability to suits. See Note 20.
Civil Procedure Code and Limitation Act. See Notes 7, 8 and 20.
Conflict of Articles. See Note 13.
Construction of Articles. See Notes 9 and 11.
Ejusdem generis — Applicability. See Note 12.
Laches and acquiescence — Difference. See Note 6.
Law of limitation is law of procedure. See Note 15.
Pending proceedings. See Note 15.
Prescription — Different significations. See Note 3.
Statute of repose. See Note 4.

1. Preamble — General. — The purpose of a Preamble is to indicate, in general terms, the object and the intention of the legislature in passing an enactment.[1] It cannot, however, be availed of to control the provisions of the enactment so as to restrict or widen the import of the express terms of a section when such terms are clear and

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Preamble — Note 1

[1] ('02) 26 Bom 757 (764) : 4 Bom L R 550 (D B), *Narandas* v. *Parshottam.*
('94) 18 Bom 636 (656, 657) (D B), *Altar Caufman* v. *Government of Bombay.*
('85) 9 Bom 333 (343) (D B), *Queen-Empress* v. *W. D. Edwards.*
('79) 2 All 218 (225) (F B), *Empress of India* v. *Sarmukh Singh.*
(1865) 4 Suth W R P C 109 (109) : 7 Moo Ind App 72 : Boul 189 : 1 Suth 285 : 1 Sar 598 (P C), *Nga Hoong* v. *Queen.*
('33) 20 AIR 1933 Bom 51 (57) : 57 Bom 346 : 142 Ind Cas 370 (D B), *Official Assignee of Bombay* v. *Chimniram Motilal.*
('84) 7 Mad 197 (200) : 1 Weir 90 (F B), *Queen-Empress* v. *Subbanna.*
('32) 19 AIR 1932 Oudh 152 (153) : 7 Luck 648 : 137 Ind Cas 42 (F B), *Kedar Nath* v. *Peary Lal Gupta.*
('13) 19 Ind Cas 197 (201, 202) : 40 Cal 477 : 14 Cri L Jour 197 (F B), *Har Prasad* v. *Emperor.*
('10) 8 Ind Cas 123 (124) (D B) (Cal), *Govinda* v. *Apkar.*
('89) 11 All 262 (266) : 1889 All W N 85, *Queen-Empress* v. *Indarjit.*
[*See* ('78) 2 All 74 (90) (D B), *Uda Begam* v. *Imam-Ud-Din.* (The language of the preamble was considered as indicating the intention of the Legislature.)]

unambiguous.[2] The reason is that so far as an enactment deals specifically with a point it must be deemed to be exhaustive and the law must be ascertained with reference to its provisions[3] which, when clear and unambiguous, must always prevail against the Preamble.[4] But when the language of a particular section or article is ambiguous or doubtful,[5] or where there is nothing in the provisions of the Act to the contrary,[6] the Preamble may be taken into consideration in interpreting the enactment.

2. History of the Law of Limitation in British India.— Before the year 1862, there was no law of limitation applicable to the *whole* of India. The Supreme Courts of India established by the Royal Charter adopted the English law of limitation as contained in

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[2] ('33) 20 AIR 1933 Bom 51 (58) : 57 Bom 346 : 142 Ind Cas 370 (D B), *Official Assignee of Bombay* v. *Chimniram.*
('32) 19 AIR 1932 All 617 (618) : 55 All 24 : 140 Ind Cas 631 (F B), *Bhola Umar* v. *Mt. Kausilla.*
('27) 14 AIR 1927 Cal 763 (765) : 55 Cal 67 : 103 Ind Cas 662 (D B), *Nepra* v. *Sajer Pramanick.*
('98) 22 Bom 321 (331) (F B), *Vithu* v. *Govinda.*
('13) 21 Ind Cas 538 (540) (Cal) (D B), *Keshav Panda v. Bhobani Panda.*
('19) 6 AIR 1919 Cal 551 (560) : 44 Ind Cas 770 (779) : 45 Cal 343 (F B), *Mani Lal Singh* v. *Trustees for the Improvement of Calcutta.*
('89) 11 All 262 (266) : 1889 All W N 85, *Queen-Empress* v. *Indrajit.*
('92) 14 All 145 (154) : 1892 All W N 6 (DB), *Kadir Baksh* v. *Bhavani Prasad.* (Speeches of legislators not to be referred for guidance.)
(1865) 4 Suth W R P C 109 (109) : 7 Moor Ind App 72 : 1 Sar 598 : Boul 189 : 1 Suther 285 (P C), *Nga Hoong* v. *Queen.*
('31) 18 AIR 1931 Lah 706 (707) : 14 Lah 203 : 134 Ind Cas 788 (DB), *Sahib Singh* v. *Data Ram.*
('31) 18 AIR 1931 Mad 629 (630):54 Mad 845:133 Ind Cas 779 (DB), *Kannammal* v. *Kanakasabai Mudaliar.*
('77) 3 Cal 63 (82) : 1 Cal L R 161 (FB), *Empress* v. *Burah.*
(1846) 4 Moor Ind App 190 (200) : 6 Moor P C 12 : 1 Sar 335 : 11 Jurist 137 (PC), *Attorney-General* v. *Brodie.*

[3] ('28) 10 AIR 1928 Cal 724 (725) : 50 Cal 872 : 73 Ind Cas 773 : 24 Cri L Jour 677 (DB), *Rahim Sheikh* v. *Emperor.*
('02) 29 Cal 707 (715) : 29 Ind App 196 : 6 Cal W N 825 : 4 Bom L R 793 (PC), *Gokul Mandar* v. *Pudmanund.*
[*See* ('76) 2 Bom 19 (38) (DB), *Baban Mayacha* v. *Nagu Shranucha.* (Preamble not part of statute.)]

[4] ('19) 6 AIR 1919 P C 52 (53) : 43 Mad 529 : 46 Ind App 302 : 54 Ind Cas 154 (PC), *Secretary of State for India* v. *Maharajah of Bobbili.*
('28) 15 AIR 1928 Lah 35 (38) : 9 Lah 260 : 104 Ind Cas 661 (DB), *Rajmal* v. *Harnam Singh.* (AIR 1919 P C 52, followed.)

[5] ('33) 20 AIR 1933 Bom 51 (57, 58) : 57 Bom 346 : 142 Ind Cas 370 (DB), *Official Assignee of Bombay* v. *Chimniram.*
('32) 19 AIR 1932 All 617 (618) : 55 All 24 : 140 Ind Cas 631 (FB), *Bhola Umar* v. *Mt. Kausilla.*
('28) 15 AIR 1928 Lah 35 (38) : 9 Lah 260 : 104 Ind Cas 661 (DB), *Rajmal* v. *Harnam Singh.*
('31) 18 AIR 1931 Lah 706 (707) : 14 Lah 203 : 134 Ind Cas 788 (DB), *Sahib Singh* v. *Data Ram.*
('31) 18 AIR 1931 Mad 629 (630) : 54 Mad 845 : 133 Ind Cas 779 (DB), *Kannammal* v. *Kanakkasabai Mudaliar.*
('26) 13 AIR 1926 Mad 381 (382) : 92 Ind Cas 1053, *Kesavalu Naicken* v. *Corporation of Madras.*
('74) 22 Suth W R Cr 20 (21) : 13 Beng L R 474 (DB), *Queen* v. *Jackson.*
(1864) 2 Mad H C R 322 (324) (DB), *Chinna Ayyan* v. *Md. Fakruddin.*

[6] ('90) 12 All 409 (418) : 1890 All W N 145 (FB), *Shankar Sahai* v. *Din Diyal.*

Preamble Note 2

21 James I, c. 16 and 4 Anne, c. 16,[1] while the Provincial Courts in each presidency which were established by the East India Company were governed by certain Regulations[2] and Acts[3] particularly applicable to them. The non-regulation provinces were governed by Codes of their own and sometimes by certain Circular Orders of the Judicial Commissioner.[4]

The Regulations and Acts applicable to the mofussil Courts of each of the presidencies differed from each other and from the English law of limitation applicable to the Supreme Courts, with the result that there was a good deal of uncertainty and confusion in applying the laws.

In order to avoid this uncertainty and anomaly, a draft Act of Limitation applicable to the whole of India was prepared in 1841 which was later on substituted by another draft in 1842 which again was finally succeeded by Act XIV of 1859. This Act, however, provided for the limitation of *suits* only, though the previous drafts had also included provisions as to acquisition and extinction of rights by *prescription.* The rules of prescription which had been in force before were left untouched.

The Act of 1859 was repealed in the year 1871 and a new Limitation Act (Act IX of 1871) was passed providing for the limitation of *suits, appeals* and *certain applications* to Courts and also providing for the *acquisition of easements* and the *extinguishment of rights to land and hereditary office* at the determination of a specified period. The Act, thus, dealt with both *limitation* and *prescription.* It was drafted in the form in which we find it at present, that is to say with sections and a schedule containing a tricolumnar tabular statement of different sorts of suits, appeals, and applications, the periods of limitation applicable to them and the time from which such periods begin to run.

The Act of 1871 again was repealed by Act XV of 1877. This Act provided for the extinguishment of rights not only to *land and hereditary office* but also to *any* property including moveable property. It also defined "easement" as including profits *a prendre.* After a

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Note 2

[1] (1849) 5 Moor Ind App 43 (64): 7 Moor P C 85: 14 Jurist 253: 1 Sar 394 (PC), *The East India Company* v. *Oditchurn Paul.*
(1852) 5 Moor Ind App 234 (248, 249) : 8 Moor P C 4 : 1 Sar 423 (PC), *Her Highness Ruckmaboyee* v. *Lulloobhoy Mottichund.*

[2] *Bengal* : Reg. III, 1793; Reg. VII, 1795 extending Reg. III, 1793 to Benares and certain Provinces therein; Reg. II, 1803 extending Reg. III, 1793 to Ceded Provinces; Reg. II, 1805; Reg. VIII, 1831.
Madras : Reg. II, 1802.
Bombay : Reg. I, 1800; Reg. V, 1827.
[*See* ('40) 27 AIR 1940 All 29 (31): I L R (1939) All 990 : 187 Ind Cas 485 (DB), *Asharfilal* v. *Zamir Fatima Bi Bi.* (Bengal Regulation III of 1793, S. 14.)
('29) 16 AIR 1929 Cal 149 (153) : 118 Ind Cas 566 (DB), *Khantamoyee Debi* v. *Hridayananda Bhattacharjee.* (Suits instituted before January 1862 were governed by Reg. III of 1793 and Reg. II of 1805.)]

[3] Act I of 1845; Act XIII of 1848; Act XI of 1859.

[4] (1864) 10 Moor Ind App 114 (120): 2 Sar 87 (PC), *Saligram* v. *Mirza Azim Ali Beg.*
('66) 5 Suth W R P C 18 (18) : 10 Moor Ind App 362 : 1 Suther 612 : 1 Sar 160 (PC), *Shah Mukkam* v. *Nawab Imtiazood Dowlah.*

number of amendments in various years,[5] Act XV of 1877 was finally replaced by the present Act, IX of 1908, repeating in substance the provisions of that Act, the alterations being confined to matters of detail. The Act of 1908 has subsequently been amended on several occasions.[6]

3. Act deals with limitation and prescription. — As has been seen in Note 2, this Act deals with the law of *prescription* as well as with the law of *limitation*. A law of *prescription* prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is *acquired* or *extinguished*. A prescription by which a right is *acquired*, such as that referred to in section 26, is called an *acquisitive* prescription. A prescription by which a right is *extinguished*, such as that dealt with by section 28, is called an *extinctive* prescription. The distinction between the two is, however, not of much practical importance. For, the extinction of the right of one party is often the mode of acquiring it by another; the right extinguished is virtually transferred to the person who claims it by prescription.

"Prescription" implies that the thing prescribed is the property of *another* and that it is enjoyed *adversely* to that other. In this respect it must be distinguished from acquisition by mere *occupation* as in the case of *res nullius*. The acquisition in such cases does not depend upon occupation for any particular length of time.

The law of limitation is, historically, of a later growth than the law of prescription. It is the procedural equivalent of the prescription of rights and is, in fact, a kind of *imperfect* prescription in that it destroys, not the principal substantive right itself, but the *accessory right of action only*. In other words, a law of limitation limits the time after which a suit or other proceeding cannot be maintained in a Court of justice; it does not affect the *substantive rights* of the parties which remain and continue to be available in other ways. Thus, where A owes B a certain sum of money, but B fails to institute a suit within the specified period, his *judicial remedy* by way of suit is barred, but the right to the amount remains and if A happens to pay B subsequently, the payment cannot be recalled on the ground of want of consideration. See Note 16.

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[5] Act XVII of 1877 ; Act XII of 1879 ; Act VIII of 1880 ; Act V of 1881 ; Act V of 1882 ; Act IX of 1887 ; Act VII of 1888 ; Act VIII of 1891 ; Act XII of 1891 ; Act VI of 1892 ; Act X of 1899 ; Act VI of 1900 ; Act XI of 1900 ; Act IV of 1906 ; Act III of 1907.

[6] Act XVII of 1914. (Passed on 16-9-1914). Repealing S. 32 and the Sch. III.
Act XVIII of 1919. (Passed on 17-9-1919). Amending Column III of Art. 158.
Act XXVI of 1920. (Came into force on 1-1-1921). Amending Arts. 176, 178 and 179.
Act X of 1922. (Came into force on 5-3-1922). Amending S. 5 and S. 29.
Act XI of 1923. (Came into force on 5-3-1923). Amending certain articles in Sch. I. Also substituting another section for S. 2 of the Act XXVI of 1920.
Act XII of 1923. (Came into force on 16-3-1923). Adding Art. 150A.
Act XXX of 1925. (Came into force on 1-4-1926). Amending Arts. 5 and 159.
Act I of 1927. (Came into force on 1-1-1928). Amending Ss. 20 and 21 of the Act and Arts. 132 and 166.
Act IX of 1927. (Came into force on 1-1-1928). Amending Art. 182.
Act X of 1927. (Came into force on 4-4-1927). Amending Art. 162.
Act I of 1929. (Came into force on 1-1-1929). Adding an Explanation to S. 10; Repealing Art. 133; Amending Art. 134 and introducing new Arts. 48A, 48B, 134A, 134B and 134C.
Act XXI of 1929. (Came into force on 1-4-1930). Amending Art. 132.
Act VIII of 1930. (Came into force on 16-3-1930). Repealing Ss. 30 and 31 and Sch. II and amending Arts. 43, 151.
Act VIII of 1935. (Passed on 28-9-1935). Amending Art. 162.
Act XIV of 1937. (Passed on 13-3-1937). Amending Art. 149.
Act XX of 1937. Repealing Art. 4.
Government of India (Adaptation of Indian laws) Order, 1937. Amending S. 13 S. 26 and Arts. 149, 151, 162.
For further enactments see Chronological Table of Enactments.

4. **Reason and object of the law of limitation and prescription.** — The doctrine of limitation and prescription is based upon two broad considerations. The *first* is that there is a presumption that a right not exercised for a long time is non-existent. Thus, where a person has not been in possession of a particular property for a long time, the presumption is that he is not the owner thereof. The reason is that owners are usually possessors and possessors are usually owners, possession thus being normally evidence of ownership. The longer the possession has continued the greater is its evidentiary value. The law, therefore, has deemed it expedient to confer upon such evidence of possession for a particular time, a *conclusive force.* "It (the law) has established," observes Sir John Salmond in his work on *Jurisprudence*, "a conclusive presumption in favour of the rightfulness of long possession and against the validity of claims which are vitiated by long want of possession. Lapse of time is thus recognized as creative and destructive of rights, instead of merely as evidence for and against their existence. . . . . .The conclusive presumption on which prescription is thus founded falls, like all other conclusive presumptions, more or less wide of the truth. Yet, in the long run, if used with due safeguards, it is the instrument of justice. It is not true, as a matter of fact, that a claim unenforced for a long time is always unfounded, but it may be wise for the law to act as if it were true. For, the effect of thus exaggerating the evidentiary value of lapse of time is to prevent the persons concerned from permitting such delays as would render their claims in reality doubtful. In order to avoid the difficulty and error that necessarily result from lapse of time, the presumption of the coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so, within that period; otherwise his rights, if any, will be forfeited as a penalty for his neglect. *Vigilantibus non dormientibus jura subveniunt* — Laws come to the assistance of the vigilant, not of the sleepy." [1]

Note 4

[1] Salmond's Jurisprudence, 8th Edition, pages 468, 469.

('04) 27 Mad 143 (150) : 31 Ind App 17 : 6 Bom L R 241 : 14 Mad L Jour 1 : 8 Cal W N 162 : 8 Sar 617 (P C), *Rangayya* v. *Bobba Sriramulu.*

('66) 6 Suth W R P C 24 (25, 27) : 3 Moor Ind App 1 (P C), *Sheikh Imdad Ali* v. *Mt. Kootby Begam.*

('29) 16 AIR 1929 Nag 74 (75) : 117 Ind Cas 282, *Nandu* v. *Bhuwanoo.* (Statutes of limitation are intended to check dilatoriness.)

[*See also* ('18) 5 AIR 1918 Mad 1187 (1192) : 40 Mad 989 : 37 Ind Cas 741 (FB), *Aiyasamier* v. *Venkatachela.* (The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's right.)]

The other consideration on which the doctrine of limitation and prescription may be said to be based is that it is necessary that title to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense. This is in accordance with the maxim *Interest reipublicæ ut sit finis litium* — The interests of the State require that there should be an end to litigation.[2] Statutes of limitation and prescription are thus statutes of peace and repose.[3] "A statute of limitation," observed Story, J., in *Bell* v. *Morrison*,[4] "instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of justice as would have made it, what it was intended emphatically to be, a statute of repose." In his *Conflict of Laws*, the same learned Judge observed as follows:

> "Laws, thus limitating suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished, whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it, in some measure, equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time lest they should be immortal while men are mortal — *Ne autem lites immortales essent, dum litigantes mortales sunt.*"[5]

5. Doctrine of limitation distinguished from the doctrine of laches. — The doctrine of laches is an application of the maxim of equity "Delay defeats equities." In the case of equitable reliefs, Courts of Equity in England refused to grant such reliefs to an applicant who had wilfully slept over his rights. This principle is applicable in this country also in so far as *discretionary orders* of the Court are claimed, such as specific performance, permanent or temporary injunction, appointment of receiver. In such cases Courts can still refuse relief where the delay on the applicant's part has prejudiced the defendant even though the applicant might have come to Court within the period prescribed by the Limitation Act.[1]

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[2] ('52) 5 Moor Ind App 234 (251) : 8 Moor P C 4 : 1 Sar 423 (P C), *Her Highness Ruckmaboyee* v. *Lulloobhoy Mottichund.*
('11) 11 Ind Cas 164 (166) (Cal) (D B), *Tara Nath* v. *Ishwar Chandra Das.*
('81) 5 Bom 68 (72) (D B), *Chhaganlal* v. *Bapubhai.*

[3] ('14) 1 AIR 1914 Mad 526 (528, 529) : 18 Ind Cas 586 : 37 Mad 186 (D B), *Ramana Reddy* v. *Babu Reddy.* (Referring to observations of Lord St. Leonards, Lord Kenyon, Lord Coke and Lord Blackburn, and citing Banning and Angell.) [*See* ('86) 8 All 475 (481) : 1886 All W N 233 (DB), *Manghu Lal* v. *Kandhai Lal.*]

[4] 7 Peters (U. S.) R. 360 *cited in* ('86) 8 All 475 (482) : 1886 All W N 233 (D B), *Manghu Lal* v. *Kandhai Lal.*

[5] *Cited in* ('86) 8 All 475 (483) : 1886 All W N 233 (D B), *Manghu* v. *Kandhai.*

Note 5

[1] ('75) 1 All 82 (86, 87) (DB), *Uda Begum* v. *Imam-ud-din.*
[*See also* ('03) 27 Bom 515 (532) : 5 Bom L R 274 (DB), *Fatesingji* v. *Bamanji.*
('36) 23 AIR 1936 Bom 423 (428) : 167 Ind Cas 529, *Kissondas Premchand* v. *Jivatlal Pratapshi & Co.* (Delay in seeking an equitable remedy is technically called laches and will disentitle the claimant to come in and establish his claim even though the claim is not disputed.)]

But the basis of the doctrine of limitation and prescription is not the same as that of the doctrine of laches. As has been seen in Note 4, the former is based upon *public policy* and *utility* rather than upon *equity* alone, while the latter is based upon equity. Laches, like limitation, no doubt, deprives the plaintiff of his remedy but it depends upon general principles while limitation depends upon *express* law. Again, laches may be adapted to the facts of a particular case but limitation is a matter of inflexible law. A positive rule of limitation cannot depend upon whether there is laches or not,[2] and, except in the case of discretionary orders, the defence of laches or acquiescence cannot prevail when a statutory period of limitation is prescribed for an action.[3] In other words, in cases where the Court is *bound* to grant a relief if the plaintiff proves his case, there is no question of laches affecting the plaintiff's rights, provided the suit is instituted within the time limited by law.[4]

6. Doctrine of limitation distinguished from the doctrine of acquiescence. — If a party having a right stands by and sees another acting in a manner inconsistent with that right and makes

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2. ('14) 1 AIR 1914 Mad 526 (529): 37 Mad 186: 18 Ind Cas 586, *Ramana Reddy* v. *Babu Reddy.*

('18) 5 AIR 1918 Low Bur 131 (133, 134) : 41 Ind Cas 722, *Appan Charan* v. *Kyause Ma.*

3. ('40) 27 AIR 1940 Mad 281 (284) : 189 Ind Cas 185, *Krishnamachari* v. *Chengalraya Naidu.* (Objection as to laches or delay cannot be allowed to prevail where legal and not equitable relief is sought and the only question is whether a right is barred by the statute of limitation.)

('29) 16 AIR 1929 Lah 679 (680) : 117 Ind Cas 225 (DB), *Allah Ditta* v. *Jamna Das.* (Mere delay short of the prescribed period in suing for specific performance is no bar to plaintiff's right unless there is waiver or acquiescence.)

('23) 10 AIR 1923 Sind 50 (52) : 16 Sind L R 278 : 77 Ind Cas 897 (DB), *Begraj* v. *Alisher.* (Specific performance — Delay short of the prescribed period of limitation does not operate as a bar to relief unless defendant is prejudiced.)

('98) 21 Mad 42 (44) (DB), *Athikarath Nanu Menon* v. *Erathanikat Komu Nair.* (Mere lapse of time short of the prescribed period is not per se good ground for refusing the relief.)

('75) 23 Suth W R 99 (101) : 14 Beng L R 386 : 2 Ind App 48 : 3 Sar 419 : 3 Suther 61 (PC), *Juggurnath Sahoo* v. *Syud Shah Mahomed Hossein.* (The period of limitation prescribed for a suit cannot be diminished on the ground of laches of a party.)

('15) 2 AIR 1915 Cal 13 (15) : 41 Cal 771 : 26 Ind Cas 284 (DB), *Osmond Beeby* v. *Khitish Chandra.* (Laches.)

('74) 22 Suth W R 267 (267) (DB), *Taruk Chunder Bhuttacharjee* v. *Huro Sunkur Sandyal.* (Acquiescence.)

('30) 17 AIR 1930 Mad 364 (369) : 122 Ind Cas 37 (DB), *Ramaswami Chetty* v. *Palaniappa Chettiar.*

(1864) 2 Mad H C R 114 (116) (DB), *Rama Rau* v. *Raja Rau.*

('26) 13 AIR 1926 Nag 416 (422, 423) : 95 Ind Cas 636, *Murarilal* v. *Balkishan.*

(1864) 2 Mad H C R 270 (273) (DB), *Peddamuthulaty* v. *Timma Reddy.*

('89) 3 C P L R 162 (163, 164), *Khetsing* v. *Mt. Radha.*

[*See also* ('33) 20 AIR 1933 Lah 18 (21) : 150 Ind Cas 674, *Secretary of State* v. *Balwant Singh.*

(1865) 3 Suth W R P C 31 (32) : 8 Moor Ind App 225 : 1 Suther 405 : 1 Sar 749 (PC), *Government of Bengal* v. *Mt. Shuruffutoonnissa.*

('10) 7 Ind Cas 568 (570) (Lah) (DB), *Barkhurdar* v. *Munawar Din.* (Suit for specific performance of contract of sale—Suit dismissed as the circumstances of the case were such that the Court did not feel justified in exercising in favour of the plaintiff its discretionary power of decreeing specific performance of the contract in question.)]

4. ('75) 1 All 82 (86) (DB), *Uda Begum* v. *Imam-ud-din.*

no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word *acquiescence.*[1] Acquiescence may be direct or indirect. Direct acquiescence is where the act complained of is done with the *express approbation* of another. Indirect acquiescence is where a person having a right to set aside a transaction stands by and is quiescent under circumstances from which assent may be reasonably inferred.[2] In either case *assent*, express or implied, underlies the doctrine of acquiescence. It is thus an instance of the law of estoppel by conduct. It differs from laches in that *firstly* the latter is merely passive without any implication of assent, and *secondly* the latter like limitation affects the party's *remedy* while acquiescence like prescription practically destroys the party's *right.* It differs from limitation in that acquiescence like laches depends upon general principles and is a conclusion drawn from the facts of each particular case while limitation like prescription is a matter of express and inflexible rules of law and applies independently of the existence of laches or acquiescence. Acquiescence and laches again may be pleaded either against the plaintiff or the defendant, while limitation can be pleaded generally, against the plaintiff only.[3]

6a. Reference to English Law. — Where the law is codified the Courts must construe the Code according to the wording thereof. It is not open to them to ignore the enacted law and apply a rule or principle derived from the English law.[1]

The proper meaning, therefore, of a positive enactment of the Indian Legislature must be ascertained from the language of that statute uninfluenced by the English law on which it may be founded,[2] or by decisions of Courts in England which are based upon statutes altogether different in language[3] and upon a different system of the law.[4] The policy of the law of limitation in England is different from

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Note 6

[1] (1878) L R 8 Ch Div 286 (314) : 47 L J Ch 381 : 38 L T 370 : 3 Asp M C 384, *De Bussche* v. *Alt.*
(1846) 2 Ph 117 (123) : 10 Jur 956, *Duke of Leeds* v. *Earl of Amherst.*

[2] (1878) 8 Ch Div 286 (314) : 47 L J Ch 381 : 38 L T 370, *De Bussche* v. *Alt.*

[3] U. N. Mitra's Limitation, 6th Edn., p. 68.

Note 6a

[1] ('25) 12 AIR 1925 P C 1 (8) : 52 Ind App 40 : 52 Cal 197 : 26 Cri L Jour 431 : 85 Ind Cas 47 (P C), *Barindra Kumar Ghosh* v. *Emperor.*
('32) 19 AIR 1932 All 18 (22) : 53 All 642 : 136 Ind Cas 91 : 33 Cri L Jour 236 (DB), *Emperor* v. *Joti Prasad Gupta.*

[2] ('28) 15 AIR 1928 P C 2 (4) : 107 I. C. 14 : 55 Ind App 18 : 7 Pat 221 (PC), *Mt. Ramanandi Kuar* v. *Mt. Kalavathi Kuer.* (Especially so in testamentary cases.) [*See* (1851) 5 Moo Ind App 234 (250) : 8 Moo P C 4 : 1 Sar 423 (P C), *Her Highness Ruckmaboyee* v. *Lulloobhoy Mottichund.* (Before enactment of Indian statutes of limitation, the English statute was held to be applicable.)]

[3] ('33) 20 AIR 1933 Cal 325 (327) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Umesh Chandra* v. *Hemanga Chandra.* (Sections 19 and 20 of Indian Limitation Act.)
('29) 16 AIR 1929 Sind 140 (143, 144) : 116 Ind Cas 581, *Nenomal Jiamal* v. *Chandumal Assanmal.* (There is no warrant for importing into Limitation Act provisions of special English statute of limitation such as Ss. 3 and 4, Real Property Limitation Act, 1833.)

[4] ('32) 19 AIR 1932 Mad 516 (518) : 138 Ind Cas 632 : 55 Mad 758 (DB), *Muthu Chettiar* v. *Muthuswami Aiyangar.* (Except for discovery of general principles English decisions cannot be applied to Indian cases.)

that adopted in S. 3, Indian Limitation Act. Thus, in England the law of limitation comes under the category of those rules, whether created by statutes or by the Common Law, which exist for the benefit of the parties and which, like the plea of minority, may be waived by the persons entitled to the benefit thereof. But according to the Indian Act the rule of limitation cannot be waived.[5] Again, the law of limitation in England is variable. A distinction in its operation is recognized between the Equity side and at Common Law. The question varies also with the nature of property. Laches or acquiescence forms sufficient bar to actions in proper cases. In India, however, the law of limitation is definite and inflexible and mere laches is no bar.[6] It therefore follows that rules and principles derived from the English law are not to be generally applied in interpreting the Indian Limitation Act.

6b. Interpretation of statutes of limitation. — Statutes of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Equitable considerations are out of place in construing the provisions of a statute of limitation and the strict grammatical meaning of the words is the only safe guide.[1] For a fuller discussion of the principles with reference to which the Limitation Act should be construed and applied, see Notes under S. 9. For a discussion of the general principles of interpretation of statutes, see the Authors' Commentary on the Civil Procedure Code, Notes under Preamble.

7. Acts in pari materia.—Acts *in pari materia* may be treated as forming one Code and read together, but when the Acts are not in *pari materia* the construction put upon the one cannot be relied upon as a guide to the construction of the other.[1] The Civil Procedure Code and the Indian Limitation Act are the two great procedural Codes in India and being in *pari materia* are, generally speaking, to be taken as forming one system, interpreting and enforcing each other.[2] Where, however, the definition of a word in the Limitation Act is by law governed by the General Clauses Act, it is not competent to import a meaning of the same word from other statutes like the Civil Procedure Code.[3]

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[5] ('86) 8 All 475 (484) : 1886 All W N 233 (DB), *Manghu Lal* v. *Kandhai Lal.*

[6] (1864-65) 2 Mad H C R 270 (272, 273) (DB), *Peddamuthulaty* v. *Thimma Reddy.*
('79) 4 Cal L R 577 (580) (DB), *Sheikh Allij Hossain* v. *Sheikh Muzhur Hossain.*

Note 6b

[1] ('41) 28 AIR 1941 P C 6 (9) :67 Ind App 416 : 193 Ind Cas 225 (P C), *General A. F. and L. Assurance Corporation Ltd.* v. *Janmahomed.*
('32) 19 AIR 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 : 137 Ind Cas 529 (P C), *Nagendra Nath* v. *Sureshchandra Dey.*
('09) 4 Ind Cas 449 (451): 36 Cal 1003 : 36 Ind App 148 (P C), *Abhiram Goswami* v. *Shyama Charan Nandi.*
('41) 28 AIR 1941 Mad 449 (460) (F B), *Venkateswara Sarma* v. *Venkatesa Ayyar.* (Krishnaswami Iyengar, J., however, pointed out that the words of a statute if sufficiently flexible, must be construed in a sense which though less correct grammatically, is more in harmony with the intention of the Legislature. His Lordship held that for this purpose it was permissible to take into consideration the circumstances in which an enactment came to be passed.)
See also Note 10.

Note 7

[1] ('15) 2 AIR 1915 Mad 889 (891) : 38 Mad 275 : 21 Ind Cas 65 (D B), *Vairavan Chettiar* v. *Avicha Chettiar.* (The Contract Act and the Limitation Act are not *in pari materia.*)
('86) 9 Mad 134 (135) (D B), *In re Kota.* (Court-fees Act and Limitation Act not *in pari materia.*)
('80) 4 Bom 515 (526) (F B), *Dayachand* v. *Hem Chand.* (Do.)
('99) 22 Mad 494 (502) : 9 Mad L Jour 37 (D B), *Assan* v. *Fathuma.* (Do.)

8. Technical terms. — There is a distinction between the interpretation to be put on popular language and the interpretation to be put on technical expressions used in legislative enactments. Words not used in technical sense must receive their popular and ordinary meaning.[1] In the latter case, the expressions being terms of art must be construed in the light of the meaning given to them in cognate or contemporary enactments. The words "a suit to obtain a declaration" in Art. 118 of the Limitation Act of 1877, for instance, relate to S. 42 of the Specific Relief Act enacted previously in the same year as the Limitation Act, and have to be construed in the same way as they have been in cases under the latter Act.[2] Similarly, the word "person" in Art. 165 of the Limitation Act, 1908, should be construed to include only such persons as are covered by O. 21, Rr. 100 and 101 of the Code of Civil Procedure, 1908, to which the Article impliedly and by context refers.[3] So also it was held, before the passing of the General Clauses

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[**See however** ('10) 8 Ind Cas 512 (515, 516) (Mad) (F B), *Rangiah Chetty* v. *Subramania Chetty*. (The words "to enforce the right to share in any property on the ground that it is joint family property" in S. 7, clause (iv) (b) of the Court-fees Act construed in the same sense as used in Art. 127, Limitation Act.)]

2. ('39) 26 AIR 1939 All 403 (405, 412) : ILR (1939) All 647 : 183 Ind Cas 242 (F B), *Durag Pal Singh* v. *Pancham Singh*. (The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act.)
('26) 13 AIR 1926 Mad 159 (159) : 91 Ind Cas 302, *Kaman Mada* v. *Malli*. (Section 3 of the Limitation Act to be read along with O. 33, R. 8, Civil P. C.)
('25) 12 AIR 1925 Pat 1 (8) : 3 Pat 371 : 78 Ind Cas 200 (F B), *Balmukand Marwari* v. *Basanta Kumari*. (Per Das, J. — Overruled in AIR 1934 Pat 246 (F B) on another point.)
('31) 18 AIR 1931 Pat 241 (246) : 133 Ind Cas 337 : 10 Pat 670 (F B), *Tribini Prasad Singh* v. *Ramasray Prasad*. (Per Jwala Prasad, J.)
[*See also* ('82) 5 Mad 141 (143, 144) (D B), *Kunhi* v. *Seshagiri*.]
[**See however** ('24) 11 AIR 1924 Rang 145 (147) : 1 Rang 694 : 79 Ind Cas 755 (D B), *K. E. A. K. Ahmad Sahib* v. *M. K. Pakir Mohammad Rowther*. ("Cause of action" in Civil Procedure Code should not be construed as in the Limitation Act, or English law.)]

3. ('15) 2 AIR 1915 Nag 69 (69) : 11 Nag L R 18 : 27 Ind Cas 935, *Murlidhar* *Mulu*. ('Moveable property' in Article 29 not to be defined as in the Civil Procedure Code.)

Note 8

1. *See* ('86) 12 Cal 559 (563) (D B), *Goluck Chandra* v. *Harapriah Debi*.
('72) 9 Bom H C R 99 (112) (FB), *Balvantrao* v. *Pursholam*. (The term 'immovable property' is not a term of art of the English law and as such should receive the construction which that term ordinarily bears in common parlance.)

2. ('24) 11 AIR 1924 P C 137 (142) : 48 Bom 411 : 51 Ind App 220 : 79 Ind Cas 971 (P C), *Kalyandappa* v. *Chanbasappa*.
[*See* ('77) 2 Cal 336 (339) (F B), *Dhonessur Kooer* v. *Roy Gooder*. (Word 'suit' as used in Limitation Act, 1871, does not include 'application'.)]

3. ('16) 3 AIR 1916 All 104 (105, 106) : 34 Ind Cas 231 : 38 All 339 (D B), *Abdul Karim* v. *Mt. Islamunnissa Bibi*. (It does not include a judgment-debtor who is excluded from the scope of O. 21, Rr. 100 and 101. See also Art. 165 Note 3.)

Act, that the term "immoveable property" might be considered to bear the meaning which could be gathered from the Hindu law in the case of the Hindus,[4] more especially if the meaning can only be determined by reference to Hindu law and usage.[5] When words have been used in an Act in a technical sense, and they have been judicially construed to have a certain meaning prior to the statute and have been adopted by the Legislature in that sense, the rule of construction of statutes will require that those words should be construed in that sense, although the sense may vary from the literal meaning of those words.[6]

9. Harmonious construction. — It is one of the primary rules of construction of statutes that the various statutory provisions should be read so as to harmonize and not so as to conflict with one another, unless it is manifest and apparent that there is conflict between them.[1] Thus, where a later Act does not purport or affect to supersede an earlier Act, the two enactments must, if possible, be read together so as to avoid conflict.[2] The same rule would apply to different provisions of the same Act, *e. g.*, the sections and the articles of the Limitation Act.[3] In construing the Limitation Act where there are a variety of articles dealing with a variety of particular cases, the Courts must try to so construe the articles as to make them harmonious and consistent with one another.[4]

10. Construction in favour of right to sue. — Where the language of a statute is clear, the Court is bound to give effect to its plain meaning uninfluenced by extraneous considerations but that where the language of the enactment is not itself precise or is ambiguous or of doubtful import, recourse may be had to extraneous considerations. No exception can be recognised to these rules of construction in the case of the Limitation Act.[1] There is thus no room

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[4] ('81) 5 Bom 322 (328, 329, 336) (D B), *The Collector of Thana* v. *Krishnanath.*

[5] ('74) 21 Suth W R 178 (181) : 1 Ind App 34 : 13 Beng L R 254 : 10 Bom H C R 281 : 3 Sar 306 (P C), *Maharana Futtehsangji* v. *Desai Kullianraiji Hekoomutraiji.* (Suit to establish right to 'toda giras hak'.)

[6] ('51) 5 Moo Ind App 234 (250) : 8 Moo P C 4 : 1 Sar 423 (P C), *Her Highness Ruckmaboyee* v. *Lulloobhoy Mottichund.*

Note 9

[1] ('93) 15 All 65 (69) : 1893 All W N 29, *Jainti Prasad* v. *Bachu Singh.*

[2] ('13) 19 Ind Cas 387 (390) : 37 Bom 231 (DB), *Rangacharya Appacharya* v. *Dasacharya.* (Section 1 of Bombay Regulation, V of 1827 conferring rights by prescription and Limitation Act, XIV of 1859.)

[3] *See* ('85) 9 Bom 373 (400), *The New Fleming, Spinning and Weaving Co. Ltd.* v. *Kessowji Naik.* (Section 10 and Article 98.)

[4] ('04) 31 Cal 681 (684) : 8 Cal W N 476 (F B), *Sati Prasad Sen* v. *Jogesh Chandra Sen.* (Articles 136, 137 and 138.)

('87) 11 Bom 133 (137, 138), *Essoo Bhayaji* v. *Steam-Ship "Savitri".* (Articles 36, 48 and 49.)

[*See* ('81) 5 Bom 673 (677, 678) (F B), *Bhikambhat* v. *Joseph Fernandez.* (The general words 'decree or order' in Art. 167 of the Act of 1871 must be read as including only such decrees and orders as have not been already specially provided for in Art. 166.)]

Note 10

[1] ('41) 28 AIR 1941 P C 6 (9) : 67 Ind App 416 : 193 Ind Cas 225 (P C), *General A. F. and L. Assurance Corpn. Ltd.* v. *Janmahomed.* (Considerations of hardship should not be taken into account.)

Preamble
Note 10

for an equitable construction of the provisions of the Act, where the language of such provisions is *plain and clear*.[2] But where the

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('39) 26 AIR 1939 Nag 150 (154) : I L R (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna* v. *Baijnath*. (However startling, fantastic or absurd it may appear to be, the Courts cannot refuse to give effect to the plain meaning of the words used by the Legislature.)

('73) 20 Suth W R 375 (376, 377) : 2 Suther 897 : 13 Beng L R 177 (PC), *Lachmee Buksh Roy* v. *Runjeetram Panday*.

('09) 4 Ind Cas 449 (451) : 36 Cal 1003 : 36 Ind App 148 (PC), *Abhiram Goswami Mohant* v. *Shyama Charan Nandi*.

('86) 8 All 475 (483, 484) : 1886 All W N 233 (DB), *Manghu Lal* v. *Kandhai Lal*.

('28) 15 AIR 1928 Cal 646 (647) : 56 Cal 61 : 117 Ind Cas 543 (S B), *Hari Mohan Dalal* v. *Parameshwar Sahu*. (Courts are not warranted in introducing savings or exceptions not found in statute.)

('02) 24 All 218 (220) : 1902 All W N 27, *Durga Singh* v. *Bisheshur Dayal*. (Order 7, R. 11, C. P. C., does not give power to extend prescribed period of limitation.)

('34) 21 AIR 1934 All 626 (633) : 57 All 26 : 150 Ind Cas 1096 (FB), *Parameshwar Singh* v. *Sitladin Dube*. (Interpretation following logically from language should not be rejected on the ground that it creates hardship.)

('33) 20 AIR 1933 Cal 124 (126, 127) : 60 Cal 571 : 143 Ind Cas 802 : 34 Cri L Jour 633 (DB), *Nilratan* v. *Emperor*. (Another meaning not to be given on grounds of hardship.)

('19) 6 AIR 1919 Mad 972 (979, 981) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Setti Kutti* v. *Kunhi Pathumma*. (Case covered by article—It is not permissible to depart from article itself.)

('90) 12 All 129 (137) : 1890 All W N 39 (FB), *Bal Karan Rai* v. *Gobind Nath Tewari*. (Courts cannot read into Limitation Act an article which is not there.)

(1849) 5 Moo Ind App 43 (69) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Company* v. *Oditchurun Paul*. (Hard cases should not make bad law.)

[*See* ('88) 10 All 587 (595, 596) : 1888 All W N 258 (D B), *Ramjiwan* v. *Chendmal*. (In interpreting Acts of limitation Courts are not bound by rules in England.)

('90) 12 All 79 (90, 91) : 1890 All W N 25 (DB), *Parbati* v. *Bhola*. (Do.)

('91) 13 All 282 (287) : 1891 All W N 88 (FB), *Amme Raham* v. *Zia Ahmad*. (Do.)

('88) 10 All 524 (529) : 1888 All W N 218 (DB), *Jag Lal* v. *Har Narain*. (Do.)

('29) 16 AIR 1929 Nag 74 (75) : 117 Ind Cas 282, *Nandu* v. *Bhuwanoo*. (Object being to check dilatoriness, Statute of Limitation should be strictly construed.)

('38) 25 AIR 1938 Bom 281 (282) : I L R (1938) Bom 327 : 175 Ind Cas 528 (DB), *Achut Dadaji* v. *Parashram Vasudev*. (Act must be construed strictly.)

('36) 23 AIR 1936 Bom 322 (326) : 60 Bom 848 : 165 Ind Cas 184, *Kaikhusroo* v. *Gangadas*. (The Statute of Limitation the object of which is to prevent stale demands must be construed strictly.)]

[2] ('33) 20 AIR 1933 Lah 615 (618) : 146 I.C. 939, *Basheshar Das* v. *Dewan Chand*. (No extension of time on equitable considerations unless expressly provided by statute.)

('04) 1904 Pun L R No. 133 at p. 472 : 1904 Pun Re No. 79 (DB), *Bhagwan Das* v. *Collector, Lahore*.

('32) 19 AIR 1932 P C 165 (167) : 137 Ind Cas 529 : 59 Ind App 283 : 60 Cal 1 (P C), *Nagendra Nath Dey* v. *Suresh Chandra Dey*. (Meaning of word "appeal" in Art. 182.)

('33) 20 AIR 1933 Cal 422 (424) : 144 I. C. 150 (DB), *Ashutosh Chowdhury* v. *Kumud Kamini Dasi*.

('30) 17 AIR 1930 Pat 455 (472) : 9 Pat 885 : 127 Ind Cas 817 (D B), *Naurangi Lal* v. *Ram Charan Das*. (Idol or mutt cannot be brought under the same category as a minor, lunatic or idiot.)

('29) 16 AIR 1929 All 677 (679) : 118 Ind Cas 670 (D B), *Maqbul Ahmad* v. *Pateshri Partab Narain Singh*. (A I R 1921 Bom 379, not approved.)

('27) 14 AIR 1927 Cal 117 (122) : 101 Ind Cas 62 (D B), *Panna Lal Ghose* v. *The Adjai Coal Co.* (Reversed in A I R 1930 P C 113 on another point.)

('19) 6 AIR 1919 Cal 1078 (1079) : 47 Ind Cas 122, *Deutsch Asiatische Bank* v. *Hiralal Burdhan & Sons*. (Meaning of word 'disability' in S. 9.)

(1864-1865) 2 Mad H C R 268 (269) (D B) *Kambinayani Javaji Subba Rajalu Nayani Varu* v. *Uddighri Venkataraya Chetty*.

language is not precise or is of doubtful import, the provision should be construed equitably. In the case of the Limitation Act which takes away a right to sue, an equitable construction, where the language is not clear, would be to adopt a construction in *favour* of the right to proceed rather than one *barring* such right.[3] It is in this view that it is generally observed that the Limitation Act must be construed in *favour of the right to sue.*[4]

[*See* ('73) 21 Suth W R 318 (319, 320) : 1 Ind App 167 : 13 Beng L R 292 : 3 Sar 363 (P C), *Mohammud* v. *Collector of Bareilly.*
('04) 31 Cal 519 (538) : 8 Cal W N 500 (D B), *Administrator General of Bengal* v. *Krishto Kamini Dassee.* (Per Hill, J.)
('27) 14 AIR 1927 All 177 (179) : 99 I. C. 280, *Munawar Ali* v. *Jagmilan Ram.* (Applicability of Art. 134.)
('35) 22 AIR 1935 Lah 115 (118) (DB), *Mt. Mayadevi* v. *Diwan Chand.* (Statute of Limitation must be construed with reasonable strictness.)
('87) 11 Bom 524 (525, 526) (DB), *Motichand* v. *Krishnarao.*
('87) 11 Bom 599 (601, 602) (D B), *Sidlingapa* v. *Karibasappa.* (Words are to be construed *also* with reference to the general purpose of statute.)
('83) 9 Cal 711 (721) : 12 Cal L R 318 (F B), *Mamtazul Huq* v. *Nirbhai Singh.* (Per Garth, C. J.)]
[*See also* ('81) 7 Cal 127 (132) : 8 Cal L R 409 (D B), *Gureebullah* v. *Mohun Lall* (Per Princep, J.)
('34) 21 AIR 1934 All 661 (664, 665) : 57 All 108 : 151 Ind Cas 585 (F B), *Jawaharlal* v. *Mathura Prasad.* (Per Sulaiman, C. J.)]

[3] ('39) 26 AIR 1939 Nag 150 (153) : ILR (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna* v. *Baijnath.* (Per Stone, C. J.)
('12) 16 Ind Cas 167 (169) : 40 Cal 239 (DB), *Pochya Mitay* v. *Emperor.* (In case of doubt upon a question of limitation benefit of longer period is to be given.)
('18) 5 AIR 1918 Mad 492 (493) : 41 Mad 18 : 41 Ind Cas 807 (DB), *Venkanna* v. *Venkatakrishnayya.*
('30) 17 AIR 1930 Mad 991 (994) : 128 Ind Cas 867 : 54 Mad 445 (DB), *Seshayya Chetty* v. *Subbadu.*
('34) 21 AIR 1934 All 626 (639) : 57 All 26 : 150 Ind Cas 1096 (FB), *Parameshwar Singh* v. *Sitladin Dube.*
('01) 5 Cal W N 356 (359) (DB), *Jogeshur Bhagat* v. *Ghanasham Dass.*
('97) 24 Cal 382 (384) (DB), *Latifunnessa* v. *Dhan Kunwar.*
('83) 7 Bom 542 (545) (DB), *The Collector of Broach* v. *Rajaram Laldas.* (1 Bom 19 followed.)
('27) 14 AIR 1927 Nag 10 (11) : 98 Ind Cas 22 : 22 Nag L R 147, *Secretary of State* v. *Bagmal Kisandayal.*
[*See* ('96) 20 Bom 408 (420) (FB), *Datto Dudheswar* v. *Vithu.*
('17) 4 AIR 1917 Bom 210 (211) : 41 Ind Cas 238 : 41 Bom 625 (DB), *Kurgodigouda Lingangouda* v. *Ningangauda Ningangauda.* (Section 6 of Limitation Act is enabling section—Liberal construction in favour of persons under disability should be put.)
('05) 28 Mad 557 (559) (DB), *Pachiappa Achari* v. *Poojali Seenan.* (The provisions of the Act should receive a fair and not too technical construction.)
('04) 1904 Pun L R No. 133 at pp. 472, 473 : 1904 Pun Re No. 79 (DB), *Bhagwan Das* v. *Collector, Lahore.* (The principle, that the Limitation Act being restrictive of the legal rights should be construed in favour of the right to sue, should be applied only where the language is doubtful or ambiguous.)]

[4] ('37) 24 AIR 1937 Nag 305 (308) : ILR (1937) Nag 440 : 173 Ind Cas 51 (DB), *Vishwanath Singh* v. *Mahabir Prasad.* (Limitation Act ought to be interpreted liberally in favour of decree-holder.)
('82) 6 Bom 719 (724) (FB), *Lallubhai* v. *Naran.*
('20) 7 AIR 1920 Lah 447 (448, 449) (DB), *Anant Ram* v. *Inayat Ali Khan.* (In case of doubt, a construction in favour of the right to proceed should be adopted.)
('76) 1 Bom 19 (22) (DB), *Umiashankar Lakhmiram* v. *Chhotalal Vajeram.* (9 Bom H C R 99 relied on.)
('29) 16 AIR 1929 Lah 513 (514) : 121 Ind Cas 379 (DB), *Asa Ram* v. *Darba Mal.* (Unless article distinctly bars, construction must be in favour of continuation of suit.)

It is no part of the duty of the Court to deprive a litigant of the benefit of any exemption under the Act or make the Limitation Act more stringent than it is[5] by unduly restricting its language,[6] or straining it beyond its natural meaning,[7] or by importing words of limitation not found in the statute.[8] A construction having the effect

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('85) 9 Bom 373 (402), *The New Fleming Spinning and Weaving Company, Ltd.* v. *Kessowji Naik.*

('86) 10 Bom 483 (487), *Parell Spinning and Weaving Company Ltd.* v. *Maneck Haji.* (9 Bom H C R 99 followed.)

('11) 9 Ind Cas 300 (302) : 1911 Pun Re No. 26 (FB), *Sundar* v. *Saligram.* (1903 Pun Re No. 56 followed.)

('79) 3 Cal L R 440 (442) (DB), *In re Ramshankar Bhadoory.* (9 Bom H C R 99, relied on.)

('07) 31 Bom 162 (165):8 Bom L R 892 (DB), *Ramchandra* v. *Lakshman.* (Execution petition defective in minor details—Not barred by limitation on that ground.)

('31) 18 AIR 1931 Sind 146 (149) : 25 Sind L R 230 : 134 Ind Cas 369 (DB), *Municipality of Hyderabad* v. *Allahdino.*

[*See* ('21) 8 AIR 1921 Cal 67 (71) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal* v. *Tarubala Dassi.* (The Limitation Act being an Act of a restrictive character must be strictly construed.)

('18) 5 AIR 1918 Bom 73 (74) : 43 Bom 44 : 47 Ind Cas 726 (DB), *Hargovind Fulchand* v. *Naja Sura.* (Limitation Act must be construed strictly and any provision in the nature of an exception should be liberally construed.)

('98) 25 Cal 496 (503) : 2 Cal W N 269 (FB), *Purno Chunder Ghose* v. *Sassoon.*]

[*See also* ('05) 29 Bom 480 (498) : 7 Bom L R 497, *Balwant Ramchandra Natu* v. *Secretary of State.* (Pensions Act.)]

[5] ('78) 2 Bom 294 (298), *Jamna Das* v. *Lalitaram.*

[6] ('39) 26 AIR 1939 Nag 150 (153): I L R (1939) Nag 185: 182 Ind Cas 662 (DB), *Balkrishna* v. *Baijnath.* (The day on which copy is applied for should not be excluded in computing the 'time requisite' under S. 12 simply because that happens to be the day on which judgment was pronounced.)

('07) 29 All 264 (266) : 4 All L Jour 152 : 1907 All W N 67, *Ram Kishen Sastri* v. *Kashibai.* (Meaning of words 'time requisite for obtaining a copy' in S. 12.)

('06) 33 Cal 1278 (1281) : 11 Cal W N 107, *Domi Lal Sahu* v. *Roshan Dobey.* (There is nothing in S. 20 to indicate that new period is to operate only against person making payment.)

('04) 27 Mad 343 (345) (DB), *Bank of Madras* v. *Multan Chand Kanhyalal.* ("Other relief" in Art. 95 not to be restricted to relief on ground of fraud.)

[7] ('14) 1 AIR 1914 Cal 50 (51) : 41 Cal 52 : 21 Ind Cas 431 (DB), *Rudra Narain Maity* v. *Natabar'jana.* (The language of an article should not be extended by figures of speech and metaphors.)

('81) 7 Cal 333 (336) : 9 Cal L R 209, *Roberts* v. *Harrison.* (Handing in an award to proper officer by arbitrator for filing is not 'application' within meaning of this Act.)

('79) 3 Cal L R 440 (442) (DB), *In re Ram Shankar Bhadoory.* (Applicability of Article 172.)

[*See* ('91) 15 Bom 299 (305) (DB), *Parashram Jethmal* v. *Rakhma.* (Statutes of limitation are not to be extended by construction to cases not clearly included within their terms.)]

[8] (1865) 2 Suth W R 263 (264) (DB), *Syed Mahomed Afzul* v. *Kanhyalal.* (Claim suit when claim petition has been rejected without enquiry—One year limitation does not apply.)

('21) 8 AIR 1921 Cal 277 (278): 66 Ind Cas 923 (DB), *Maharajah of Cooch-Behar* v. *Mahendra Ranjan.* (Order under S. 41, Bengal Survey Act—Suit instituted more than three years after—It is not barred by Art. 46, Limitation Act.)

('08) 32 Bom 14 (22, 25) : 9 Bom L R 1138 (FB), *Chunilal* v. *Dahyabhai.* (No rule of High Court can add or modify conditions and limitations in Limitation Act.)

('32) 19 AIR 1932 Mad 19 (20) : 134 Ind Cas 59 : 54 Mad 852, *Chinna Vel Naick* v. *Venkatarama Naik.* (Article 182—Step in aid.)

[*See* ('01) 1901 Pun Re No. 18 : 1901 Pun L R No. 31, *Imami* v. *Saddan.*

of destroying a right before it has effectively arisen[9] or of dating the cause of action before the remedy is available[10] should be avoided if possible.

11. **Sections and Articles.** — The sections in the body of the Limitation Act govern and control the application of the articles in the schedule except so far as the language of a particular article clearly precludes the application of any such section.[1]

When words are employed which are merely intended to be declaratory or enabling, a legislative *mandate* cannot be evolved from *inferences* based upon the use of such words without any express enacting terms, particularly where to do so would take the matter out of the scope and purview of the Act as set out in the Preamble.[2] The words of the articles of the Act should be construed strictly.[3] In construing the words of a particular article, it is not always safe to rely on the meaning of similar language in all other articles.[4]

('36) 23 AIR 1936 Mad 782 (783), *Meghavaranam Naidu* v. *Mahomed Mohideen.* (It is not right to read into the Limitation Act words which are not there when the words which are there have themselves clear and unmistakable meaning.)]

[9] ('33) 20 AIR 1933 Bom 439 (441) : 57 Bom 593 : 147 Ind Cas 919 (DB), *Ganpat Bhujang* v. *Hanamgouda Shidagouda.* (Article 135 — Mortgagor must have actual possession or the right to possession before time can start against him.)

('19) 6 AIR 1919 Mad 972 (981, 984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Setti Kutti* v. *Kunhi Pathumma.* (Article 134 does not apply where possession is not taken by transferee.)

('24) 11 AIR 1924 Cal 600 (609) : 81 Ind Cas 874 (DB), *Dwijendra Narain* v. *Joges Chandra.* (Statute of limitation does not attach to a claim till there is right of action for it.)

[*See* ('69) 12 Suth W R 167 (169) (DB), *Khuruckdharee Singh* v. *Rewatlall Singh.* (Statute never begins to run until there has been cause of action.)

('17) 4 AIR 1917 Nag 187 (193) (DB), *Baxiram* v. *Bhikaji.* (Ignorance of facts giving right to sue—Limitation does not operate.)

('24) 11 AIR 1924 Nag 256 (257) : 20 Nag L R 70 : 78 I. C. 872, *Ram Bux* v. *Motti.*

('16) 3 AIR 1916 Low Bur 79 (80) : 32 I. C. 536, *Ma Shwe On* v. *Maung Kywet.*]

[10] ('35) 22 AIR 1935 Cal 333 (335) : 62 Cal 66 : 158 I. C. 191 (DB), *Jateendra Chandra* v. *Rebatee Mohan Das.*

('18) 5 AIR 1918 Mad 1187 (1192) : 40 Mad 989 : 37 Ind Cas 741 (FB), *Aiyasamier* v. *Venkatachela Mudali.* (Limitation does not run against party seeking to enforce his rights till he can avail himself of the remedy.)

('28) 15 AIR 1928 Cal 646 (648) : 56 Cal 61 : 117 I. C. 543 (SB), *Hari Mohan Dalal* v. *Parameshwar Shau.* (Interpretation of language of third column of schedule.)

('20) 7 AIR 1920 Mad 1 (13) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty* v. *Mohammad Madar Ammal.* (Do.)

Note 11

[1] ('11) 12 Ind Cas 695 (697) (Mad) (DB), *Doraisawmy Serumadan* v. *Nandisawmi Saluvan.* (Per Abdur Rahim, J.)

[2] ('91) 13 All 126 (144) : 1891 All W N 18 (DB), *Binda* v. *Kaunsilia.* (Per Mahmood, J.)

[3] ('22) 9 AIR 1922 Mad 150 (166) : 45 Mad 648 : 71 Ind Cas 177 (FB), *Yerukola* v. *Yerukola.* (Per Devadoss, J.)

[4] ('34) 21 AIR 1934 All 661 (664, 665) : 57 All 108 : 151 Ind Cas 585 (FB), *Jawahar Lal* v. *Mathura Prasad.* (In a sense Limitation Act is a purely arbitrary enactment.)

('16) 3 AIR 1916 Cal 488 (495) : 43 Cal 903 : 36 Ind Cas 602 (FB), *Chutterput Singh* v. *Sait Sumari Mal.* (The scheme and scope of Arts. 182 and 183 are radically distinct and no useful purpose will be served by interpreting the one by reference to the other.)

12. Residuary Article.

1. A residuary article can be applied only if no other article is applicable to the case.[1]
2. It must be construed *ejusdem generis* with the other articles providing for specific proceedings.

13. Where more than one provision applicable.— In giving effect to a statute of limitation, if two articles are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps *alive*, rather than that which *bars* the right to sue, should generally, apart from other equitable considerations, be preferred.[1] It is also an established rule of construction that where there are two articles, the general article does not govern the case where there is a particular article covering it.[2]

Note 12

1. ('33) 20 AIR 1933 Lah 615 (616) : 146 Ind Cas 939, *Basheshar Das* v. *Diwan Chand.* (Article 120 will not apply when Art. 109 applies.)

('24) 11 AIR 1924 Mad 137 (137) : 77 Ind Cas 631 : 47 Mad 525 (DB), *Paramasiva* v. *Pulukaruppa Thevar.* (Article 181.)

('99) 26 Cal 564 (567) : 3 Cal W N 464 (FB), *Sharoop Das Mondal* v. *Joggessur Roy Chowdhury.* (Article 120.)

('02) 25 Mad 507 (510) : 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade.* (Article 144.)

[*See* ('03) 26 Mad 780 (789) : 13 Mad L Jour 412 (DB), *Rungiah Goundan & Co.* v. *Nanjappa Row.* (Article 181 applies only where an execution application does not fall under Art. 182.)]

See also Note 20 and Art. 181 Note 2.

Note 13

1. ('25) 12 AIR 1925 Pat 765 (768) : 4 Pat 448 : 93 Ind Cas 129 (DB), *Tofa Lal Das* v. *Moinuddin Mirza.* (Articles 62 and 92.)

('34) 21 AIR 1934 Bom 491 (495) : 154 Ind Cas 680, *Kasturchand Okaji* v. *Hari Govind.* (Articles 62, 113 or 120.)

('30) 17 AIR 1930 Nag 300 (303, 304) : 27 Nag L R 152 : 127 Ind Cas 889, *Jairam* v. *Bhilaji.* (Articles 148 and 144.)

2. ('26) 13 AIR 1926 Pat 401 (403) : 5 Pat 759 : 96 Ind Cas 529 (DB), *Rameshwar Narain* v. *Mahabir Prasad.* (Articles 95 and 12.)

('25) 12 AIR 1925 Mad 1255 (1256) : 48 Mad 925 : 91 Ind Cas 151 (DB), *Ramiah & Co.* v. *Sadashiva Mudaliar.* (Articles 96 and 62.)

('90) 1890 Pun Re No 112 (FB), *Ram Saran Dass* v. *Mehtab.* (Article 132 held to apply in preference to Art. 147.)

('15) 2 AIR 1915 Cal 681 (685) : 28 Ind Cas 463 : 42 Cal 85 (DB), *Madras Steam Navigation Co. Ltd.* v. *Shalimar Works Ltd.* (Articles 36, 49 or 29.)

('20) 7 AIR 1920 Cal 357 (359) : 57 Ind Cas 375 (FB), *Norendra Nath Koer* v. *Bhusan Chandra Pal.* (Articles 29, 36 or 42.)

('31) 18 AIR 1931 Nag 47 (48) : 130 Ind Cas 157, *Krishna* v. *Sitaram.*

('27) 14 AIR 1927 Nag 402 (404) : 105 Ind Cas 431, *Ram Rao* v. *Gulabrao.* (Even where the particular article is in a special or local Act—Schedule II, Article 1, C. P. Tenancy Act and Art. 47, Limitation Act.)

('02) 26 Bom 430 (432) : 4 Bom L R 72 (DB), *Narmadabai Shivlal* v. *Bhavani Shankar.* (Articles 48, 49 or 145.)

('25) 12 AIR 1925 Lah 478 (479) : 6 Lah 301 : 88 Ind Cas 979 (DB), *Secretary of State* v. *Dunlop Rubber Co.* (Articles 31 and 49.)

('23) 10 AIR 1923 Cal 507 (508) : 73 Ind Cas 17 (DB), *Mahamed Mozaharal Ahmad* v. *Mahamed Azimaddin Bhuinya.* (Articles 103, 104 or 116.)

('21) 8 AIR 1921 Lah 335 (336) : 67 Ind Cas 365 (DB), *Kunj Lal* v. *Gulab Ram.* (Articles 81 and 61.)

('16) 3 AIR 1916 Mad 314 (318) : 30 Ind Cas 840 : 39 Mad 1 (F B), *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co., Calcutta.* (Articles 31 and 49.)

Preamble
Note 13

Generalia specialibus non derogant.[2a] This is based on the principle that there is always only one article applicable to a case though more than one may seem to apply, the duty of the Court being, on proper consideration, to find out that article.[3] On the same principle Courts should not, where the suit naturally falls within a particular article, strain the construction so as to bring it under a category which gives a more favourable period of limitation.[4]

Where, however, there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances, and the other, the shorter, to special circumstances only, the longer term given by the statute ought to be applied unless there is clear proof of the circumstances which would make the shorter term applicable.[5] Generally the correct article applicable will have to be determined by ascertaining the exact frame of the suit.[6] Where a suit, as framed, falls under an article with a longer period of limitation, it cannot be contended in defence that the suit ought to have been framed so as to fall under an article providing a shorter period.[7]

('17) 4 AIR 1917 Pat 404 (406) : 40 Ind Cas 907 (D B), *Kunti Dai* v. *Jharu Lal Das Mazumdar.* (Likewise special provisions of limitation in Rent Acts exclude the general provisions of the Limitation Act.)
('25) 12 AIR 1925 Pat 765 (767) : 4 Pat 448: 93 Ind Cas 129 (D B), *Tofa Lal Das* v. *Moinuddin Mirza.* (Articles 96 and 62.)
('04) 26 All 482 (487, 488) : 1 All L Jour 195 : 1904 All W N 95 (D B), *Municipal Board of Mussooree* v. *H. B. Goodall.* (Articles 2 and 28.)
('98) 25 Cal 692 (698, 699) : 2 Cal W N 265 (FB), *Mangun Jha* v. *Dolhin Golab.*
('99) 26 Cal 564 (567) : 3 Cal W N 464 (F B), *Sharoop Das Mondal* v. *Joggessur Roy Chowdhary.* (Articles 32 and 120.)
('08) 4 Nag L R 49 (54), *Nagoba* v. *Madholala Kalar.*
[*See* ('35) 22 AIR 1935 Lah 645 (646):159 Ind Cas 1044, *Shanti Lal* v. *Lyallpur Bank Ltd.* (Special provision of limitation in the rules framed under the Companies Act must prevail over the Limitation Act.)
('99) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (P C), *Runchordas Vandravandas* v. *Parvatibai.*
('89) 16 Cal 25 (29) (DB), *Ishur Chunder* v. *Jibun Kumari.* (Articles 59 and 60.)]
[*See also* ('06) 4 Cal L Jour 553 (554) (D B), *Kalicharan Bhowmik* v. *Harendra Lal Roy.* (Special period of limitation in Tenancy Act cannot be extended by ordinary rules of limitation in Limitation Act.)
('73) 19 Suth W R 5 (6) : 15 Beng L R 60*n* (P C), *Unnoda Persaud* v. *Kristo Coomar Moitro.* (General and Special Acts.)
('26) 13 AIR 1926 Cal 757 (761) : 94 Ind Cas 444, *Albert Bonnam* v. *Imperial Tobacco Company (India) Ltd.*]

[2a] ('98) 21 Mad 141 (142):7 MadLJour 275 (DB), *Natesan Chetty* v. *Sundarraja.*

[3] ('21) 8 AIR 1921 Mad 272 (275) : 44 Mad 951 : 68 Ind Cas 734 (D B), *Sesha Naidu* v. *Periaswami.*

[4] ('91) 13 All 282 (284) : 1891 All W N 88 (F B), *Amme Raham* v. *Zia Ahmad.* (Per Straight, J.)

[5] ('11) 11 Ind Cas 164 (166) (Cal) (D B), *Tara Nath* v. *Iswar Chandra.*

[6] ('35) 22 AIR 1935 Mad 709 (710, 712) : 158 Ind Cas 121 (D B), *Chennamma* v. *Mangamma.* (The form of remedy which the plaintiff seeks and not some other claim which he might have made determines the article applicable.)
('29) 16 A I R 1929 Lah 208 (209) : 114 Ind Cas 437, *Tulsi* v. *Guran Ditta.* (The question of the particular law of limitation applicable to a case must depend upon the form of the suit and the relief claimed and not on what might be the ultimate effect of the relief claimed.)
('03) 27 Bom 363 (368) : 4 Bom L R 743 (D B), *Dattagiri* v. *Dattatraya.*

[7] ('32) 19 AIR 1932 All 358 (359, 360):136 Ind Cas 829 (DB), *Zia Uddin Ahmed Khan* v. *Akbar Ali.*
See also Section 3 Note 8.

14. Columns of the schedule. — The first and the third columns of the schedule should be read together and the same words appearing in both the columns should be given the same meaning.[1]

Unless a particular suit as brought and the particular relief asked for therein strictly come within the wording of the first column of an article in the schedule, the limitation prescribed therein cannot be made applicable.[2] If, in any case, the first column of an article be applicable but not the third column containing the starting point of limitation, that article must be rejected.[3]

The function of the third column of the schedule is not to define causes of action but to fix the starting point from which the period of limitation is to be computed.[4]

15. Retrospective operation of the Act. — It is a general principle of law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.[1] This rule is embodied in the well known maxim *Omnes*

Note 14

1. ('19) 6 AIR 1919 Mad 972 (980, 981) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Setti Kutti* v. *Kunhi Pathumma.* (Word 'transfer' in Art. 134.)

2. ('27) 14 AIR 1927 Nag 10 (12) : 98 Ind Cas 22 : 22 Nag L R 147, *Secretary of State* v. *Bagmal Kisan Dayal.*

3. ('10) 8 Ind Cas 882 (882) (Mad), *Kothandarama Chetty* v. *British India Steam Navigation Co. Ltd.* (26 Mad 780, Relied on.)
[*See* ('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara Sarma* v. *Venkatesa Ayyar.* (In this case, a suit was brought by the manager of a mutt for possession of mutt properties alienated by his predecessor in office — It was contended on his behalf that Art. 134B did not apply to the suit as at the time mentioned in the third column, viz., the death of the previous manager, nobody had been appointed to succeed him and there was no one who could have sued and consequently there was no cause of action at that time — The contention was rejected by the majority of the Full Bench though Abdur Rahman and Krishnaswamy Iyengar, JJ., agreed with the contention.)]
See also S. 9 Note 8.

4. ('11) 11 Ind Cas 540 (542) (DB) (Cal), *Jailam Singh* v. *Choonee Lal.*

Note 15

1. (1892) 3 Ch D 402 (421): 61 L J Ch 580: 67 L T 275: 40 W R 679, *Laurie* v. *Renad.*
('31) 18 AIR 1931 Cal 91 (91) : 129 Ind Cas 859 (DB), *Suresh Chandra* v. *Mohendra Chandra.* (Bengal Tenancy Act.)
('10) 6 Ind Cas 188 (189) : 32 All 499 (DB), *Konsilla* v. *Ishri Singh.* (Retrospective effect is not to be given unless such intention appears from the terms of the statute or by necessary implication.)
('01) 1901 Pun L R No. 153 p. 388: 1902 Pun Re No. 4 (DB), *Ram Ditta* v. *Tehlu.*
(1901) 1901 App Cas 297 (305): 70 L J P C 53: 84 L T 801, *Smith* v. *Callander.*
('31) 18 AIR 1931 Cal 25 (25) : 57 Cal 796 : 129 Ind Cas 355 (DB), *Jnanendranarayan* v. *Saradasundari.*
('31) 18 AIR 1931 Cal 321 (322): 131 Ind Cas 398: 58 Cal 817 (DB), *Kanak Kanti Roy* v. *Kripa Nath Gain.* (Bengal Tenancy Act—Retrospective operation extends only to the extent the language permits.)
('30) 17 AIR 1930 All 706 (709) : 128 Ind Cas 390: 52 All 886 (DB), *Sheopujan* v. *Bishnath Rai.* (Agra Pre-emption Act, 1922.)
('31) 18 AIR 1931 Nag 60 (63): 27 Nag L R 24: 132 Ind Cas 450, *Mt. Bana Bai* v. *Mt. Chandrabhaga.* (Transfer of Property Act — Amending statute itself laying down as not retrospective.)
('32) 19 AIR 1932 Rang 197 (198) : 10 Rang 465 : 140 Ind Cas 156, *Ko Po Kun* v. *C. A. M. A. L. Firm.* (Transfer of Property Act — Certain sections expressed to be not retrospective does not mean that others are retrospective.)
('32) 19 AIR 1932 Mad 734 (736): 56 Mad 169 : 139 Ind Cas 870 (DB), *Kanji and Moolji Bros.* v. *T. Shunmugham Pillai.* (Transfer of Property Act.)

nova constitutio futuris temporibus formam imponere debet non præteritis—Every new enactment should affect future and not past times. A statute which takes away or affects *vested* rights or imposes a new liability or confers a new right must be *presumed* not to have a retrospective operation.[2] Enactments dealing with *procedure*, however,

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('29) 16 AIR 1929 Bom 262 (263, 264): 122 Ind Cas 76: 53 Bom 453 (DB), *Pandarinath* v. *Thakoredas.*
('30) 17 AIR 1930 Pat 61 (62) : 123 Ind Cas 408 (DB), *Mt. Ramjhari Koer* v. *Gokhul Singh.* (Legal Practitioners' Act.)
('31) 18 AIR 1931 Mad 83 (85, 91) : 130 Ind Cas 177 : 54 Mad 627 (D B), *A. T. Panerselvam* v. *Veeriah Vandayar.* (Madras Local Boards Act.)
('29) 16 AIR 1929 Nag 41 (41) : 24 Nag L R 85 : 109 Ind Cas 647, *Balaji Jagannath Kalar* v. *Sarfrajkhan.* (C. P. Land Revenue Act.)
('28) 15 AIR 1928 Lah 627 (631) : 113 Ind Cas 529 : 10 Lah 165 (F B), *Kripa Singh* v. *Ajaipal Singh.* (Sikh Gurdwaras Act, 1925 — Some sections retrospective—Act silent as to other sections—Particular section to be examined to see if it is retrospective.)
('22) 9 AIR 1922 Nag 227 (228) : 18 Nag L R 85 : 77 Ind Cas 798, *Mt. Lahani* v. *Bala.* (C. P. Tenancy Act.)
('21) 8 AIR 1921 Mad 126 (128) : 61 Ind Cas 979 (D B), *N. Viswanatha Sastri* v. *Seethalakshmi Ammal.* (Transfer of Property Act.)
('77) 2 Bom 148 (159) : 2 Ind Jur 529 & 563 (F B), *In re Ratansi Kalianji* (Civil Procedure Code.)
('16) 3 AIR 1916 Cal 446 (449) : 32 Ind Cas 774 : 43 Cal 973 (D B), *Ananda Kumar* v. *Secretary of State.* (Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing.)
('17) 4 AIR 1917 Mad 937 (939) : 35 Ind Cas 497 : 40 Mad 34 : 17 Cri L Jour 321 (D B), *Frederick* v. *Emperor.* (Penal statute never retrospective.)
('31) 18 AIR 1931 Lah 145 (151) : 131 Ind Cas 353 : 32 Cri L Jour 700, *Pars Ram* v. *Emperor.* (Do.)
('19) 6 AIR 1919 Cal 210 (211): 50 Ind Cas 335 (D B), *Promothanath Pal* v. *Sourav Dasi.*
('13) 20 Ind Cas 689 (691) (D B) (Mad), *Muthiah Chettiar* v. *Ramaswami Chettiar.* (Madras Estates Land Act.)
(1900) 1900 Pun L R No 18 p. 41 (44): 1900 Pun Re No 12 (FB), *Narsingh Das* v. *Lala Dholandass.* (Punjab Courts Act.)
('10) 5 Ind Cas 980 (981): 5 Low Bur Rul 148 (D B), *Mashedee Khan* v. *B. Mohomed Azim.* (Lower Burma Courts Act.)
('14) 1 AIR 1914 Lah 345 (346) : 1914 Pun Re No 86 : 26 Ind Cas 743 (D B), *Karar Hassan* v. *Mustafa Hasan.* (Punjab Pensions Act.)
('28) 15 AIR 1928 P C 128 (130) : 107 Ind Cas 455 (PC), *Municipal Council of Sydney* v. *Margaret Alexandra Troy.* (The Sydney Corporation Act.)
('34) 21 AIR 1934 Pesh 30 (31) : 150 Ind Cas 308 (D B), *Jada Ram* v. *Faizullah Khan.* (Provincial Insolvency Act.)
('31) 18 AIR 1931 Cal 92 (93) : 129 Ind Cas 878: 58 Cal 167, *Asikannessa Bibi* v. *Dwijendrakrishna Datta.* (Bengal Tenancy Act.)
('32) 19 AIR 1932 All 614 (616) : 139 Ind Cas 170 : 54 All 482 (D B), *Ram Sahai* v. *Debi Din.* (Bundelkhand Land Alienation Act, 1929.)
(1903) 1903 App Cas 355 (357, 363) : 72 L J P C 91 : 88 L T 779 : 19 T L R 545, *Commissioner of Public Works* v. *Logan.* (Cape of Good Hope Act, 1874.)
('34) 21 AIR 1934 Mad 138 (139) : 147 Ind Cas 1139 : 57 Mad 718 (D B), *Krishnan Chettiar* v. *Manickkammal.* (Succession Act, 1929.)
('32) 19 AIR 1932 Sind 71 (72) : 26 Sind L R 204 : 139 Ind Cas 589 (D B), *Gurmukhdas* v. *Hassomal.* (Provincial Insolvency Act, 1920.)
('87) 14 Cal 553 (555, 556) (D B), *Jogessur Das* v. *Aisani Koyburto.* (Bengal Tenancy Act, 1885.)
('88) 15 Cal 376 (382) (F B), *Tupsee Singh* v. *Ram Saran Koeri.* (Do.)
('31) 18 AIR 1931 Nag 138 (140) : 133 Ind Cas 395, *Harlal* v. *Lala Prasad.* (Transfer of Property (Amendment) Act, 1929.)
('33) 20 AIR 1933 All 20 (21) : 54 All 1092 : 143 Ind Cas 481, *Parmeshar Kurmi* v. *Bakhtawar.* (Court-fees (Amending) Act, 1932.)
('31) 18 AIR 1931 All 317 (317) : 132 Ind Cas 193 : 53 All 524 (D B), *Amjad Ali* v. *Saadat Begum.*

[2] ('39) 26 AIR 1939 Pat 282 (283) : 18 Pat 355 : 183 Ind Cas 212 (D B), *Biranchi Singh* v. *Nand Kumar Singh.*

are an exception to this general rule and are always retrospective in the sense that these provisions will apply to proceedings already commenced

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('38) 25 AIR 1938 Mad 688 (700) : 179 Ind Cas 16 (D B), *Girdharilal Son & Co.* v. *Kappini Gowder.* (The real test to determine whether a statute is retrospective is to see whether it affects existing rights including rights of action which are substantive rights.)

('31) 18 AIR 1931 Cal 25 (26) : 57 Cal 796 : 129 Ind Cas 355 (D B), *Jnanendra Narayan* v. *Saradasundari Dasi.*

('29) 16 AIR 1929 Bom 262 (264, 265) : 53 Bom 453 : 122 Ind Cas 76 (D B), *Pandarinath* v. *Thakoredas.*

('23) 10 AIR 1923 Cal 13 (17, 18) : 72 Ind Cas 698 (D B), *Lalit Mohan* v. *Manoranjan Ghose.* (Public Demands Recovery Act, retrospective effect of.)

(1898) L R 2 Q B 547 (552) : 67 L J Q B 935 : 79 L T 303 : 47 W R (Eng.) 144 : 5 Manson 322, *In re Athlumney.*

('81) 5 Bom 653 (658) (D B), *Ichharam* v. *Govindram.*

('11) 9 Ind Cas 805 (806) (D B) (Cal), *Kalanand Singh* v. *Bhekh Dhari Singh.*

('77) 2 Bom 148 (171) : 2 Ind Jur 529 & 563 (F B), *In re Ratansi Kalianji.*

('99) 16 Cal 267 (272) (F B), *Deb Narain Dutt* v. *Narendra Krishna.* (Bengal Tenancy Act, 1885.)

('04) 26 All 119 (130) : 31 Ind App 30 : 7 Oudh Cas 254 : 8 Cal W N 201 : 8 Sar 593 : 6 Bom L R 238 (P C), *Mohammad Abdus Samad* v. *Aurban Hussain.* (Oudh Estates Act, 1869.)

('14) 1 AIR 1914 P C 66 (67) : 36 All 350 : 23 Ind Cas 649 (P C), *Chandri Abdul Majid* v. *Jawahir Lal.*

('21) 8 AIR 1921 Nag 170 (170) : 69 Ind Cas 870, *Lakhmichand* v. *Baji Rao.* (C. P. Tenancy Act, 1920.)

('21) 8 AIR 1921 Oudh 121 (122) : 24 Oudh Cas 157 : 63 Ind Cas 334 : 22 Cri L Jour 638, *Municipal Board, Fyzabad* v. *Mt. Vidyadhari.* (Bye-laws and rules framed under Oudh Municipalities Act, 1916.)

('21) 8 AIR 1921 Pat 185 (186) : 61 Ind Cas 4 (D B), *Kedar Nath* v. *Tarini Prasad.*

('22) 9 AIR 1922 Cal 491 (492) : 70 Ind Cas 370 (D B), *Ajit Singh* v. *Bhagabati Charan Mukerjee.*

('22) 9 AIR 1922 Nag 227 (229) : 18 Nag L R 85 : 77 Ind Cas 798, *Mt. Lahani* v. *Bala.* (C. P. Tenancy Act, 1898.)

('23) 10 AIR 1923 Cal 85 (90) : 50 Cal 115 : 70 Ind Cas 606 (D B), *Makar Ali* v. *Sarfaddin.* (Repeal does not affect even contingent rights.)

('25) 12 AIR 1925 Nag 377 (377) : 87 Ind Cas 72, *Durga Prasad* v. *Thakur Prasad.* (Decree already passed cannot be invalidated by subsequent Acts.)

('25) 12 AIR 1925 Nag 249 (250) : 83 Ind Cas 752, *Champalal* v. *Kanji Lal.* (C. P. Tenancy Act, 1920.)

('28) 15 AIR 1928 Lah 627 (630, 631) : 113 Ind Cas 529 : 10 Lah 165 (FB), *Kirpa Singh* v. *Rasalldar Ajaipal Singh.*

('28) 15 AIR 1928 Mad 1194 (1194) : 114 I. C. 823 (DB), *Sri Rajah Satrucherla* v. *Maharaja of Jaipur.* (Change in law cannot affect execution order already passed.)

('28) 15 AIR 1928 Pat 109 (110) : 105 Ind Cas 33 (DB), *Sukul Lakhpat Ram* v. *Raghu Koeri.* (Chota Nagpur Tenancy Act, 1908.)

('10) 34 Bom 260 (266) : 5 Ind Cas 864 (DB), *Mugapa Chenbasappa Sawadatti* v. *Mohammad Sahib.* (Change in law cannot affect decree already obtained.)

('12) 16 Ind Cas 1002 (1003) : 36 Bom 617, *Lakshman Krishnaji* v. *Balkrishna Rangnath.* (Vested rights under decrees cannot be affected.)

('86) 12 Cal 583 (586) (FB), *Bhobo Sundari Debi* v. *Rakhal Chunder Bose.* (T. P. Act, 1882.)

('14) 1 AIR 1914 Cal 806 (810) : 41 Cal 1125 : 24 Ind Cas 37 (FB), *Gopeshwar Pal* v. *Jibanchandra.* (Bengal Tenancy Act, 1908.)

('20) 7 AIR 1920 Cal 435 (437) : 47 Cal 1108 : 58 Ind Cas 327 (DB), *Promotha Nath Pal* v. *Sourav Dasi Chowdharani.*

('04) 27 Mad 538 (539) : 14 M. L. J. 340 (DB), *Vedavalli Narasiah* v. *Mangamma.*

('16) 3 AIR 1916 Mad 607 (608, 609) : 18 Ind Cas 64 (66) : 38 Mad 101 (DB), *Ramakrishna Chetty* v. *Subraya Iyer.*

('15) 2 AIR 1915 Mad 1022 (1027) : 27 I. C. 688 : 39 Mad 84, *Venkata Perumal* v. *Ramudu.* (Per Kumaraswami Sastri and Napier, JJ.; Sadasiva Aiyar, J. dissenting.)

(1876) 1 Ch D 48 (50) : 45 L J Ch 12 : 33 L T 774 : 24 W R (Eng.) 184, *In re Suche & Co.*

('18) 5 AIR 1918 Mad 162 (163) : 45 Ind Cas 11 (DB), *Subramania Iyer* v. *Namasivaya Asari.* (Right to treat decree as final is vested right.)

at the time of their enactment.[3] The reason is that no one can have a

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('16) 3 AIR 1916 Nag 22 (23) : 42 Ind Cas 384 : 13 Nag L R 165, *Nilkant* v. *Ghulya.* (C. P. Tenancy Act, 1898.)

('32) 19 AIR 1932 Sind 71 (72) : 26 Sind L R 204 : 139 Ind Cas 589 (DB), *Gurmukhdas* v. *Hassomal.* (Provincial Insolvency Act, 1920.)

('19) 6 AIR 1919 Pat 202 (202) : 50 Ind Cas 515 (DB), *Brajalall Dutta* v. *Kenarampal.* (Chota Nagpur Tenancy Act, 1908.)

('17) 4 AIR 1917 Pat 171 (173) : 42 Ind Cas 387 (DB), *Ganpat* v. *Chhottan Ram.*

('71) 6 Mad H C R 122 (126) (DB), *Lee Morris* v. *Sambamurthi Rayar.*

('04) 28 Bom 105 (114) : 5 Bom L R 790 (DB), *Secy. of State* v. *Bulwant Ganesh.*

(1865) 2 Suth W R 205 (206) (FB), *Sonaton Ghose* v. *Moulvie Abdul Turrub.*

[*See also* ('77) 3 Cal 47 (56, 57) : 4 Ind App 127 : 3 Sar 721 : 3 Suther 423 : 1878 Pun Re No 7 : 1 Ind Jour 457 (P C), *Delhi & London Bank Ltd.* v. *Orchard.*]

[3] ('39) 26 AIR 1939 Pat 282 (283) : 18 Pat 355 : 183 Ind Cas 212 (DB), *Biranchi Singh* v. *Nand Kumar.*

('38) 25 AIR 1938 Mad 688 (694, 695) : 179 Ind Cas 16 (D B), *Girdharilal Son & Co.* v. *Kappini Gowder.* (Law of procedure is retrospective except in cases where it tends to destroy the right or the remedy.)

('35) 22 AIR 1935 Mad 245 (245) : 157 Ind Cas 272, *Krishnaswami Naicker* v. *Thiruvengada Mudaliar.* (The statute of limitation being a law of procedure is generally retrospective in its operation.)

('27) 14 AIR 1927 P C 242 (244) : 54 Ind App 421 : 9 Lah 284 : 106 Ind Cas 156 (PC), *Delhi Cloth & General Mills Co.* v. *Income-tax Commr., Delhi.*

('01) 1901 Pun L R No. 153, p. 586 : 1902 Pun Re No. 4 (DB), *Ram Ditta* v. *Tehlu.*

('89) 11 All 408 (412) : 1888 All W N 111(FB), *Chajmal Das* v. *Jagdamba Prasad.*

('31) 18 AIR 1931 All 635 (639) : 136 Ind Cas 145 : 54 All 299 (F B), *Ram Karan Singh* v. *Ram Das Singh.* (Choice of forum and limitation is a matter of procedure.)

('31) 18 AIR 1931 All 735 (736) : 133 I.C. 911 (DB), *Bunni Pandey* v. *Brahmdeo Pandey.* (Do.)

('29) 16 AIR 1929 Lah 761 (762) : 119 Ind Cas 733 (DB), *Shib Narain* v. *Lachmi Narain.*

('33) 20 AIR 1933 Cal 435 (437) : 143 Ind Cas 164 : 60 Cal 1037 (S B), *Jiban Krishna* v. *Abdul Kadir.*

('33) 20 AIR 1933 All 846 (849) : 148 Ind Cas 229 : 56 All 142 (D B), *Sohan Lal* v. *Atal Nath.*

('32) 19 AIR 1932 All 30 (31) : 134 Ind Cas 450 (D B), *Hazari* v. *Mt. Maktula.*

('29) 16 AIR 1929 Bom 262 (264, 265) : 53 Bom 453 : 122 I.C. 76 (DB), *Pandarinath* v. *Thakoredas.*

('34) 21 AIR 1934 All 253 (255) : 147 I.C. 1201 (D B), *Laiq Ram* v. *Har Prasad.*

('30) 17 AIR 1930 Cal 34 (36, 37) : 56 Cal 1117 : 122 Ind Cas 201, *Khondkar Mahomed* v. *Chandra Kumar.*

('33) 20 AIR 1933 Oudh 274 (275) : 145 Ind Cas 363 : 8 Luck 504, *Naqi Ahmed* v. *Sheo Shankarlal.*

('30) 17 AIR 1930 Cal 422 (423) : 57 Cal 148 : 124 Ind Cas 817 (D B), *Janakinath Singha* v. *Nirodbaran Ray.*

('29) 16 AIR 1929 Mad 881 (882) : 121 I. C. 858 : 53 Mad 119 (D B) *Thayammal* v. *Muthukumaraswami.* (Evidence Act S. 68; amendment by Act XXXI of 1926.)

('30) 17 AIR 1930 All 561 (567) : 125 Ind Cas 754 (D B), *Parasram* v. *Mt. Mewa Kunwar.*

('30) 17 AIR 1930 All 706 (709) : 128 Ind Cas 390 : 52 All 886 (DB), *Sheopujan Rai* v. *Bishnath Rai.*

('29) 16 AIR 1929 Nag 282 (283) : 119 Ind Cas 682, *Gokal Prasad* v. *Govindrao Subhedar.* (Amendment giving jurisdiction in election petitions to Civil Courts—Change in forum operates retrospectively.)

('31) 18 AIR 1931 All 489 (490) : 53 All 687 : 136 Ind Cas 284 (F B), *Pitam Lal* v. *Kalla Ram.*

('13) 19 Ind Cas 793 (798) (Cal), *Manjuri Bibi* v. *Akkel Mohammad.*

('10) 5 Ind Cas 980 (980) : 5 Low Bur Rul 148 (DB), *Mashedee Khan* v. *Mahomed Azim.*

('10) 7 Ind Cas 11 (14) (D B) (All), *Shamsheryar Khan* v. *Gopal Chand.*

('84) 8 Bom 511 (523) (D B), *In re Bhagwandas Hurjeevan.*

('94) 18 Bom 429 (432) (D B), *Hajrat Akramnnissa* v. *Valiulnissa.*

('97) 21 Bom 822 (825, 826) (D B), *Gangaram* v. *Punamchand Nathuram.*

('86) 12 Cal 583 (589) (F B), *Bhobo Sundari Debi* v. *Rakhal Chunder Bose.*

vested right in any particular form of, much less in an older form of procedure.[4] But, where some of the provisions of the enactment of procedure do affect vested rights, whether substantive[5] (*e. g.* rights to

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('04) 27 Mad 538 (539):14 M. L. J. 340 (DB), *Vedavalli Narasiah* v. *Mangamma.*

('21) 8 AIR 1921 Mad 650 (651) : 62 Ind Cas 795 (DB), *Vaithinatha Iyer* v. *Govindaswami Odayar.* (Rules of limitation.)

('24) 11 AIR 1924 Cal 983 (984) : 26 Cri L Jour 353 : 84 Ind Cas 705 (DB), *Rajib Lochan Dhar* v. *Jogesh Chandra Das.*

('24) 11 AIR 1924 Mad 657 (657) : 47 Mad 384 : 25 Cri L Jour 361 : 77 Ind Cas 297 (DB), *Nataraja Pillai* v. *Rangaswami Pillai.* (Criminal Procedure Code.)

('24) 11 AIR 1924 Nag 24 (25, 26) : 76 I. C. 82 (DB), *The Commissioner of Income-tax, C. P.* v. *Dharamchand.*

('26) 13 AIR 1926 All 667 (668) : 96 Ind Cas 93, *Kharag Singh* v. *Kiddha.*

('26) 13 AIR 1926 Pat 561 (563) : 97 Ind Cas 608 (DB), *Chote Lal* v. *Tula Singh.*

('27) 14 AIR 1927 Nag 127 (128):101 I. C. 284:23 N. L. R. 50, *Kedarnath* v. *Netram.*

(1878) 3 App Cas 582 (603), *Gardener* v. *Lucas.*

(1876) 1 Ch D 48 (50):45 LJ Ch 12:33 LT 774:24 W R (Eng.) 184, *In re Suche & Co.*

('18) 5 AIR 1918 Mad 919 (920) : 41 Ind Cas 268 (DB), *Nimmala Mahankali* v. *Kallakuri Subba Rao.* (Civil Procedure Code.)

('11)'11 Ind Cas 912 (913) : 7 Nag L R 125 (DB), *Shankargir* v. *Ramchandra.*

('21) 8 AIR 1921 Pat 185 (186) : 61 Ind Cas 4 (DB), *Kedar Nath* v. *Tarini Prasad.*

('10) 6 Ind Cas 1015 (1016) : 13 Oudh Cas 152, *Gokul Prasad* v. *Ali Baksh.*

('10) 8 I.C. 999 (1039) : 1910 Pun Re No. 97 (DB), *Mt. Nahal Devi* v. *Kishore Chand.*

('90) 14 Bom 516 (525) (DB), *Javanmal Jitmal* v. *Mukta Bai.*

('95) 19 Bom 204 (206) (DB), *Bal Krishna Pandarinath* v. *Bapu Yesaji.*

('12) 13 Ind Cas 264 (266) : 5 Sind L R 184, *Hemandas* v. *Chellaram.* (Declaratory enactments also retrospective.)

('08) 12 Cal W N 987 (989) (DB), *Rahimuddin Sarkar* v. *Jagatkishore.*

('27) 14 AIR 1927 All 657 (659) : 104 Ind Cas 292 : 50 All 202 (DB), *Nissar Hussain* v. *Sundar Lal.* (Procedural law has immediate effect.)

('11) 10 Ind Cas 823 (823) : 1911 Pun L R No. 70, *Zaibulnissa* v. *Ghulam Fatima.*

('69) 11 Suth W R 100 (100) (DB), *Shamee Mohammad Sircar* v. *Brinda Mundle.*

(1864) 1864 Suth W R (Gap) Act X Rul 19 (20, 21) (DB), *Messrs. R. Watson & Co.* v. *Rutnokanth Roy.*

(1865) 2 Suth W R Misc 17 (17)(DB), *Collector of Beerbhoom* v. *Raj Coomaree Dassia.*

(1865) 4 Suth W R 13 (14) (DB), *Shahzada Mohammad Buseeroodeen* v. *Nawab Hazee Mohammad Khan Kuzulibash.*

('04) 1904 Pun Re No 90 (FB), *Shaib Dad* v. *Rahmat.*

('31) 18 AIR 1931 Mad 83 (85) : 130 Ind Cas 177 : 54 Mad 627 (DB), *Pannirselvam* v. *Veeriah Vandayar.*

[*See* ('20) 7 AIR 1920 Cal 588 (592) : 53 Ind Cas 764 (767) (DB), *Habibullah* v. *Soleman Quadir.* (Mussalman Wakf Validating Act, 1913, not declaratory.)

('16) 3 AIR 1916 Cal 861 (863) : 33 Ind Cas 54 (DB), *Jotiram Khan* v. *Jonaki Nath.* (Do.)

('30) 17 AIR 1930 Lah 1004 (1007) : 129 Ind Cas 6 : 12 Lah 172, *R. H. Skinner* v. *Veronico Skinner.* (Alteration in procedure may have retrospective effect.)

('28) 15 AIR 1928 Mad 1173 (1174) : 113 Ind Cas 416, *Muthukrishna Pillai* v. *Ayyasami Ayyar.* (Act I of 1926 being declaratory Act is retrospective—Right to attachment mere processual right.)]

[4] ('39) 26 AIR 1939 Pat 282 (283) : 18 Pat 355 : 183 Ind Cas 212 (DB), *Biranchi Singh* v. *Nand Kumar.*

('29) 16 AIR 1929 Bom 262 (265) : 53 Bom 453 : 122 Ind Cas 76 (DB), *Pandari Nath* v. *Thakoredas.*

('09) 4 Ind Cas 492 (493) (All), *Inderjit* v. *Arshad Ali.*

('10) 7 Ind Cas 11 (14) (DB) (All), *Shamsheryar Khan* v. *Gopal Chand.*

('11) 9 Ind Cas 800 (801) (All), *Payne & Co.* v. *Brahmdeo.*

('14) 1 AIR 1914 Oudh 125 (125, 126) : 25 Ind Cas 668, *Sankatha Prasad* v. *Raja Krishna Datt Singha.*

('30) 17 AIR 1930 Cal 422 (423) : 57 Cal 148 : 124 Ind Cas 817 (DB), *Janakinath Singha* v. *Nirodbaran Ray.*

('21) 8 AIR 1921 Pat 185 (186) : 61 Ind Cas 4 (DB), *Kedar Nath* v. *Tarini Prasad.*

('84) 6 All 262 (268) : 1884 All W N 79 (FB), *Ganga Sahai* v. *Kishen Sahai.*

[5] ('25) 12 AIR 1925 Lah 446 (447, 448) : 6 Lah 262 : 93 Ind Cas 149 (DB), *Crown* v. *Fitzmaurice.* (Right of trial by jury.)

Preamble Note 15

property or under contract), or remedial[6] (*e. g.* right of appeal or of reference), retrospective operation of such provisions will apply.

Rules of limitation are, *prima facie*, rules of procedure and consequently no one has any vested right *in a period of limitation*, unless the contrary follows from the rules themselves.[7] When the Act prescribes a period of limitation for the institution of a particular suit, it does not create any *right* in favour of any person or define or create causes of action, but simply prescribes that the remedy can be exercised only within a limited period and not subsequently.[8] Nor does the law

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('10) 6 Ind Cas 188 (189) : 32 All 499 (DB), *Kounsilla* v. *Ishri Singh*. (Right to execute decree is a substantive right.)

[6] ('27) 14 AIR 1927 P C 242 (244) : 54 Ind App 421 : 9 Lah 284 : 106 Ind Cas 156 (P C), *Delhi Cloth & General Mills Co.* v. *Income-tax Commr., Delhi*. (Right of finality of orders.)

('14) 1 AIR 1914 Cal 806 (810) : 41 Cal 1125 : 24 Ind Cas 37 (FB), *Gopeswar* v. *Jiban Chandra*.

('21) 8 AIR 1921 Mad 126 (128) : 61 Ind Cas 979 (DB), *Viswanatha Sastri* v. *Seetalakshmi Ammal*.

('24) 11 AIR 1924 Nag 24 (25, 26) : 76 Ind Cas 82 (DB), *The Commissioner of Income-tax, C. P.* v. *Dharamchand*.

('11) 9 Ind Cas 55 (55) (Mad), *Venkatachellaya* v. *Subramania Aiyar*. (6 Bom 26, followed.)

[7] ('38) 25 AIR 1938 Mad 688 (693, 699) : 179 Ind Cas 16 (DB), *Giridharilal Son & Co.* v. *Kappini Gowder*. (Per Venkataramana Rao, J.—See however the observations of Pandrang Row, J., to the effect that the law of limitation is retrospective if it is clearly intended to be retrospective and not because it is merely a matter of procedure.)

('37) 24 AIR 1937 Pat 605 (606) : 171 Ind Cas 953, *Badri Narayan Singh* v. *Ganga Singh*. (In absence of express intention of Legislature affecting vested rights change of limitation is to be taken as a matter of procedure.)

('26) 13 AIR 1926 All 93 (94) : 90 Ind Cas 274 : 48 All 121 (DB), *Mt. Begam Sultan* v. *Sarvi Begam*.

('28) 15 AIR 1928 All 708 (708) : 110 Ind Cas 719 : 50 All 865, *Baijnath* v. *Doolarey Hajjam*.

('16) 3 AIR 1916 Pat 300 (303) : 34 Ind Cas 27 : 1 Pat L Jour 214 (DB), *Krishna Dayal Gir* v. *Mt. Sakina Bibi*.

('30) 17 AIR 1930 Cal 422 (423) : 57 Cal 148 : 124 Ind Cas 817 (DB), *Janakinath Singha* v. *Nirodbaran Ray*. (Matters of procedure apply to pending suit if law is changed during pendency.)

('30) 17 AIR 1930 Cal 34 (38) : 122 Ind Cas 201 : 56 Cal 1117 (DB), *Khondkar Mahomed Saleh* v. *Chandra Kumar Mukherji*.

('11) 11 Ind Cas 635 (636) : 36 Mad 108 (DB), *Krishna Doss* v. *Alambu Ammal*.

('31) 18 AIR 1931 All 635 (639, 640) : 136 Ind Cas 145 : 54 All 299 (FB), *Ram Karan Singh* v. *Ramdas Singh*. (Question of limitation should be decided as per Act in force at institution of suit.)

[*See* ('78) 1878 Pun Re No 59, *Mehtab Rai* v. *Nanak Chand*. (Limitation is not a question of jurisdiction.)]

[8] ('94) 21 Cal 8 (18) : 20 Ind App 183 : 6 Sar 334 : 17 Ind Jur 481 (P C), *Harinath* v. *Mothoor Mohun*.

('31) 18 AIR 1931 All 635 (649) : 136 Ind Cas 145 : 54 All 299 (F B), *Ram Karan Singh* v. *Ramdas Singh*. (Per Bajpai, J.)

('32) 19 AIR 1932 All 543 (544) : 138 Ind Cas 396 : 54 All 525 (D B), *Bhajja* v. *Mohammad Said Khan*.

('24) 11 AIR 1924 Pat 721 (728) : 3 Pat 880 : 83 Ind Cas 812 (D B), *Kesho Prasad Singh* v. *Madho Prasad Singh*. (Article 141 cannot be construed as altering law of the land.)

('79) 3 Bom 207 (209) : 3 Ind Jur 566 (D B), *Jiri* v. *Ramji*. (Act does not define or create causes of action.)

('01) 28 Cal 37 (46) : 5 Cal W N 195 (D B), *Surjyamoni Dasi* v. *Kali Kanta Das*.

('23) 10 AIR 1923 Mad 462 (465) : 72 Ind Cas 488 (D B), *Aiyapparaju* v. *Veera Venkatakrishnayya*. (Per Venkatasubbarao, J.)

of limitation create any *obligation* to sue where none exists. Thus, where a sale is *void*, and it is not necessary to sue to have it set aside, the Limitation Act should not be so construed as to create an obligation to sue.[9]

It follows that in respect of any particular suit or proceeding the law of limitation applicable is the law which is in force on the day on which such suit or proceeding is instituted notwithstanding that the cause of action may have arisen before such Act came into force.[10]

('30) 17 AIR 1930 Rang 228 (230, 231) : 8 Rang 380 : 127 Ind Cas 161 (FB), *Abdul Ganny* v. *Mrs. Russel.* (It restricts remedies, not substantive rights.)
('12) 16 Ind Cas 742 (744) (DB) (Cal), *Kumeda Charan Bala* v. *Ashuthosh Chatopadhya.*
('16) 3 AIR 1916 Cal 661 (663) : 30 Ind Cas 824 (DB), *Kalicharan Nath* v. *Sukhada Sundari Debi.*
('25) 12 AIR 1925 Oudh 400 (401) : 86 Ind Cas 725, *Ram Narain* v. *Barkandi.*
[*See* ('97) 24 Cal 1 (7) : 23 Ind App 97 : 6 Sar 680 (PC), *Hurri Bhusan* v. *Upendra Lal.*]
[*See also* ('15) 2 AIR 1915 Cal 173 (175) : 42 Cal 550 : 26 Ind Cas 296 (DB), *Mohini Mohun* v. *Surendra Narain.* (Limitation Act does not give a party a right of suit unless such a right exists independent of the Limitation Act.)]
See also Article 122, Note 1.

[9] ('15) 2 AIR 1915 Mad 1196 (1197) : 29 Ind Cas 1 : 39 Mad 456 (DB), *Narayanan Chettiar* v. *Lakshmanan Chettiar.*

[10] ('40) 27 AIR 1940 P C 116 (121) : 67 Ind App 251 : ILR (1940) Kar P C 251 : ILR (1940) Lah 493 : 189 Ind Cas 1 (PC), *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.* (By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of Muslims but only in so far as it has not been modified by legislation—Thus the Limitation Act applies though limitation is not an original principle of Mahomedan law.)
('39) 26 AIR 1939 Pat 282 (283) : 18 Pat 355 : 183 Ind Cas 212 (DB), *Biranchi Singh* v. *Nand Kumar.*
('39) 26 AIR 1939 Pat 122 (125) : 18 Pat 1 : 180 Ind Cas 414 (DB), *Reyasat* v. *Gopinath Missir.*
('37) 24 AIR 1937 Pat 605 (606) : 171 Ind Cas 953, *Badri Narayan Singh* v. *Ganga Singh.*
('37) 24 AIR 1937 Pat 311 (313): 169 Ind Cas 78, *Rameshwar* v. *Mangar Kahar.*
('37) 24 AIR 1937 Lah 9 (10) : 169 Ind Cas 732 (DB), *Abdul Kadir* v. *Siraj-ud-Din.* (Unless there is a distinct provision to the contrary.)
('18) 5 AIR 1918 Cal 841 (842) : 38 Ind Cas 609 (DB), *Badial Alam* v. *Abdul Hakim.* (Except in cases where the effect of such construction would be to take away the plaintiff's right of suit altogether.)
('17) 4 AIR 1917 Lah 144 (145) : 1916 Pun Re No 101 : 37 Ind Cas 292 (DB), *Manohar Lal* v. *Mt. Sadiqa Begam.*
('17) 4 AIR 1917 Pat 485 (487) : 1 Pat L Jour 214 : 34 Ind Cas 27 (DB), *Krishna Dayal Gir* v. *Sakina Bibi.*
('15) 2 AIR 1915 Lah 73 (74) : 27 Ind Cas 607, *Mahia Mal* v. *Ghulam Kadir.* (A person is entitled to the benefit of the new law of limitation extending the period if on the date of its coming into force his right to sue subsists.)
('13) 21 Ind Cas 43 (45) (DB) (Cal), *Barhanuddi* v. *Lal Khan.*
('09) 2 Ind Cas 981 (981) : 1909 Pun Re No 69, *Arura Mal* v. *Kesar Singh.*
('09) 2 Ind Cas 962 (963) : 1909 Pun Re No 64 (DB), *Jiwanah* v. *Abdulla.* (Right not barred under the old Act when new Act came into force—New Act applies even if it extends the period of limitation.)
('28) 15 AIR 1928 All 708 (708) : 110 Ind Cas 719 : 50 All 865, *Baijnath* v. *Doolarey Hajjam.*
('13) 19 Ind Cas 291 (294) : 35 All 227 : 40 Ind App 74 (84) (PC), *Soni Ram* v. *Kanhaiya Lal.* (Unless there is a distinct provision to the contrary.)
('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal* v. *Soni Ram.* (Following 7 Bom 459.)
('21) 62 Ind Cas 100 (100) (DB) (Pat), *Myers* v. *Divakar Manilal & Co.* (Law of limitation governs all proceedings taken after the date of its enactment — A I R 1917 Pat 485 followed.)

Preamble Note 15

Where a particular Limitation Act is *repealed* by another Act, the following positions may arise :

(1) Where, at the time of the new Act, a suit is barred according to the repealed Act.

(2) Where the suit is within time according to the old Act but the new Act prescribes a shorter term of limitation than the former Act.

(3) Where the suit is within time according to the old Act but barred according to the new Act and a future date is fixed for its coming into operation.

(4) Where the suit is within time according to the old Act but barred by the new Act, and the new Act comes into force at once.

In order to discuss these positions properly, it will be necessary to refer to section 6 of the General Clauses Act, X of 1897, which enacts as follows :

> "Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not —
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect ; or
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed ; or
>
> (d) ... ...

('27) 14 AIR 1927 Sind 270 (271) : 21 Sind L R 195 : 86 Ind Cas 757 (DB), *Ganga Ram* v. *Secretary of State.*

('30) 34 Cal W N 733 (734), *Kanai Lal Subbai* v. *Purnachandra Chatterji.*

('77) 1 Mad 264 (265) (DB), *Teagaraya Mudaly* v. *Mariappa Pillai.*

('74) 11 Bom H C R 117 (119) (DB), *Reg* v. *Dorabji.*

('77) 1 Bom 305*n* (307*n*) (DB), *Ramchandra* v. *Soma.* (Act IX of 1871 applies to a suit instituted after the Act came into force though the cause of action arises under the Act of 1859.)

('76) 1 Mad 52 (53), *Pasupati Latchmia* v. *Pasupati Muthambhatlu.*

('16) 3 AIR 1916 Cal 754 (755) : 29 Ind Cas 833, *Biswessor Sen* v. *Immamuddi Chowdhuri.*

('15) 2 AIR 1915 All 392 (393) : 37 All 597 : 30 I. C. 573, *Jia Bibi* v. *Ilahi Baksh.*

('81) 6 Cal 340 (347) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree.*

[*See* ('02) 1902 Pun Re No 4 : 1901 Pun L R No 153, *Ram Ditta* v. *Tehlu.* (Case under Punjab Limitation Act, 1900.)

(1864) 1 Suth W R 52 (52), *Radhamonee Dossee* v. *Goluck Chunder.*

('25) 12 AIR 1925 Bom 326 (326) : 87 Ind Cas 769 (DB), *Gulabrao Yeshwant* v. *Magan Ghelabhai.* (The limitation provided by S. 48, C. P. C., 1908, applies to application filed after the date when the new Code came into force though the decree itself is passed before new Code came into force.)]

[*See also* ('81) 3 All 340 (341, 342) (DB), *Bansidar* v. *Har Sahai.*

('31) 18 AIR 1931 All 635 (643, 645) : 136 Ind Cas 145 : 54 All 299 (FB), *Ram Karan Singh* v. *Ram Das Singh.* (Per Mukerji, J.)

('09) 3 Ind Cas 389 (390) (DB) (Cal), *Thakomoni Dasi* v. *Mohendra Nath Dey.*

(1864) 1864 Suth W R (Gap) 280 (280, 281) (DB), *Rajah Indoo Bhoosun Deb Roy* v. *Hurro Nath Roy.* (New Act coming into operation when plaint presented to proper Court on return—New Act governs the suit.)

(1864) 1864 Suth W R (Gap) Misc 6 (6) (DB), *Baboo Bishonath* v. *Chowdhry Kripa Narain Singh.*

('29) 16 AIR 1929 Lah 877 (878) : 117 Ind Cas 900, *Surat Singh* v. *Nihal Kaur.* (New Act coming into force when plaint presented to proper Court on return—New Act governs the suit.)]

[See however ('74) 7 Mad H C R 392 (394) (DB), *Chinnasami Aiyangar* v. *Gopalacharry.*]

Preamble
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(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation . . . . . . as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . . . . as if the Repealing Act or Regulation had not been passed."

It follows that, in the *first case*, the right of action which is barred by limitation at the time when the new Act comes into force cannot be revived by the change in the law subsequently.[11] [Clause (a) of S. 6 of Act X of 1897.]

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[11] ('40) 27 AIR 1940 Cal 115 (131) (DB), *Narendra Nath* v. *Midnapore Zamindari Co. Ltd.* (Extension of limitation by new Act cannot revive right barred under repealed Act.)
('39) 26 AIR 1939 Bom 342 (343) : 185 Ind Cas 149, *Karbalai Gulam* v. *Haji Ebrahim Busheri & Co.* (Suit barred under Art. 5—Right not revived by Bombay amendment of 1938, coming into force after suit became barred, under which a longer period is provided for such suits.)
('35) 22 AIR 1935 Mad 245 (245) : 157 Ind Cas 272, *Krishnaswami Naicker* v. *Thiruvengada Mudaliar.* (There is no provision in Limitation Act so retrospective in its effect as to revive and make effective a barred right.)
('25) 12 AIR 1925 Bom 339 (340) : 87 Ind Cas 699 (DB), *Indurai* v. *Shivlal.*
('15) 2 AIR 1915 Mad 749 (749) : 26 Ind Cas 368 (DB), *Akkamma* v. *Kopparam.* (New Act cannot revive barred rights without express words.)
('15) 2 AIR 1915 Mad 637 (639): 27 Ind Cas 109(DB), *Venkoba Row* v. *Nataraja.*
('06) 1906 Pun L R No. 15, p. 47 : 1905 Run Re No. 97, *Kahn Singh* v. *Hakim Singh.* (Suit barred under the Limitation Act, 1877 — Right is not revived by the Punjab Loans Limitation Act, 1904.)
('80) 5 Cal 894 (896) : 6 Cal L R 437 (DB), *Shumbhoonath Shaha* v. *Guruchurn Lahiri.* (Execution of decree barred under the Act of 1871 would not be revived under the Act of 1877.)
('76) 1 Bom 286 (291) (DB), *Sitaram* v. *Khanderav.* (Suit for share of immovable property barred under Reg. V of 1827 before Act IX of 1871 came into force — Art. 123 of Act of 1871 will not apply.)
('74) 7 Mad H C R 298 (300) (D B), *Venkataramanier* v. *Manche Reddy.*
('74) 7 Mad H C R 288 (290) (DB), *Naganna* v. *Narappa.*
('12) 16 Ind Cas 236 (237) (DB) (Mad), *Sakkarai Ambalagaran* v. *Sundilapathi.* (But where the right of suit is subsisting at the time when the new Act comes into force the plaintiff gets the extension under the new Act.)
('93) 20 Cal 487 (497) : 20 Ind App 30 : 6 Sar 261 : 17 Ind Jur 164 (PC), *Mohesh Narain* v. *Taruck Nath.*
('89) 12 Mad 26 (33) : 15 Ind App 167 : 12 Ind Jur 370 : 5 Sar 255 (PC), *Appasami* v. *Subramanya.*
('22) 9 AIR 1922 P C 187 (190, 191) : 49 Cal 203 : 48 Ind App 335 : 74 Ind Cas 660 (PC), *Sachindra Nath* v. *Maharaja Bahadur Singh.* (There is nothing in Act of 1908 so retrospective as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time.)
('80) 4 Bom 230 (234) : 5 Ind Jur 90 (DB), *Vinayak Govind* v. *Babaji.*
('84) 8 Bom 99 (103) : 8 Ind Jur 261 (DB), *Dharma Vithal* v. *Govind Sadvalkar.*
('93) 17 Bom 173 (183) (DB), *Bhogilal* v. *Amritlal.* (Per Telang, J.)
('78) 3 Cal 331 (335) : 2 Ind Jur 679 (DB), *Krishna Mohan Bose* v. *Okhilmoni Dossee.* (Per Markby, J.)
('04) 31 Cal 314 (317, 318) (DB), *Jagamba Gosamini* v. *Ram Chandra Goswami.*
('12) 39 Cal 506 (509, 510) : 15 I. C. 551 (DB), *Nepal Chandra* v. *Niroda Sundari.*
('10) 8 Ind Cas 689 (691) : 33 All 244 (DB), *Mod. Faiaz Ali* v. *Kallu Singh.*
('11) 10 Ind Cas 477 (480) : 33 All 356 : 38 Ind App 87 (PC), *Khunnilal* v. *Govind Krishna.*
('13) 20 Ind Cas 465 (466) : 16 Oudh Cas 157, *Raja Ram* v. *Parag Narain.*
('12) 17 Ind Cas 629 (632) : 37 Bom 393 (DB), *Mohammad Mehdi* v. *Sakinabai.*
('30) 17 AIR 1930 Bom 55 (57) : 122 I. C. 862 (DB), *Dhondi Shivaji* v. *Lakshman Mhaskuji.*
('28) 15 AIR 1928 Bom 28 (30, 31) : 107 Ind Cas 60 (D B), *Narayan Balaji* v. *Govind Sakharam.* (35 All 227 distinguished.)
('18) 5 AIR 1918 Mad 86 (88) : 43 Ind Cas 50 (D B), *Raman Kurup* v. *Chapan Nair.* (5 Mad 182 and 27 Cal 1004 followed.)
('77) 1877 Bom P J 85 (D B), *Vasudevabhat* v. *Krishnabhat.*

Preamble Note 15

In the *second case*, the general rule stated above with regard to the law of limitation applies, namely, the new Act applies to the proceeding notwithstanding that the period of limitation is shortened by the new Act. The reason is, as has been seen already, that no one has got a vested right in a period of limitation which is but a rule of procedure. When, therefore, at the time the new Act comes into force there is time even according to the new Act within which the suit can be instituted, the new Act will apply.[12] In such cases the fact that the new Act postpones the date of its coming into force becomes unimportant in deciding the question of its retrospective effect.[13]

In the *third case*, the fact that the Legislature has postponed the operation of the new Act shows that it has provided for all possible hardships and consequently the rule is that the new Act applies from the date of its taking effect.[14]

('82) 1882 Bom P J 224 (D B), *Bapuji* v. *Kasinath.*

('83) 1883 Bom P J 125, *Vithu* v. *Narayan.*

('84) 1884 Bom P J 73, *Rustomji* v. *Kuvarbai.*

('97) 2 Cal W N 162 (164) (D B), *Mohema Chunder Rai* v. *Gouri Nath Dey.*

('80) 1880 Pun Re No. 85, *Hakim Devi Dayal* v. *Prab Dayal.*

('01) 1901 Pun L R No. 53 p. 175 : 1901 Pun Re No. 39, *Teka* v. *Sohnu.* (Case under Punjab Limitation Act, 1900.)

('80) 5 Cal 897 (900, 901) : 6 Cal L R 489 : 3 Shome L R 154 (D B), *Nursing Doyal* v. *Hurryhur Saha.*

('74) 7 Mad H C R 283 (283) (D B), *Venkatachella Mudali* v. *Sashagherry Rau.*

[*See* ('77) 1 Mad 228 (234, 235) : 1 Ind Jur 231 : 1 Mad L R 351 (DB), *Valia Tambaratti* v. *Vira Rayan.* (A contractual right was existing when new act came into force.)

('15) 2 AIR 1915 All 314 (315) : 29 Ind Cas 292, *Amir Shah* v. *Tula Pande.* (Section 10 of Act of 1871 cannot be applied to a suit already barred before the Act of 1871 came into force.)]

[*See also* ('22) 9 AIR 1922 Lah 398 (398) (D B), *Hakumat Rai* v. *Wadhawa Singh.*

(1900) 27 Cal 1004 (1011) : 27 Ind App 103 : 4 Cal W N 565 : 7 Sar 718 (P C), *Fatimatulnissa Begum* v. *Sunder Das.*

('76) 1 Cal 328 (330), *Nocoor Chunder Bose* v. *Kally Coomar Ghose.* (Overruled in 6 Cal 340 on another point.)

('14) 1 AIR 1914 Mad 15 (16) : 22 Ind Cas 40 (DB), *Ramamma* v. *Narayanaswami.*

('18) 5 AIR 1918 Mad 794 (798, 799) : 40 Mad 846 : 41 Ind Cas 546, *Somasundaram Chettiar* v. *Vaithilinga Mudaliar.*]

[See however ('12) 16 Ind Cas 124 (125) : 34 All 412 (DB), *Ayesha* v. *Faiz Husain.* (Section 6 of the General Clauses Act not referred to.)]

[12] ('21) 8 AIR 1921 Bom 40 (43) : 45 Bom 365 : 59 Ind Cas 790 (DB), *Gopaldas Ganpatdas* v. *Tribhowan.* (Section 48, C. P. C., has retrospective effect in regard to decree obtained before the Code of 1908.)

('26) 13 AIR 1926 All 93 (94) : 90 Ind Cas 274 : 48 All 121 (DB), *Mt. Begam Sultan* v. *Sarvi Begam.*

[13] ('30) 17 AIR 1930 Cal 34 (37) : 56 Cal 1117 : 122 Ind Cas 201 (DB), *Khondkar Mahomed Saleh* v. *Chandra Kumar Mukherji.* (Observation of Lord Campbell, C. J., in *Queen* v. *Leeds and Broadford Ry. Co.*, (1852) 18 Q B 343, referred to.)

[14] ('39) 26 AIR 1939 Pat 282 (283, 285) : 18 Pat 355 : 183 Ind Cas 212 (DB), *Biranchi Singh* v. *Nand Kumar Singh.* (Bihar Tenancy Act, VIII of 1934—Retrospective intention inferred from the fact of its postponement of operation.)

('39) 26 AIR 1939 Pat 122 (125) : 18 Pat 1 : 180 Ind Cas 414 (DB), *Reyasat* v. *Gopinath Missir.* (The Bihar Tenancy Amending Act of 1934 applies to all suits instituted after 10th June 1935, whether the cause of action had accrued or not before that date.)

('37) 24 AIR 1937 Pat 311 (313, 314) : 169 Ind Cas 78, *Rameshwar Prasad* v. *Mangar Kahar.* (Bihar Tenancy (Amendment) Act, VIII of 1934.)

('85) 9 Bom 475 (477) (DB), *Baiva Khan* v. *Bhiku Sazba.* (Section 2 of the Act of 1877 extended the benefit of the Act of 1871 for a period of two years.)

In the *fourth case*, it will be observed that the result of applying the new Act would be to destroy the right to sue which was vested in the plaintiff on the date the new Act came into force. As has already been seen, even an enactment relating to procedure will not operate retrospectively so as to destroy *vested rights*, whether substantive or remedial. It follows that the suit in such cases can be filed within the time fixed by the old Act.[15] In *Rajah of Pittapur* v. *Gani Venkatasubba*

('79) 4 Bom 87 (89) (DB), *Ichhashankar* v. *Killa*. (Do.)
('82) 6 Bom 26 (29, 30) (DB), *Khushalbhai* v. *Kabhai*.
('13) 20 Ind Cas 821 (822) (DB) (Cal), *Budhu Kumar* v. *Hafiz Hussain*.
('22) 9 AIR 1922 Mad 417 (419) : 70 Ind Cas 743 (DB), *Ganapathi Mudaliar* v. *Krishnamachari*. (Retrospective intention may be inferred when new statute postpones its coming into effect.)
('21) 8 AIR 1921 Mad 650 (651) : 62 Ind Cas 795 (DB), *Vaithinatha Aiyar* v. *Govindaswami Udayar*.
('10) 7 Ind Cas 982 (985) (DB) (Bom), *Hope Mills Ltd.* v. *Vithaldas*.
('23) 10 AIR 1923 Nag 166 (167) : 71 Ind Cas 176, *Nimba* v. *Mt. Janki*.
(1865) 2 Mad H C R 42 (42), *Mohidin Sahib* v. *Khadir Sahib*.
('80) 2 Mad 397 (399) : 4 Ind Jur 335(DB), *Sabapathi Chetty* v. *Chidambaran*.
('81) 3 Mad 96 (97) : 5 Ind Jur 192 (DB), *Bandi Subbayya* v. *Madalapalli Subanna*.
('82) 8 Cal 51 (61) : 8 Ind App 123 : 11 Cal L R 113 : 4 Sar 248 (PC), *Mungul Pershad Dichit* v. *Grija Kant Lahiri*. (Limitation Act, IX of 1871—Section 1 expressly provided that portions of the Act did not affect suits instituted before 1st April 1873.)
('77) 1 Mad 301 (302) : 1 Ind Jur 736 (DB), *Madharan* v. *Achuda*.
('80) 2 Mad 113 (116) : 3 Ind Jur 415 (DB), *Appasami* v. *Aghilanda*.
[*See* ('78) 1878 Bom P J 269, *Ramachandra* v. *Gunwantrao*.
(1865) 4 Suth W R Misc 24 (24) (DB), *Mudoosoodan Mookerji* v. *Dinomoonee Banerjee*.
('81) 5 Bom 673 (679) (FB), *Bhikambhat* v. *Joseph Fernandez*. (Act XIV of 1859 and not Act IX of 1871 applied to application in suits instituted before 1st April 1873.)]
[*See also* ('10) 5 Ind Cas 421 (422) : 34 Mad 292, *Palaniappa Chettiar* v. *Valayuta Pillai*.]
[But see ('21) 8 AIR 1921 Mad 126 (129) : 61 Ind Cas 979, *Viswanath Sastri* v. *Sitalakshmi Ammal*. (Inference of non-retrospectiveness made from the fact of the new statute postponing the date of its coming into effect is unsound—Per Oldfield, J.)]

[15] ('23) 10 AIR 1923 Lah 642 (643) : 73 Ind Cas 357 (D B), *Sarup Singh* v. *Pal Singh*. (A right to sue acquired before the Punjab Limitation Act, 1900, came into force will not be affected by that Act.)
('16) 3 AIR 1916 Mad 912 (913):30 Ind Cas 94:39 Mad 645 (DB), *Raja of Pittapur* v. *Gani Venkatasubba Row*. (AIR 1916 Mad 607 followed.)
('24) 11 AIR 1924 Pat 183 (184) : 71 Ind Cas 957, *Gokaran Prasad* v. *Waris Ali*. (Intention to defeat vested rights without compensation is not to be imputed to Legislature.)
('13) 19 Ind Cas 793 (807) (DB) (Cal), *Manjuri Bibi* v. *Akkel Mahmud*.
('27) 14 AIR 1927 P C 242 (244) : 54 Ind App 421 : 106 Ind Cas 156 : 9 Lah 284 (PC), *Delhi Cloth & General Mills Co. Ltd.* v. *Income-tax Commissioner, Delhi*.
('11) 11 Ind Cas 401 (402) (DB) (Cal), *Fazil Karim* v. *Ananda Mohan Roy*.
('82) 6 Bom 26 (29, 30) (DB), *Khushalbhai* v. *Kabhai*.
('16) 3 AIR 1916 Mad 607 (608):18 Ind Cas 64 : 38 Mad 101, *Ramakrishna Chetty* v. *Subraya Iyer*.
[*See* ('22) 9 AIR 1922 Cal 491 (492): 70 Ind Cas 370 (DB), *Ajit Singh* v. *Bhagabati Charan Mukerjee*. (In this case, though the Amending Act introduced a shorter period of limitation the application in question did not become barred according to that Act on the date of its coming into operation—Still the Court held the old Act applied—This cannot be considered to be right.)
('10) 8 Ind Cas 189 (189) (Bom), *Gajanan Vinayak* v. *Waman*.
('33) 20 AIR 1933 Oudh 38 (40): 140 Ind Cas 182, *Ragunandan Misra* v. *Mahadeo*. (Amendment to Art. 134 by Act I of 1929 cannot have retrospective effect so as to displace rights acquired by prescription.)

Preamble
Note 15

Row,[16] Wallis, C. J., observed as follows :

> "The principle to be applied is that where an Act contains provisions for the limitation of suits which take away altogether a *vested right of suit* without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. This rule of construction was adopted to give effect to the presumed intention of the Legislature not to take away vested rights in this fashion."

Of course it is always open to the Legislature, by express words, to apply a new statute of limitation so as to *take away* a right of suit or other proceeding; but in that case it will be simply an instance of the *express intention* of the Legislature overriding the ordinary rule of construction.[17] See also the undermentioned cases.[18]

An alteration of the law of limitation *during the pendency* of a suit or proceeding does not, in any event, affect such suit or proceeding.[19]

A law creating a *new right* cannot, as such, be presumed to have no retrospective effect. The rule against retrospective operation is

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('30) 17 AIR 1930 Pat 455 (467):9 Pat 885:127 Ind Cas 817 (DB), *Naurangi Lal* v. *Ram Charan Das.*

('76) 1 Bom 286 (291) (DB), *Sitaram Vasudev* v. *Khanderav Balkrishna.*]

[16] ('16) 3 AIR 1916 Mad 912 (913):30 Ind Cas 94:39 Mad 645.

[17] ('37) 24 AIR 1937 Pat 605 (606) : 171 Ind Cas 953, *Badri Narayan Singh* v. *Ganga Singh.* (In absence of express intention change of limitation is to be taken as a matter of procedure.)

('12) 14 Ind Cas 184 (186) (DB) (Mad), *Sundaram Iyer* v. *Muthu Ganapathi Iyer.* (Per Abdur Rahim, J.—Section 210 of Madras Estates Land Act is retrospective.)

('10) 5 Ind Cas 420 (421) : 34 Mad 292 (DB), *Arayil Kali Amma* v. *Pelappakkara Manakal.*

('21) 8 AIR 1921 Bom 40 (43):45 Bom 365:59 Ind Cas 790 (DB), *Gopaldas Ganapatdas* v. *Tribhowan.* (Section 48, C. P. C., 1908, has retrospective effect.)

('13) 21 Ind Cas 113 (114) (DB) (Cal), *Narendra Lal* v. *Upendra Nath.*

('17) 4 AIR 1917 Lah 144 (147):37 Ind Cas 292:1916 Pun Re No. 101 (DB), *Manohar Lal* v. *Mt. Sadiqa Begum.*

('10) 8 Ind Cas 543 (544): 35 Mad 678 (DB), *Chidambarm Chetty* v. *Karuppan.* [*See* ('23) 72 Ind Cas 989 (991) (Pesh), *Ghulam Haidar* v. *Bazid Shah.* (The Legislature has power to revive even a lapsed title if it makes a special law which distinctly allows such a revival.)

('83) 7 Bom 459 (462, 463) (DB), *Gurupadappa Basapa* v. *Virbhadrapa Irsangapa.* (A new Limitation Act may itself state when it is to take effect.)]

See also Section 6 Note 4.

[18] ('16) 3 AIR 1916 Pat 300 (303):34 Ind Cas 27 (DB), *Krishna Dayal Gir* v. *Mt. Sakina Bibi.* (Limitation Act governs all proceedings from date of its enactment.)

('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori Dasi* v. *Mukund Lal.*

[19] ('34) 21 AIR 1934 P C 77 (78):147 Ind Cas 887:61 Ind App 50:56 All 111 (PC), *Mt. Allah Rakhi* v. *Shah Mohammad Abdur Rahim.* (Amendment of 1929 to S. 10, Limitation Act, does not govern previously instituted suit.)

('14) 1 AIR 1914 Cal 167 (167):19 Ind Cas 968 (969) (DB), *Maula Baksh* v. *Bhabasundari Dasya.*

('10) 6 Ind Cas 488 (489) : 1910 Pun L R No. 5, *Gujjar Mal* v. *Sita Ram.* (New Act cannot be construed as depriving a person of rights which he had under the old law and which rights he was actually seeking to enforce at the time when new Act came into force.)

('01) 1901 Pun L R No. 153, p. 392:1902 Pun Re No. 4 (DB), *Ram Ditta* v. *Tehlu.* (The Punjab Limitation Act does not apply to a suit instituted before the date of its enactment.)

('83) 9 Cal 446 (449):12 Cal L R 431 (DB), *Behari Lall* v. *Goverdhun Lall.* (2 Bom 148 followed.)

[See however ('66) 5 Suth W R 95 (96) (PC), *Lall Dokul Sing* v. *Lall Rooder Purtab Sing.*]

intended to apply not so much to a law creating a new *right* as to a law creating a new *obligation* or interfering with vested rights. Where the new right is created expressly under conditions which prevent its imposing any new obligation on, or its interfering with, any vested rights in others, the reason against its retrospective operation ceases to exist.[20]

In the undermentioned case[21] of the Calcutta High Court the question was raised without being decided whether, when a later Limitation Act repeals a prior Act which itself had kept alive certain provisions of a still earlier Act, the earliest Act was kept in force in so far as those provisions were concerned. But subsequently the same High Court has decided[22] the question and laid down that the earliest Act was not kept in force.

16. Limitation bars remedy but does not destroy right. — As has been seen in Note 3, *limitation*, as distinguished from prescription, merely bars the remedy but does not destroy the right,[1] which remains and continues available in other ways. Thus, where a suit or a debt is barred by limitation, the debt nevertheless remains; it is open to the debtor to pay the barred debt and the payment cannot be recalled on the ground of failure of consideration.[2] Similarly, a barred debt is a good consideration for a written promise to pay it. See S. 25 of the Contract Act. See Note 14 under section 3.

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[20] ('95) 22 Cal 767 (777, 778) (FB), *Jagadanund Singh* v. *Amirta Lall Sircar.* (Overruling 14 Cal 636.)

[21] ('83) 9 Cal 644 (646, 647) (DB), *Radha Prosod Singh* v. *Sundur Lall.*

[22] ('85) 11 Cal 55 (58) (DB), *Bacharam Dutta* v. *Abdul Wahed.*

Note 16

[1] ('39) 26 AIR 1939 Bom 494 (496) : I L R (1939) Bom 685 : 185 Ind Cas 366, *Surat Borough Municipality* v. *Sarifa Karunnisa.* (The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under S. 28, Limitation Act.)
('87) 14 Cal 50 (55) (D B), *Anando Kishore Dass* v. *Anando Kishore Bose.*
('10) 7 Ind Cas 898 (899): 33 Mad 308 (D B), *Subramania Iyer* v. *Gopala Iyer.*
('31) 18 AIR 1931 All 635 (649) : 136 Ind Cas 145: 54 All 299 (F B), *Ram Karan Singh* v. *Ram Das Singh.* (Obiter—Per Bajpai, J.)
('30) 17 AIR 1930 Rang 228 (232) : 8 Rang 380 : 127 Ind Cas 161 (F B), *Abdul Ganny* v. *I. M. Russell.* (Per Carr, J.)
('21) 8 AIR 1921 Lah 170 (171): 65 Ind Cas 642 (DB), *Nathwa* v. *Kanhiya.* (AIR 1915 All 480, disapproved.)
('21) 8 AIR 1921 Lah 351 (352): 57 I.C. 348 (DB), *Akbar Hussain* v. *Ragnandan.*
('35) 22 AIR 1935 Oudh 213 (216) : 153 Ind Cas 307 : 10 Luck 481 (DB), *Sarda Nand* v. *Daya Shanker Singh.* (Mortgagee in possession — So long as possession lasts, his right to the mortgage money is not lost though right of suit on the mortgage may have become time-barred.)
[*See* ('16) 3 AIR 1916 Low Bur 67 (68): 35 I.C. 741, *S. King* v. *D. J. Buchanan.* ('80) 5 Cal 897 (899): 6 Cal LR 489: 3 Shome L R 154 (DB), *Nursingh Dayal* v. *Hurryhur Saha.*]
See also Section 28 Note 1.

[2] ('40) 27 AIR 1940 Lah 166 (169): 188 Ind Cas 833, *Punjab National Bank Ltd.* v. *Official Receiver, Karnal.* (Sections 60 and 61 of the Contract Act which recognise this principle give the right to a creditor to appropriate payments even towards time-barred debts.)
('40) 27 AIR 1940 Mad 908 (908), *Thimmanna Bhat* v. *Adyanthaya.* (The relationship of debtor and creditor does not cease even though the debt is barred by limitation.)
('39) 26 AIR 1939 Bom 494 (496): I L R (1939) Bom 685: 185 Ind Cas 366, *Surat Borough Municipality* v. *Sarifa Karunnisa.* (A barred debt if paid cannot be recovered back on the ground that it was barred by limitation.)

17. Limitation and defence. — See Note 15 to Section 3.

18. "Consolidate and amend."—"The very object of consolidation," said Lord Watson in *Administrator-General of Bengal* v. *Premlal Mullick*,[1] "is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed."

In the case, therefore, of a consolidating statute, the construction must be, not with reference to the circumstances existing at the time of the preceding Acts, but in relation to those existing at the time of the consolidating itself,[2] and the law should thenceforth be ascertained from that enactment itself and not from prior decisions.[3]

19. Act, if exhaustive. — "The essence of a Code," said Lord Davy in *Gokul Mandar* v. *Pudmanund Singh*,[1] "is to be exhaustive on the matters *in respect of which it declares the law*, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

The Indian Limitation Act is an exhaustive Code governing the law of limitation in India in respect of all matters specifically dealt with by it, and the Indian Courts are not permitted to travel beyond its provisions to add to or supplement them.[2] In respect of matters

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('77) 1 Mad 267 (276) : 1 Ind Jur 367 : 1 Mad L R 343 (DB), *Administrator-General* v. *Hawkins*.

[*See* ('21) 8 AIR 1921 Cal 67 (68): 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal* v. *Tarubala Dassi*. (A creditor can enforce the lien in respect of the debt though the debt itself is barred.)

('10) 7 Ind Cas 399 (400): 34 Mad 167 (DB), *Kandaswami Pillai* v. *Avayambal*.]

Note 18

[1] ('95) 22 Cal 788 (798): 22 Ind App 107: 6 Sar 603 (PC). (It is not correct to give the Act a meaning in the light of the circumstances present at the time of the enactment in its original form.)

[*See also* ('30) 17 AIR 1930 All 225 (230) : 125 Ind Cas 477 : 52 All 619 (F B), *Santha Nand Gir* v. *Basudevanand*. (Consolidation means reduction to a system of the whole of the statute law relating to the same subject-matter as illustrated by judicial decisions.)]

[2] ('95) 22 Cal 788 (798) : 22 Ind App 107 : 6 Sar 603 (PC), *The Administrator-General of Bengal* v. *Premlal Mullick*.

[3] ('96) 23 Cal 563 (571, 572): 23 Ind App 18 : 6 Mad L Jour 71 : 6 Sar 667 (PC), *Norendra Nath Sircar* v. *Kamalbasini Dassi*.

('01) 28 Cal 517 (528): 5 Cal W N 640 (DB), *Lala Suraj Prosad* v. *Golab Chand*.

('23) 10 AIR 1923 Mad 523 (525): 73 Ind Cas 343: 46 Mad 605: 24 Cri L Jour 599 (FB), *Gopal Naidu* v. *Emperor*. (Per Schwabe, C. J.)

('09) 4 Ind Cas 442 (445)(DB)(Cal), *Bidhumukhi Dasi* v. *Jitendra Nath*. (Essence of a Code is to be exhaustive on matters in respect of which it declares the law.)

('09) 1 Ind Cas 829 (832) : 36 Cal 354 (364) (DB), *Burn & Co. Limited* v. *Colin McDonald*. (Per Maclean, C. J.)

Note 19

[1] ('02) 29 Cal 707 (715) : 29 Ind App 196 : 6 Cal W N 825 : 4 Bom L R 793 : 8 Sar 323 (PC).

[2] ('40) 27 AIR 1940 Rang 276 (278) : 1941 Rang L R 1 : 192 I. C. 625 (FB), *Firm Eng Gim Moh* v. *Chinese Merited Banking Co. Ltd.* (There is no judicial discretion to relieve the parties from the operation of the Limitation Act in a case of hardship or any authority in the Court to dispense with its provisions.)

not dealt with by it, however, the Act does not apply and there will be no limitation in respect of such matters. It is a rule of construction of every statute that the Court ought not to act on the principle that every procedure is to be taken as *prohibited* unless it is expressly provided for, but should proceed on the converse principle that every procedure is to be understood as *permissible* till it is shown to be prohibited by law.[3] Again, while the periods of limitation or the rules of computation must be strictly confined to the limits of the Act, there will be nothing repugnant in so *construing the words* of column 3 of the schedule as to date a cause of action only when the remedy based on it is available.[4]

('39) 26 AIR 1939 All 82 (83, 84) : ILR (1939) All 207 : 180 Ind Cas 927 (DB), *Lakhmi Chand* v. *Bibi Kalsumannissa.* (It is not permissible to the Court to discover in the provisions of the Limitation Act general principles and to apply these principles to cases which are not specifically provided for by the Act itself.)

('38) 25 AIR 1938 Nag 534 (535) : ILR (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji* v. *Paiku.* (Effect must be given to the provisions of the Act unhampered by questions of expediency and the like.)

('35) 22 AIR 1935 P C 85 (88) : 62 Ind App 60 : 57 All 242 : 155 Ind Cas 205 (PC), *Maqbul Ahmad* v. *Onkar Pratap.* (The Court has no general discretion, outside the limits of the Act, to dispense with its provisions or to relieve a suitor from the operation of the Act in a case of hardship or mistake.)

('27) 14 AIR 1927 Lah 200 (208, 209) : 8 Lah 54 : 102 I. C. 523 (DB), *Hari Singh* v. *Mahomed Said.* (No saving of limitation apart from the provisions of the Act.)

('27) 14 AIR 1927 All 446 (449) : 49 All 565 : 102 Ind Cas 96 (DB), *Ram Charan Sahu* v. *Goga.* (No rule of suspension of limitation contrary to S. 9 of the Act.)

('33) 20 AIR 1933 Mad 418 (420) : 56 Mad 490 : 143 Ind Cas 1 (FB), *Sundaramma* v. *Abdul Kadir.* (Exemption unknown to the Limitation Act cannot be granted.)

('35) 22 AIR 1935 All 323 (325, 326) : 153 Ind Cas 1058 (DB), *Mahomed Yunis* v. *Tilog Chand.* (Principle of equity cannot be invoked to enlarge period of limitation.)

('26) 13 AIR 1926 Cal 65 (73) : 89 I. C. 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal.*

('28) 15 AIR 1928 Mad 509 (512, 513) : 111 I. C. 210 : 51 Mad 549 (DB), *Ammalu Amma* v. *Narayanan Nair.*

('25) 12 AIR 1925 Oudh 369 (369) : 87 Ind Cas 17, *Ram Pher* v. *Ajudhia Singh.* (A I R 1914 Bom 201 dissented from.)

('25) 12 AIR 1925 Mad 334 (337) : 85 Ind Cas 272 (DB), *Ammathayi Ammal* v. *Sivarama Pillai.* (No new ground of extension or suspension of time to be allowed.)

('27) 14 AIR 1927 Mad 597 (597) : 50 Mad 417 : 100 Ind Cas 776 (DB), *Satyanarayana Brahman* v. *M. Seethayya.* (No equitable ground of suspension of cause of action.)

('26) 13 AIR 1926 Mad 857 (859) : 96 Ind Cas 657 (DB), *Sornam Pillai* v. *Thiruvazhiperumal Pillai.*

[*See* ('36) 23 AIR 1936 All 383 (384) : 163 Ind Cas 244 (DB), *Ram Gopal* v. *Mt. Ganga Devi.*

('32) 142 Ind Cas 23 (24) (DB) (Cochin), *Sankunny Menon* v. *Parameswara Menon.* (Cochin Limitation Regulation.)]

[3] ('83) 5 All 163 (172) : 1882 All W N 202 (FB), *Narsingh Das* v. *Mangal Dubey.* (Per Mahmood, J.)

('89) 11 All 267 (287) : 1889 All W N 55 : 13 Ind Jur 427 (FB), *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan.*

('25) 12 AIR 1925 Mad 42 (44) : 84 Ind Cas 134 : 48 Mad 494, *Sooryaprakasam* v. *Muniswami Chetti.* (Section 151, C. P. C.)

('10) 5 Ind Cas 532 (534) : 37 Cal 399 (DB), *Chhayunnissa Bibi* v. *Basirar Rahman.* (But Court should see that the decision is not in conflict with the intention of Legislature.)

[4] ('25) 12 AIR 1925 Cal 456 (459) : 86 I. C. 130 (DB), *Dina Nath* v. *Jadu Nath.*

('20) 7 A I R 1920 Mad 1 (13) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthukorakkal* v. *Madar Ammal.* (Per Seshagiri Aiyar, J.)

[*See* ('35) 22 A I R 1935 Cal 333 (335) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra* v. *Rebateemohan Das.*]

Preamble Note 20

20. "Certain applications to Courts."—The Act lays down the law relating to the limitation of *all* suits and appeals but of *certain* applications only. These applications are specified in the articles of the Act dealing with *applications.* The Act does not govern an application which does not fall under one or the other of these articles.[1]

The Limitation Act applies only to such applications as a party is bound to make for securing the relief he requires and does not apply when the application relates to an action which the Court ought to take *of its own motion,* whether the parties apply for it or not,[2] or which the Court has no discretion to refuse,[3] or which is only

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Note 20

[1] ('28) 15 AIR 1928 Bom 236 (238) : 52 Bom 360 : 109 Ind Cas 734 (DB), *Shankar Appaji* v. *Ganga Ram Bapuji.* (Application to ascertain mesne profits.)
[*See* ('02) 25 Mad 724 (725) : 12 Mad L Jour 438, *Alagappa Chetty* v. *Sarathambal.* (Application for insolvency after one month mentioned in S. 55, C. P. C.—Not barred by limitation.)]

[2] ('16) 3 A I R 1916 Cal 231 (232, 233) : 28 Ind Cas 211 (DB), *Beni Singh* v. *Berhamdeo Singh.* (Application under O. 34, R. 5 (2) must be made by party — Hence Article 181 applies.)
('30) 17 AIR 1930 Nag 206 (207) : 26 Nag L R 166 : 122 Ind Cas 441, *Mt. Lakshmi Bai* v. *Tukaram.* (An application for appointment of a commissioner to make partition, the preliminary decree itself having made provision for the appointment — No limitation : 4 Mad 172 relied on.)
('04) 28 Mad 127 (129) : 14 Mad L Jour 436 (DB), *Latchmanan Chetty* v. *Ramanathan Chetty.* (Do.)
('15) 2 A I R 1915 Oudh 140 (141, 142) : 30 Ind Cas 230, *Ali Muhammad* v. *Alia Khanum.* (Court setting aside an erroneous order confirming a sale under S. 151, C. P. C. — No limitation.)
('06) 30 Bom 415 (420, 421) : 8 Bom L R 218 (DB), *Babaji* v. *Kushaba.* (Bombay Mamlatdar's Courts Act, 1876—Mamlatdar himself bound to order village officers to give effect to his order for possession without party's application.)
('13) 19 Ind Cas 496 (496) (Mad), *Hyder Sahib* v. *Giria Chettiar.* (Correction of obvious slips or mistakes in an award.)
('29) 16 AIR 1929 Pat 368 (368) : 8 Pat 482 : 117 Ind Cas 647 (D B), *Kamakhya Narayan Singh* v. *Akloo Singh.* (Application for ascertainment of mesne profits.)
('92) 19 Cal 132 (138, 139) (F B), *Puran Chand* v. *Roy Radha Kishen.*
[*See* ('26) 13 AIR 1926 Pat 141 (142, 143) : 5 Pat 223 : 92 Ind Cas 629 (D B), *Bhatu Ram Madi* v. *Fogal Ram.* (Application for mesne profits.)
('24) 11 AIR 1924 Pat 781 (782) : 4 Pat 57 : 84 Ind Cas 272, *Harakhpan Misser* v. *Jagdeo Missir.* (Do.)]
[*See also* ('24) 11 AIR 1924 Cal 895 (897) : 80 Ind Cas 55 (DB), *Chandra Kumar Mukhopadhya* v. *Sm. Sudhansu Badani Debi.* (Amendment under S. 152, C. P. C., can be made at any time.)
('13) 21 Ind Cas 540 (541) : 7 Sind L R 53 (D B), *Bikhomal Lal Chand* v. *Rajalmal Manomal.* (Do.)]
[See however ('28) 15 AIR 1928 Mad 522 (522) : 109 Ind Cas 528 (DB), *Timma Raju* v. *Narasimharaju.* (Application under O. 20, R. 12, C. P. C., for ascertainment of mesne profits falls within Article 181.)]
See also Section 3 Note 26.

[3] ('87) 9 All 364 (365) : 1887 All W N 79, *Darbo* v. *Kesho Rai.* (Application to bring decree into conformity with judgment.)
('97) 1897 Pun Re No. 12, *Devi Das* v. *Gurdatta* (Do.)
('10) 6 Ind Cas 537 (540, 541) : 37 Cal 796 (D B), *Madhabmoni* v. *Lambert.* (Application under O. 34, R. 3, C. P. C.)
('08) 11 Oudh Cas 208 (211, 212), *Sital Prasad* v. *Abdur Rashed.* (Application to amend description of property in decree.)
[*See* ('13) 20 Ind Cas 685 (687) (Cal), *Prasanna Kumar* v. *Asutosh Roy.* (Application by assignee to be substituted in a pending suit—No limitation.)
('16) 3 AIR 1916 Low Bur 10 (11) : 8 Low Bur Rul 422 : 35 Ind Cas 950 (D B), *Moolla Kasim* v. *Moolla Abdul Rahim.*]

ministerial,[4] or is only of a formal character.[5]

The Act applies to suits or appeals or applications to *Courts*.[6] See also Note 27 under section 3.

The Act bars a remedy only against a person *against whom a right exists* and not against whom no relief is claimed.[7]

As to whether the residuary article, Art. 181, applies to applications which are not under the Civil Procedure Code, see Note 2 to Art. 181.

21. Criminal proceedings and limitation. — The Indian Limitation Act has no application to criminal proceedings except to the extent provided therein.[1] There is no limitation for preferring a complaint of a criminal offence unless the penal law creating the offence prescribes any period within which a complaint may be made in respect thereof.[2] See also the Authors' Commentary on Criminal Procedure Code (2nd Edn.), S. 4 (1) (h), Note 14. See also Note 20.

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4. ('87) 10 Mad 51 (52) (D B), *Jivraji* v. *Pragji*. (Application to bring decree into conformity with judgment—No limitation.)
('82) 6 Bom 586 (587) : 7 Ind Jur 35 (D B), *Vithal* v. *Vithojirav*. (Application for sale certificate.)
('84) 8 Bom 377 (380) (D B), *Devidas Jagjivan* v. *Pirjada Begum* (Do.)
('81) 4 Mad 172 (173) (D B), *Kylasa Gounden* v. *Ramaswami*. (Do.)
('83) 1883 All W N 262 (262) (D B), *In re Kishen Singh*. (Do.)

5. ('81) 6 Cal 60 (63, 64) : 7 Cal L R 345, *Govind Chunder Goswami* v. *Rungunmony*. (Such as application to transfer a case from one board to another or to transfer a case to the bottom of the board, change of attorney or change of case or to request the Court to deal with a pending suit in a particular way.)

6. (02) 24 All 402 (404) : 1902 All W N 99 (F B), *Udit Upadhia* v. *Imam Bandi Bibi*. (District Registrar not ordinarily a Court.)
[*See* ('13) 15 Ind Cas 652 (653) : 13 Cri L Jour 508 (FB) (Mad), *Krishnammal* v. *Krishna Ayyangar*. (Registration Officer is not a Court.)
('12) 18 Ind Cas 896 (896) : 35 All 109 : 14 Cri L Jour 144, *Emperor* v. *Udit Narain*. (Do.)]

7. ('27) 14 AIR 1927 Cal 794 (796) : 104 Ind Cas 576 (DB), *Jadu Nath Mandal* v. *Amulya Krishna Kundu*. (Application to implead a party against whom no relief is claimed — No question of limitation.)
('07) 6 Cal L Jour 558 (563) : 12 Cal W N 84 (D B), *Mohammad Ishaq* v. *Sheikh Akramul*. (Do.)

Note 21

1. *See* ('24) 11 AIR 1924 Lah 569 (569): 76 Ind Cas 183, *Abdul Qadir* v. *Mahomed Ibrahim*. (Application for sanction to prosecute—No limitation.)
('16) 3 AIR 1916 Mad 1110 (1113) : 39 Mad 750 : 14 Ind Cas 305 (FB), *Bapu* v. *Bapu*. (There is no rule of law which subjects applications made under the special provisions of S. 195, Cr. P. C., to the periods of limitation contained in the Limitation Act.)
('93) 16 Mad 347 (349): 3 M L J 180 : 1 Weir 672 (DB), *Queen-Empress* v. *Konda*. (Act XIII of 1859—Complaint in respect of breach of contract—Complaint cannot be dismissed on the ground that the claim is barred by time.)
('71) 15 Suth W R Cr 25 (27) : 7 Beng L R 63 (DB), *Queen* v. *Ammeroddeen*.

2. ('25) 12 AIR 1925 Mad 186 (187) : 85 Ind Cas 646, *Jagannadham Naidu* v. *Rama Rao*. (Madras District Municipalities Act, V of 1920, S. 180 — Offence under—Three months limitation is provided.)
('11) 10 Ind Cas 787 (789) (Low Bur), *Mahomed Jewa* v. *Wilson*. (Section 15 of the Merchandise Marks Act, IV of 1889.)
('99) 22 Mad 488 (490) : 1 Weir 821 (DB), *Ruppell* v. *Ponnusami Tevan*. (Do.)

22. Damdupat and the Limitation Act. — The rule of damdupat is not affected by the Limitation Act[1] with the result that though the Limitation Act prescribes a period of twelve years for the recovery of money due on immovable property, the plaintiff will not be entitled to recover interest in contravention of the rule of damdupat.

23. Application of periods of limitation to facts. — It is not on the facts *alleged* in the plaint but on the facts *proved or admitted* that limitation has to be computed and any particular article of the Act applied.[1]

24. **Applicability of the Act to arbitrations.** — See Note 27 to section 3.

25. **Applicability of the Act to special or local laws.** — See Note 6 to section 29.

26. **"Rules for acquiring by possession the ownership of easements and other property."** — See Notes to sections 26 and 28.

Note 22

1. ('85) 9 Bom 233 (235) (DB), *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare.* (3 Bom 312 followed.)

Note 23

1. ('40) 27 AIR 1940 Oudh 134 (135) : 15 Luck 157 : 185 Ind Cas 736 (DB), *Jai Mangal Tewari* v. *Bindeshuri Singh.*

('29) 16 AIR 1929 Nag 124 (125) : 118 Ind Cas 62, *Ibrahim Khan* v. *Nagoji.*

[*See* ('38) 25 AIR 1938 Nag 335 (339) : I L R (1939) Nag 1 : 177 Ind Cas 6 (FB), *Asaram* v. *Ludheshwar.* (Per Stone, C. J.—In considering whether a particular remedy is barred one looks not at the relief given but at the cause of action, that is, at the necessary allegations which have to be made and found before the relief sought can be given.)

('27) 14 AIR 1927 Nag 10 (12) : 98 Ind Cas 22 : 22 Nag L R 147, *Secretary of State* v. *Bagmal Kishandayal.*]

[See however ('37) 24 AIR 1937 Bom 244 (254) : 170 Ind Cas 172 (DB), *Achut* v. *Shivaji Rao.* (Question of limitation is to be decided with reference to cause of action and to frame of suit when instituted and not with what is found at the end of trial.)]

See also Section 3 Note 8.

PART I.

PRELIMINARY.

Short title, extent and commencement.

1.* *(1)* This Act may be called the Indian Limitation Act, 1908.

(2) It extends to the whole of British India; and

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

Synopsis

1. " British India."
2. " The rest of this Act shall come into force on the first day of January, 1909."

1. "British India." — The Act applies only to proceedings in British India and not to proceedings in foreign States.[1] The expression

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* **Act of 1877 : S. 1.**

PART I.

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Limitation Act, 1877":

Extent of Act. It extends to the whole of British India ; but nothing contained in sections two and three or in Parts II and III applies :

(a) to suits under the Indian Divorce Act, or

(b) to suits under Madras Regulation VI of 1831 ;

Commencement. And it shall come into force on the first day of October, 1877.

Act of 1871 : S. 1.

PART I.

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Limitation Act, 1871."

Extent of Act. It extends to the whole of British India ; but nothing contained in sections two and three or in Parts II and III applies :

(a) to suits instituted before the first day of April, 1873 ;

(b) to suits under the Indian Divorce Act ;

(c) to suits under Madras Regulation VI of 1831.

Commencement. This Act shall come into force on the 1st day of July, 1871.

Act of 1859.

No provision corresponding to the present section.

Section 1 — Note 1

[1] ('27) 14 AIR 1927 Lah 200 (208) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh v. Muhammad Said.* (Poonch State is a foreign State.)

Section 1
Note 1

"British India" is not defined in the Act and therefore the definition thereof in the General Clauses Act, X of 1897, will apply.[2] Under s. 3, clause 7 of that Act, "British India" has been defined as follows:

> "'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

Aden[3] and British Burma[4] were governed by His Majesty through Governors or other officers subordinate to the Governor-General of India and were thus within "British India." As regards Aden, it has now been provided by the Government of India Act, 1935 (25 & 26 Geo. V., c. 42), s. 288, that on such date as His Majesty may, by Order in Council appoint, Aden shall cease to be a part of British India. By virtue of an Order in Council issued under that section, Aden has ceased to be a part of British India from the 1st April 1937. By virtue of s. 46, sub-s. (2) of the said Act, Burma has ceased to be a part of British India from 1st April 1937. But, by virtue of s. 466 of the Government of India Act, 1935, the law previously in force in Burma will continue to be in force there until altered or repealed or amended by the Legislature or other competent authority.

The Laccadive Islands are a part of British India, but by virtue of s. 3 of the Laccadive Islands and Minicoy Regulation, I of 1912 the applicability of the Limitation Act is excluded.[5]

The following territories do not fall within the scope of the definition of British India:

1. Native States of India.[6]

('18) 5 AIR 1918 Mad 580 (584) : 40 Mad 1069 : 42 Ind Cas 294 (FB), *Peirce Leslie & Co. Ltd., Cochin* v. *Perumal.*

('23) 10 AIR 1923 Mad 72 (73) : 45 Mad 1014 : 69 Ind Cas 932 (DB), *Srinivasa Ayyangar* v. *Narayana Rao.* (No operation in Mysore.)

('10) 8 I. C. 645 (646) (DB) (Bom), *Chanmalapa* v. *Abdul Vahab Muhamed Hussen.*

[2] See Section 3 (7) of that Act.

[3] ('24) 11 AIR 1924 Bom 290 (293) : 84 Ind Cas 796 (DB), *Abdulla Mohamed* v. *A. M. Zulaikhi.*
See also Aden Laws Regulation of 1891, Section 2.

[4] ('86) 13 Cal 221 (223) (DB), *Aga Mohammad Hamadani* v. *Cohen.*

[5] ('26) 13 AIR 1926 Mad 657 (658) : 49 Mad 419 : 93 Ind Cas 341 (DB), *Ahmad Koya* v. *Aisamma.*

[6] ('88) 1888 Pun Re No 191 (p. 499), *Rajah of Faridkot* v. *Bir Sing.* (Reversed by Privy Council on another point.)

('02) 29 Cal 400 (401, 402) : 6 Cal W N 573 (DB), *Ratan Mahanti* v. *Khatoo Sahoo.* (The Tributary Mahals of Orissa do not form part of British India.)

('06) 33 Cal 219 (253) : 33 Ind App 1 (PC), *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal.* (Kathiawar State not British India.)

2. Lands ceded by Native Princes to the British Government for *limited* purposes,[7] e. g., civil stations and cantonment areas,[8] and land over which jurisdiction has been ceded for the purposes of railway administration.[9] Thus, the Cantonments of Wadhwan[10] and Secunderabad[11] and the Rajkot Civil Station[12] are not included in "British India."

Where full *sovereignty* has been ceded or a new territory has been acquired, the territory will of course thereby become part of British India.[13]

3. Territories specially excluded from the term "British India" by legislative enactment. Thus, Singapore[14] is not a part of British India.

The Limitation Act as such is not in force in the Shan States.[15]

2. **"The rest of this Act shall come into force on the first day of January, 1909."**—The object of postponing the operation of the Act is to enable persons to enforce their rights, if any, before the new Act negativing such rights comes into force.[1]

2.[*] In this Act, unless there is anything repugnant in the subject or context, —

Definitions.

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[*] **Act of 1877 : Ss. 2 and 3.**

References to Act IX of 1871. Saving of titles already acquired. Saving of Act IX of 1872, Section 25.

2. All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue, barred under that Act, or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25.

('82) 8 Cal 985 (990, 991) : 11 Cal L R 241 : 7 Ind Jur 136 (FB), *Empress* v. *Keshub.* (The territory of Mayurbhanj is outside British India.)

7. ('12) 17 Ind Cas 534 (535, 536) : 37 Bom 152 : 13 Cri L Jour 790 (DB), *Emperor* v. *Chimmanlal.*

('10) 6 Ind Cas 429 (429) : 6 Nag L R 49, *Babu* v. *Parbati.* (Berar.)

('25) 12 AIR 1925 Mad 1100 (1101) : 88 Ind Cas 430 (DB), *Zubeda Begum* v. *Kommana Kanniah.* (Agency Tracts of Vizagapatam.)

8. ('12) 17 Ind Cas 534 (535, 536) : 37 Bom 152 : 13 Cri L Jour 790 (DB), *Emperor* v. *Chimmanlal.* (Wadhwan civil station is not part of British India.)

9. ('97) 25 Cal 20 (31) : 24 Ind App 137 : 7 Sar 239 : 1897 Pun Re No 6 Cr : 2 Cal W N 1 (P C), *Muhammad Yusuf-ud-din* v. *Empress.*

10. ('12) 37 Bom 152 (156) : 17 Ind Cas 534 : 13 Cri L Jour 790 (DB), *Emperor* v. *Chimmanlal.* (Dissenting from 9 Bom 244.)

11. ('33) 20 AIR 1933 P C 134 (135) : 60 Ind App 167 : 56 Mad 405 : 142 Ind Cas 552 (P C), *Anantapadmanabhaswami* v. *Official Receiver, Secunderabad.*

('37) 24 AIR 1937 Bom 242 (243) : 169 Ind Cas 651, *Ezra Sian & Co.* v. *Kailas Viraiah.* (A I R 1933 P C 134 relied on.)

('98) 21 Cal 177 (179), *Hussain Ali Mirza* v. *Abid Ali Mirza.*

12. ('86) 10 Bom 186 (188) : Ratanlal 218 (DB), *Queen-Empress* v. *Abdul Latib.*

13. ('95) 19 Bom 680 (686), *Jalbhai Ardeshir Shet* v. *Louis Manuel.*

14. See Straits Settlements Act, 1866, Section 1.

15. ('37) 24 AIR 1937 Rang 477 (478) : 1937 Rang L R 287 : 173 Ind Cas 160, *Kannappa* v. *Ishaar Singh.*

Note 2

1. (16) 3 AIR 1916 Lah 146 (148) : 35 Ind Cas 67 : 1916 Pun Re No 88, *Asa Ram* v. *Budhu Mal.* (Where operation of Act is postponed, that Act is retrospective.)

('22) 9 AIR 1922 Mad 417 (418, 419) : 70 Ind Cas 743 (DB), *Ganapathi Mudaliar* v. *Krishnamachari.* (New law ought not to be applied so as to kill causes of action which were alive on date of its enactment.)

(1) "applicant" includes any person from or through whom an applicant derives his right to apply:

(2) "bill of exchange" includes a hundi and a cheque:

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:

Interpretation clause. 3. In this Act, unless there be something repugnant in the subject or context —

'plaintiff' includes also any person from or through whom a plaintiff derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued :

'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another :

'bill of exchange' includes also a hundi and a cheque :

'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be :

'promissory note' means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

'trustee' does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title :

'suit' does not include an appeal or an application :

'registered' means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order, referred to in the context :

'foreign country' means any country other than British India :

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

Act of 1871 : Ss. 2 and 3.

Repeal of enactments. 2. On and from that day the enactments mentioned in the first schedule hereto annexed shall be repealed to the extent specified in the third column of the same schedule.

Interpretation clause. 3. In this Act, unless there be something repugnant in the subject or context —

'minor' means a person who has not completed his age of eighteen years ;

'plaintiff' includes also any person through whom a plaintiff claims ;

'nuisance' means anything done to the hurt or annoyance of another's immovable property and not amounting to a trespass ;

'bill of exchange' includes also a hundi ;

'trustee' does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title ;

'registered' means duly registered under the law for the registration of documents in force at the time and place of executing the documents referred to in the context ;

'foreign country' means any country other than British India ;

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

Act of 1859.

There was no interpretation clause in this Act.

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued:

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another:

(6) "foreign country" means any country other than British India:

(7) "good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention:

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue:

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

(10) "suit" does not include an appeal or an application: and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

SECTION 2 (GENERAL)

1. Definitions — General. — This section is an interpretation clause. As a general rule of construction, words in an Act should receive their *ordinary and plain meaning* unless a contrary intention is apparent from the context. The object of a definition clause is, however, to declare that certain words used in the Act shall have the meaning given to them by the definition thereof.[1] The definition may include in the connotation of the word defined, certain things which the Legislature, under certain circumstances, intends to include, but which may not fall within the ordinary acceptation of the term.[2]

The meaning assigned to a word by the definition clause is the meaning of the word wherever it occurs in the Act,[3] *unless there is*

Section 2 (General) — Note 1

[1] ('86) 12 Cal 430 (433) (DB), *Umacharan Bag* v. *Ajadannissa Bibee.*
('26) 13 AIR 1926 Sind 58 (61) : 91 Ind Cas 99 : 25 Sind L R 345 (FB), *Walter John Brooks* v. *Nee Barwick.*

[2] ('26) 13 AIR 1926 Sind 58 (61) : 91 Ind Cas 99 : 25 Sind L R 345 (FB), *Walter John Brooks* v. *Nee Barwick.*
('11) 11 Ind Cas 610 (612) : 35 Bom 412 : 12 Cri L Jour 426 (DB), *Emperor* v. *Bras H. DeSousa.*

[3] ('86) 12 Cal 430 (433) (DB), *Umacharan Bag* v. *Ajadannissa Bibee.*

anything repugnant in the subject or context.[4] Thus, the definition of the word "suit" does not include an *appeal*. But the word read with the context in S. 31, now repealed, clearly showed that it included for the purposes of that section an appeal. There was thus a repugnancy in the context and the definition did not apply in interpreting that section.[5]

The word "includes" used in the definition clause is not intended to be exhaustive of the things denoted by the word defined. It is a word of extension and generally used to *enlarge* the meaning of the word.[6] By "including" certain things in the definition, others are thereby not excluded.[7] Where a word is defined as "including" certain things, the Legislature cannot be intended to prevent the operation of the word in its ordinary or obvious sense under all circumstances.[8] Where a definition exhaustive of the signification of the word is intended, the expression "means" or "means and includes" is used.[9]

Where a word is not defined in this Act but is defined in the General Clauses Act, 1897, that definition should be applied unless there is anything repugnant in the subject or context, inasmuch as S. 3 of that Act provides that the definitions given therein shall apply "in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context."

But a definition given in another *statute* not *in pari materia*,[10] or the incidents attached to the word by another statute,[11] cannot be made applicable except so far as provided by the statute itself.[12]

[See however ('16) 3 AIR 1916 Pat 133 (134) : 2 Pat L J 91 : 38 Ind Cas 964 (FB), *Manik Ram Ahir* v. *Emperor*. (In this case, Atkinson, J., observed that as a general rule, the interpretation clause should be used for interpreting words which are ambiguous or equivocal and not so as to disturb the meaning of such as are plain.)]

4. ('16) 3 AIR 1916 Pat 133 (134) : 2 Pat L J 91 : 38 Ind Cas 964 (FB), *Manik Ram Ahir* v. *Emperor*.

('09) 2 Ind Cas 632 (632) (DB) (All), *Birj Mohan Lal* v. *Ram Sarup Singh*.

5. ('09) 2 Ind Cas 632 (632) (DB) (All), *Birj Mohan Lal* v. *Ram Sarup Singh*.

6. ('06) 4 Cri L Jour 23 (31) : 30 Bom 558 : 8 Bom L R 457 (DB), *The Municipal Commissioner* v. *Mathorabai*.

[*See also* ('82) 8 Cal 534 (536) (DB), *Nasibuan* v. *Preoshanker Ghose*.]

7. ('98) 22 Bom 235 (237, 238) (DB), *Queen-Empress* v. *Magla Kala*. (Words "police-officer" and "Magistrate" in S. 26, Evidence Act, include police-officers and Magistrates of Native States as well as those of British India.)

('79) 4 Cal 483 (490, 493) : 3 Cal L R 270 : 1 Shom L R Cr 79 (FB), *Empress* v. *Ashutosh Chukerbutty*. (Word "Court" in S. 30, Evidence Act, includes both Judge and jury in a jury trial.)

8. *See* ('78) 2 All 74 (86) (DB), *Uda Begum* v. *Imam-ud-din*.

9. ('78) 2 Mad 5 (7) : 2 Weir 123 : 2 Ind Jur 782 (DB), *Empress* v. *Ramanujiyya*.

('79) 4 Cal 483 (493) : 3 Cal L R 270 : 1 Shom L R Cr 79 (FB), *Empress* v. *Ashutosh Chukerbutty*. (Where a definition is intended to be exclusive, the form of words is "means and includes"—Per Jackson, J.)

10. ('08) 31 Mad 408 (412) : 18 Mad L Jour 349 : 8 Mad L Tim 400 (DB), *Mylapore Hindu Permanent Fund Limited* v. *Corporation of Madras*.

('32) 19 AIR 1932 Pat 281 (283) : 139 Ind Cas 493 : 33 Cri L Jour 775, *Abdul Rauf* v. *Banarsi Lal*.

11. ('86) 12 Cal 430 (433) (DB), *Umacharan Bag* v. *Ajadannissa Bibee*.

12. ('93) 15 All 141 (143) : 1893 All W N 59, *Queen-Empress* v. *Ram Lal*.

Section 2 (1)
Applicant

(1) "Applicant" includes any person from or through whom an applicant derives his right to apply.

"Applicant." — The word "applicant" includes not only the actual applicant but also the persons from whom he derives his right to apply. As to the meaning of the word "includes," see Note 1 to the section under the heading "Definitions—General." As to when one person is said to derive his right or liability from another, see Notes under the definitions of "defendant" and "plaintiff."

Section 2 (2)
Bill of exchange

(2) "Bill of exchange" includes a hundi and a cheque.

Scope of the definition. — A "bill of exchange" as defined by S. 5 of the Negotiable Instruments Act, 1881, is —

"an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

A "cheque" is defined by S. 6 of the said Act as —

"a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

A "*hundi*" is an instrument which is generally written in an oriental language, and, by the local usage of the Indian commercial community, is negotiable. There are diverse forms of such instruments; sometimes they are so drawn that they come within the definition of "bill of exchange" given in the Negotiable Instruments Act; and at other times they are in the form of promissory notes as defined by the said Act. Where the *hundi* in any particular case falls within the definition of bill of exchange or promissory note as so defined, the Negotiable Instruments Act will of course apply. Where it does not so fall, it is not a "bill of exchange" within the meaning of the said Act and the matter is governed by the general law of contract and local usage relating thereto which is saved expressly by S. 1 of the said Act.[1]

This Act defines a "bill of exchange" as including a cheque and a *hundi* and is, consequently, wider in its scope than the definition of the expression as given in the Negotiable Instruments Act.

Section 2 (3)
Bond

(3) "Bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

Synopsis

1. Bond.
2. Bonds and agreements to do specified acts.
3. Bond and promissory note.
4. Bond and acknowledgment of liability.

Section 2 (2) — Note 1

[1] ('19) 6 AIR 1919 Nag 89 (39, 40) : 58 Ind Cas 313 (313, 314), *Radha Kisan* v. *Hiralal*.
('36) 23 AIR 1936 All 396 (399, 401) : 162 I. C. 894 : 58 All 858, *Mangal Sen* v. *Ganesni Lal*. ("Shahjog hundi "though not "a bill of exchange" is a negotiable instrument.)

Section 2 (3)
Bond

1. Bond. — The instrument mentioned in the definition is what is known in English law as a *conditional bond* and has been referred to in Art. 68 as a bond *subject to a condition.* The use of the word "includes" shows that the definition is not exhaustive and that the word *bond* is not limited in its meaning to a *conditional bond.*

But the word has been used in this Act as meaning an instrument by which a person obliges himself *to pay money* to another. Articles 66, 67, 68,[1] 74, 75 and 80, which are the only provisions in the Act relating to bonds, use the words "day specified for *payment*," "*payable* by instalments" and "when the note or bond becomes *payable*."

Under the Stamp Act, 1899, a bond includes an instrument whereby a person obliges himself to *deliver grain or other agricultural produce* to another. That definition must, however, be taken to be limited in its applicability to the interpretation of the Stamp Act and not of other Acts.[2] But in the undermentioned case,[3] it was held by the High Court of Lahore that such an instrument is a bond even for purposes of the Limitation Act. Their Lordships observed as follows:

> "The language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not expressly modify or repeal. Here we find that the Legislature in one of its enactments, that is, the Stamp Act, without giving any exhaustive definition of the term "bond" has directed that a certain type of instrument shall for the purpose of the levy of stamp duty be classed as a bond and, in the absence of any indication to the contrary, we must hold that the Legislature regards such an instrument as a bond within the meaning of another of its enactments, namely, that of limitation."

Their Lordships have not adverted in the above decision to the fact that an intention to the contrary is clearly apparent from the use of the words "payment" and "payable" wherever the word "bond" has been used in the Act. It is submitted, therefore, that the decision cannot be accepted as correct.

2. Bonds and agreements to do specified acts. — A covenant to do a particular act, the breach of which must be compensated in damages, is not a *bond* at all.[1] The covenant to do the specified *act* is

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Section 2 (3) — Note 1

1. The bond dealt with in this Article is the same as that mentioned in the definition which says that it is an obligation for *payment* of money.

('41) 28 AIR 1941 P C 6 (9) : 67 Ind App 416 : 193 Ind Cas 225 (PC), *General A. F. & L. Assurance Corpn. Ltd.* v. *Jan Mahomed Abdul Rahim.* (Administration bond is a bond within the definition and Art. 68.)

[*See also* ('82) 8 Cal 534 (536) (DB), *Nasibuan* v. *Preosunker Ghose.*]

2. See Authors' Commentary on the Civil Procedure Code (3rd Edn.), Notes to the Preamble—"Interpretation of Statutes."

3. ('25) 12 AIR 1925 Lah 415 (416) : 6 Lah 276 : 86 Ind Cas 844 (DB), *Wadhava Mal* v. *Karim Bux.*

Note 2

1. ('81) 8 Cal 284 (284, 285, 286) : 10 Cal L R 219 (DB), *Gisborne & Co.* v. *Subal Bowri.* (Approving the view taken by Stuart, C. J., in 2 All 654 (662) (FB)—Case under Stamp Act.)

('71) 7 Beng L R 510 (511, 512), *Robert & Charriol* v. *Shiroore.*

('15) 2 AIR 1915 Lah 209 (210) : 30 Ind Cas 429, *Sher Khan* v. *Gokal Chand.*

('27) 14 AIR 1927 Nag 72 (73, 74) : 98 I. C. 631, *Collector of Nimar* v. *Lakhmichandsa.* (Case under Stamp Act.)

not an obligation to pay the *money*. Further, the remedy on a bond is different from the remedy in the case of the aforesaid covenant. In the former case the plaintiff can recover, where the bond is a simple one, the *sum named in the bond*, or where the bond is a conditional one, the *actual damage* which he can prove he has sustained. In the case of covenants the breach of which must be compensated in damages, the plaintiff can only recover *compensation*, whatever be the sum named as penalty for the breach, and he can recover such compensation *whether he proves actual damage or not*.

In *Gisborne and Co.* v. *Subal Bowri*,[2] Garth, C. J., observed as follows:

> "The definition of a bond in S. 5 of the Act" (i. e. the Stamp Act, 1879, where the definition was exactly the same as is given in this Act) "is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.
>
> Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages; and by S. 74 of the Indian Contract Act, the English rule with regard to liquidated damages is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty, as the Judge at the trial considers reasonable; *but he is entitled to that compensation*, whether he proves any actual damages or not.
>
> The remedy upon a bond is very different. The plaintiff in the case of a simple money bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the *actual damage* which he can prove that he has sustained."

3. Bond and promissory note.—The expression "promissory note" has been defined in clause 9. The essential element of a promissory note is that the maker *engages to pay* a sum of money to another. This undertaking to pay must appear on the face of the instrument. Otherwise, it is not a promissory note. Where a person simply obliges himself to pay a certain sum of money to another, the *legal effect* is no doubt as if he had undertaken to pay the sum. But it cannot be said on the words used that the obligor has *engaged* to pay the sum. Thus, while a promissory note may be a bond, a bond will not necessarily be a promissory note. In *Mahomed Akbar Khan* v. *Attar Singh*,[1] their Lordships of the Privy Council observed as follows:

> "It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be *inferred* from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice; for, the third illustration indicates that an I O U is not a promissory note, though of the

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('80) 2 All 654 (660, 661, 662) : 5 Ind Jur 264 (FB), *Reference by Board of Revenue, N. W. P.* (Per Stuart, C. J.—The contrary opinion of the majority of the Full Bench was dissented from by Straight, J., in 9 All 585 (589) and by Garth, C. J., in 8 Cal 284.)

[2] ('81) 8 Cal 284 (286) : 10 Cal L R 219 (DB).

Note 3

[1] ('36) 23 AIR 1936 P C 171 (174) : 63 Ind App 279 : 17 Lah 557 : 162 Ind Cal 454 (PC).

Section 2 (3)
Bond

implied promise to pay there can be no doubt. The second illustration, however, seems to show that the express words 'I promise' or 'I undertake' are unnecessary. The form of words is taken from an early English case, reported in Selwyn's N. P., 11th Edn., page 401, from Scacc. M. I. Geo. II MSS, where according to the learned author the Court stated that the words 'to be paid' in the document there sued on amounted to a promise to pay, observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words."

4. **Bond and acknowledgment of liability.** — In a bond there is a *creation* of an obligation to pay. In the case of an acknowledgment of liability, on the other hand, there is no creation of any liability but merely a recognition of a *pre-existing* liability.

Section 2 (4)
Defendant

(4) "Defendant" includes any person from or through whom a defendant derives his liability to be sued.

1. **Scope of the definition.**—Where A has a *right to sue* B, it follows that B has a liability to be sued by A. If B dies, his liability may survive against X. If B's interest in the subject matter in respect of which the right to sue exists, is assigned to, or devolves on Y, the liability to be sued comes to, or devolves on Y. X in the former case, and Y in the latter, derive their liability to be sued from or through B, and, for purposes of limitation, stand in the same position as B.

The question as to whether a liability to be sued survives to, or devolves on, another is a matter of substantive law. The same principles, however, as are applicable to the survival or devolution of a *right to sue*,[1] will also apply to the liability to be sued.

Illustrations.

1. *X* purchased the property in dispute at an auction sale in execution of a decree against *B* and took formal possession on the 14th August 1877, but *B* remained in actual adverse possession. In 1888 *B* sold the property to *C*. *X* instituted a suit against *C* on the 18th September 1889 for possession. The question was whether the suit was barred by limitation. Article 144 of the Limitation Act provides that the period of limitation for such a suit is twelve years from the date "when the possession of the defendant becomes adverse to the plaintiff." If the word "defendant" referred in the above case only to *C*, then the suit was in time; but if it included *B*, from or through whom *C* derived his liability to be sued, then the suit was clearly barred. It was held that in view of the definition, the word "defendant" included *B* also, that, therefore, time ran from the 14th August 1877 and that the suit was barred by limitation.[2]

2. The cause of action for suit on a mortgage arose on the 14th March 1903. The mortgagee *X* instituted a suit against the mortgagors *A* and *B*, members of a joint Hindu family, on the 5th February 1915. A previous suit had been filed by him in respect of the same cause of action in a wrong Court in the year 1904 and had been dismissed in the year 1914 on the ground of want of jurisdiction. In the year 1910, *B's* son *C* was born, but was added as a party to the subsequent suit only on the 30th May 1916. The question was whether the suit was barred as against *C*. Section 14 of the Limitation Act provides that in computing the period of limitation the time during which the plaintiff has been prosecuting another

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Section 2 (4) — Note 1

[1] See Notes under "Plaintiff."

[2] ('94) 18 Bom 37 (38, 40) (DB), *Namdev* v. *Ramchandra.*

civil proceeding against the "defendant" shall, under certain circumstances, be excluded. It was held that by virtue of the definition, the word "defendant" included not only *C* but also *A* and *B* from or through whom *C* derived his liability to be sued, that, therefore, the period between 1904 and 1910 could be excluded in computing the period of limitation, and that the suit against *C* was not barred. Dawson-Miller, C. J., observed as follows : "That section (i. e. Section 2) seems to assume that every person who acquired an interest by devolution or otherwise in the subject matter of litigation previously vested in others, which renders him liable to be impleaded as a defendant, derives his liability to be sued from or through somebody. In the case of a new-born son in a Mitakshara family, the person or persons through whom he derives this liability must be the other members of the family in whom the property which the son acquires by birth was previously vested."[3]

3. The junior widow of a deceased Hindu adopted, without the consent of the senior widow, one *X* on the 1st July 1866. The senior widow however remained in adverse possession of the properties, and on the 12th August 1869, adopted *Y* who assumed and got into possession of the properties. *X* instituted a suit against *Y* for possession on the 10th August 1881. It was held that by virtue of this definition, the word "defendant" included not only *Y* but also the senior widow from or through whom *Y* derived his liability to be sued, that, therefore, limitation began to run from the 1st July 1866 and that the suit was barred by limitation.[4]

4. The trustees of a temple assumed a right to appoint *archakas* for the temple and were so appointing them for a period of about sixty years, in derogation of the right of the hereditary *archakas*. Within twelve years from the date of appointment of the last *archaka*, the hereditary *archaka* instituted a suit against the appointed *archaka* for possession of the office. The limitation applicable to the case was, under Art. 124, twelve years from the date "when the defendant took possession of the office adversely to the plaintiff." It was held that the word "defendant" in that Article included not only the actual defendant, but included the previous *archakas* appointed by the same trustees and that the suit was, therefore, barred by limitation.[5]

5. On the 7th December 1871, *R* sold certain immovable properties to the plaintiff but retained possession of the properties sold by him. On the 18th June 1872, these properties were sold in execution of a decree against *R* and were purchased by *A*. The plaintiff instituted a suit against *R* on the 7th December 1883 for recovery of the properties sold to him. On the 17th December 1884, *A* was joined as a co-defendant. It was held that *A* derived his liability to be sued from *R*, the judgment-debtor, that the word "defendant" in Art. 144 included not only *A* but also *R*, and that, therefore, limitation began to run from the date when *R's* possession became adverse against the plaintiff and that the suit was barred by limitation.[6]

6. Certain land belonging to *A* became submerged and after reformation, was taken charge of by the Government adversely to *A*. Subsequently, *B* applied to the Government claiming the land *as his own* and the Government, finding that they could not resist his claim to the land, recognized and submitted to the adverse claim of *B* and withdrew from the occupation of the land and *B* began to be in possession. Within twelve years from this latter date but beyond twelve years from the date when the Government assumed possession, *A* instituted a suit against *B* for possession on the ground that the land was his. It was held by the Privy Council that *B* did not derive his liability to be sued from the Government, inasmuch as he had advanced a claim of his own adversely to the Government,

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[3] ('22) 9 AIR 1922 Pat 450 (456, 457, 458) : 66 Ind Cas 945 : 1 Pat 506 (DB), *Hari Prasad Singha* v. *Sourendra Mohun Sinha.*

[4] ('89) 13 Bom 160 (164, 165) : 13 Ind Jur 229 (DB), *Padajirav* v. *Ram Rav.*

[5] ('19) 6 AIR 1919 Mad 292 (292, 293) : 49 Ind Cas 393 (DB), *Krishnaswami Thathachariar* v. *Veeraswami Mudali.*
See also Article 124 Note 7.

[6] ('92) 16 Bom 197 (199) (DB), *Ali Saheb* v. *Kaji Ahmad.*

Section 2 (4)
Defendant

which was rested on prior title and possession, and the Government had merely recognized that right, and that the suit was not barred by limitation.[7]

See also the undermentioned case.[8]

Section 2 (5)
Easement

(5) "Easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another.

Synopsis

1. Easement.
2. Easements and natural rights.
3. Easements and licenses.
4. There must be a dominant and servient tenement.
5. Easement must be for the beneficial enjoyment of the dominant tenement.
6. Easement is only a fractional right of user.
7. Easement is a specific right.
8. Right of easement can be vested only in determinate individual.
9. Only certain rights are recognised as easements.

9a. Extent of easement.

10. Easement, if an interest in immovable property.
11. Classification of easements.
12. "Growing in, or attached to or subsisting upon, the land of another."

Other Topics (miscellaneous)

'Easement' used in wider sense than in Easements Act. See Note 1.
Fishery right. See Notes 6, 9 and 12.
Pasturage right. See Notes 9 and 12.
Projection of building over neighbour's land. See Note 9.
Right of privacy. See Note 9.
Right of way. See Note 9a.
Rights which can be acquired as easements. See Note 9.
Rights which cannot be acquired as easements. See Note 9.
Right to bury dead. See Note 9.
Right to hunt. See Note 12.
Right to take minerals. See Note 6.

1. Easement. — A right of ownership of property *(jus in re propria)* is a right to the entirety of the lawful uses of such property.[1] The extent of such uses is only limited by the maxim *Sic utere tuo ut alienum non lædas* — Use your own property in such a manner as not to injure that of another.[2] If now, from the general and indefinite rights of user which a owner has in the property, a specific right is separated and subtracted and is vested in another person, such person has a *jus in re aliena* or a right in or over the property of another.

A *servitude* under the Roman law was a particular form of *jus in re aliena* and consisted "in a right to the limited *use* of a piece of land without the *possession* of it; for example, a right of way over it, a right to the passage of light across it to the window of a house on the adjoining land, a right to depasture cattle upon it or a right to derive support from it for the foundations of an adjoining building."[3] Such servitudes were classed into private and public servitudes, a private servitude being one vested in a *determinate individual*, a public servitude being one vested in the public in general or in some class of *indeterminate* individuals. They were also divided into *prædial* and *personal* servitudes, a prædial servitude being a right subtracted from the rights of ownership of one property called the *prædium serviens* or servient tenement, and annexed to the ownership of another property called the *prædium dominans* or dominant tenement for the enjoyment of that property, and a personal servitude being such subtracted right vested in an individual other than the owner *irrespective* of the ownership of any property.[4]

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[7] ('17) 4 AIR 1917 P C 18 (19, 20, 22): 44 Cal 858 : 44 Ind App 104 : 40 Ind Cas 337 (PC), *Basanta Kumar Roy* v. *Secretary of State.*
See also Arts. 142 and 144 Note 92.

[8] ('22) 9 AIR 1922 Cal 499 (499, 500) : 67 I. C. 943, *Ramhari* v. *Rohini.* (Suit to recover money received by defendant's father as pleader for plaintiffs — *Held,* suit was governed by Art. 62 by virtue of definition of "defendant" in S. 2 (4).)

Section 2 (5) — Note 1

[1] Salmond on Jurisprudence, 8th Edition, page 280.

[2] Peacock on Easements, 3rd Edition, page 257.

An *easement*, as used in the English law, may be said to be a private *prædial servitude*[5] and was defined in an ancient work as "a privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land or such like."[6] In more recent times, it has been defined as a right which the *owner or occupier of certain land* possesses as such for the beneficial enjoyment of that land, to utilise certain land belonging to another in a particular manner *not involving the taking of the natural produce of that land or of any part of its soil*, or a right to prevent the owner of land from utilising his land in a particular manner.[7]

It will be seen from the above definition that an easement as defined in English law will not include the following rights :

1. Servitudes *in gross*, i. e., rights exercisable by an individual on another's land, but irrespective of the ownership or occupation by that individual of any land.
2. Prædial servitudes where the right consists of *taking something* from the servient tenement. Such a right is known as a profit *a prendre*.

The Indian Easements Act, 1882, has practically adopted the English definition of easements but with the addition that a profit *a prendre* will also be an easement provided it is appurtenant or annexed to a dominant tenement, or in the words of the Indian Easements Act, it is a right exercised *for the beneficial enjoyment of the dominant heritage*.

The word "easement" in this Act is used in a wider sense than that which it has under the English law or under the Easements Act. For, under this clause, it includes not only a profit *a prendre appurtenant*, but also a profit *a prendre in gross*, i. e., a profit *a prendre* unconnected with the ownership or occupation of any property by the person claiming the right.[8] The Act does not, however, *define* what an easement is except by merely including a profit *a prendre*. In the absence of such definition, Courts have adopted the meaning given to it under the English law as extended by the definition in this clause.[9] Thus, an easement for the purposes of this Act will include—

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[3] Salmond on Jurisprudence, 8th Edition, page 458.

[4] Salmond on Jurisprudence, 8th Edition, page 459.

[5] Salmond on Jurisprudence, 8th Edition, page 460 foot-note.

[6] Termes de la Ley, page 284.

[7] Halsbury's Laws of England, 1910 Edition, Vol. 11, pages 235, 236.

[8] ('80) 5 Cal 945 (947) : 6 Cal L R 269 : 3 Shom L R 123 (DB), *Chundy Churn Roy* v. *Shib Chunder Mandal*.

1. all the easements recognised by English law, and also
2. profits *a prendre* whether appurtenant or *in gross*.

2. Easements and natural rights. — An easement must be distinguished from natural rights. The latter, as their name imports, are those incidents and advantages which are provided by nature for the use and enjoyment of a person's property. They are *part* of the rights of ownership. The illustrations to S. 7 of the Easements Act, 1882, furnish instances of such natural rights, and may be usefully referred to here —

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.[1]

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within

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[*See also* ('96) 23 Cal 55 (59) (DB), *Dukhi Mulla* v. *Halway*. (Term 'easement' includes profits *a prendre*.)]

[See however ('38) 25 AIR 1938 Nag 497 (499) : I L R (1939) Nag 81 : 181 Ind Cas 825 (DB), *Narmadaprashad Sheocharan* v. *Narayansingh*. ("Easement" does not include profits *a prendre* in gross—Obiter.)]

[9] ('17) 4 AIR 1917 Cal 681 (686) : 34 Ind Cas 450 (455) (DB), *Sital Chandra Choudhury* v. *Mrs. Allen J. Delanney*.

('27) 14 AIR 1927 Lah 492 (493) : 102 I. C. 447, *Karam Ilahi* v. *Ghulam Mustafa*.

Note 2

[1] ('11) 12 Ind Cas 27 (27) (Low Bur), *Mi Hla Thanda* v. *Maung Shwe Pan Aung*. (Where *A* has the right to discharge surplus rainfall from his land on to *B*'s land, no length of time will give *B* the right to compel *A* to send water on to him, provided *A* does not interfere with the water flowing in a natural and defined channel.)

such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond, into or out of which, a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling, on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.[2]

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land and for the purposes of any manufactory situate thereon: provided that he does not thereby cause material injury to other like owners.[3]

As has been seen in Note 1, an easement is a specific right *subtracted* from the general rights constituting ownership of one property and attached to the ownership of another property. In the language of the Easements Act, 1882, an easement is a *restriction* of a natural right.[4] The right of easement and a natural right are, thus, mutually exclusive.[5]

3. Easements and licenses. — An easement differs from a license in that the former is a right *attached to land* while the latter is a *personal* right. An easement, again, may be acquired independently of any grant by the owner as, for example, by prescription, but a license must be *granted* by the owner. Section 52 of the Easements Act defining a license may usefully be referred to in this connexion. It runs as follows :

> "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and

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[2] ('82) 8 Cal 468 (469) : 10 Cal L R 396 (DB), *Imam Ali* v. *Poresh Mandal.* (Lower land-owner must allow water falling naturally on upper land and running naturally on to lower land.)
('86) 12 Cal 323 (326) (DB), *Abdul Hakim* v. *Gonesh Dutt.* (The right of the owner of a high land to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.)

[3] ('88) 1888 Pun Re No. 49, *Ahmad Ali* v. *Malak Hashu.*

[4] *See the following cases :*
('95) 1895 Pun Re No. 35, *Sardar Kirpal Singh* v. *Lal Khan.* (One riparian owner exclusively using all the water of a river has a right of easement and can prevent other riparian owners higher up, from using the water.)
('18) 5 AIR 1918 Lah 178 (179) : 1918 Pun Re No. 57 : 46 Ind Cas 441, *Abdul Rahman* v. *Muhammad Alam.*
('23) 10 AIR 1923 Lah 594 (594) : 83 Ind Cas 538 (DB), *Bali Ram* v. *Bela Singh.*
('77) 1 Mad 335 (340) : 1 Ind Jur 802 (DB), *Subramaniya Iyer* v. *Ramchandra Row.*
[*See also* ('92-96) 2 U B R 642 (644), *Ma Hnin Nyo* v. *Maung Kyin Thu.*]

[5] ('20) 7 AIR 1920 Pat 195 (196) : 57 Ind Cas 504, *Mohendra Nath Ghose* v. *Nabin Chandra.* (They are two distinct rights.)

such right does not amount to an easement or an interest in the property, the right is called a license."

4. There must be a dominant and servient tenement.—It follows from the discussion in Note 1 that it is the essence of an easement (other than profits *a prendre in gross*) that it should *firstly* be *appurtenant* to immovable property and *secondly* be associated with *two tenements*, one to which the right is appurtenant called the *dominant tenement*, and the other upon which the burden is imposed, called the *servient tenement.*[1] Further, the notion of a right to be enjoyed on the one side and an obligation to be borne on the other involves the consequence that the dominant and the servient tenements should belong to *different* persons; for, the same person cannot have both the right and the corresponding obligation separately existing in himself. The maxim is that "none can have land and also easement over it."[2]

A right *in gross*, *i. e.* unconnected with any dominant tenement, is, therefore, not an easement. Thus, a right of way[3] or a right of ferry,[4] independent of its being necessary for the beneficial enjoyment of any dominant tenement is not an easement. Similarly, the right of the public to use a way,[5] or of the inhabitants of a village to do something on the land of a person, or of the Muhammadans of a village to bury their dead in a particular place,[6] cannot be acquired as an easement, though the first of the rights may be acquired by dedication[7] to the public and the other rights by custom.[8]

Note 4

[1] (1865) 34 L J Ex 52 (56): 3 H & C 486 : 11 Jur (N S) 141 : 12 L T 26: 13 W R 521: 140 R R 567: 159 E R 621, *Mounsey* v. *Ismay.*

('26) 13 AIR 1926 Mad 625 (626) : 92 Ind Cas 465 (DB), *Pakkir Mahamud* v. *Pichai Thevan.*

('34) 21 AIR 1934 Pesh 96 (98): 152 Ind Cas 141 (DB), *Galun Shah* v. *Nawab Ali.* (Concession granted to residents of one village personally to enjoy shamilat of another village is not a right of easement but a license.)

[2] ('30) 17 AIR 1930 Sind 34 (35) : 120 Ind Cas 497 : 24 Sind L R 208 (DB), *Girdharidas Radhakishen Das* v. *Thirtha Das Gokal Das.* (Easement implies tenements belonging to different persons—No different owners, no easement.)

[3] ('89) 2 C P L R 34 (34, 35), *Hira* v. *Khushalgir.*

[4] ('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat* v. *Hem Chandra Roy.*

[5] ('30) 17 AIR 1930 Cal 286 (287) : 57 Cal 526 : 125 Ind Cas 600 : 31 Cri L Jour 859, *Pran Nath* v. *Emperor.* (Following 15 Cal 460 (FB).)

[6] ('21) 8 AIR 1921 Cal 569 (570) : 66 Ind Cas 640 (DB), *Gopal Krishna* v. *Abdul Samad.* (NOTE.—Such a right is not an easement also because it cannot be for the *beneficial enjoyment* of any land (See Note 4) and further because it is a right unknown to law. See Note 9.)

('99) 23 Bom 666 (668) : 1 Bom L R 170 (DB), *Mohidin* v. *Shivlingappa.*

('24) 11 AIR 1924 Rang 61 (62): 76 Ind Cas 588 : 1 Rang 702 (DB), *Maung Shwe Kye* v. *Maung Po Tha.* (23 Bom 666 followed.)

[7] ('30) 17 AIR 1930 Cal 286 (287) : 57 Cal 526 : 125 Ind Cas 600, *Pran Nath* v. *Emperor.*

[8] ('21) 8 AIR 1921 Cal 569 (570, 571) : 66 Ind Cas 640 (DB), *Gopal Krishna* v. *Abdul Samad.*

[*See also* ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpatrao Madhorao* v. *Badar Farid.* (Immemorial user is not necessary to prove custom —Long user may give rise to presumption of grant.)]

As has been seen in Note 1, this Act recognizes one right *in gross* as an easement and that is what in English law is known as a profit *a prendre*. See Note 12.

5. Easement must be for the beneficial enjoyment of the dominant tenement. — An easement, other than a profit *a prendre*, can only be for the beneficial enjoyment of the *dominant* tenement. The consequence of this is that the servient owner cannot acquire any right to compel the dominant owner to continue to enjoy the easement.[1] Thus, a servient owner cannot compel the dominant owner to continue to exercise his easement to let the water falling on his land flow on the servient tenement.[2] In *Mason* v. *The Shrewsbury and Hereford Railway Company*,[3] Cockburn, C. J., observed as follows :

> "Now it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial, to the party entitled. . . . . In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose."

The words "beneficial enjoyment" denote that an easement is a right which is enjoyed for the *advantage* of the dominant tenement. A projection of the building of A, such as a cornice, over the land of B, merely for the purpose of *ornamentation* was, on this ground, held not to be for the advantage of the dominant tenement and not to be an easement.[4]

Note 5

1. ('14) 1 AIR 1914 Cal 502 (503) : 22 I. C. 514 (DB), *Bimal Chandra Chakravarthy* v. *Chandra Kanta Chakravarthy.* (Following (1871) L R 6 Q B 578.)
('22) 65 Ind Cas 84 (89, 90) (Pat), *Fudu Sahu* v. *Sarban.* (A I R 1919 Cal 1062, followed.)
('13) 20 Ind Cas 315 (315, 316) (DB) (Cal), *Altafuddin Chowdhury* v. *Aso Khadem.* ((1871) L R 6 Q B 578 relied on.)
('19) 6 AIR 1919 Cal 1062 (1062) : 46 Ind Cas 24 (DB), *Ballave Mandal* v. *Bepin Behari Mandal.*

2. (1870) 13 Suth W R 414 (414) (DB), *Bunsee Sahoo* v. *Kalee Pershad.* (Water falling on *A's* land and collected in reservoir used to flow on *B's* land—*B* cannot get a right to compel *A* to send the water.)
('78) 2 Cal L R 141 (142) (DB), *Khoorshed* v. *Teknarain.* (Provided that dominant owner does not interfere with any portion of the water which flows from his land to that of the servient owner in a natural and defined channel.)
('23) 10 AIR 1923 Pat 65 (68) : 69 Ind Cas 947 : 2 Pat 110 (DB), *Mt. Sarban* v. *Phudo Sahu.*
('01) 14 C P L R 145 (148, 150), *Chakradhar* v. *Tikaram.* (Following *Mason* v. *Shrewsbury and Hereford Railway Co.*, (1871) 40 L J Q B 293 — Unless the existence of some grant or arrangement is either proved or from the circumstances of the case may reasonably be presumed.)

3. (1871) 20 W R (Eng.) 14 (17) : L R 6 Q B 578 (587) : 40 L J Q B 293.

4. ('03) 30 Cal 503 (504, 505) : 7 Cal W N 649 (DB), *Nritta Kumari Dassi* v. *Puddomoni Bewah.* (NOTE.—Assuming that such projection is for the advantage of the dominant tenement, there is a conflict of opinion as to whether the right is an *occupation of space* or an easement : See Note 9.)

A right to bury the dead in the land of another has been held not to be for the *beneficial enjoyment* of any land, and not to be, therefore, an easement.[5]

6. Easement is only a fractional right of user.—Since an easement is a right subtracted from the general rights of user vested in the owner, it is a fraction of the rights of user constituting ownership, and does not exclude the owner himself from using his property. A right which would prevent the servient owner from making ordinary use of his property and which would oust him from the property cannot, therefore, be acquired as an easement.[1] A right which would *destroy* the ordinary user[2] of property by the owner cannot be acquired by easement. Thus, a right to the promiscuous use of the whole property, as for example, by driving cattle over it in all directions,[3] or a claim to throw burnt earth in a tank belonging to the servient owner, the result of which is to increase the burden each time until the tank as a tank would be destroyed by the bed being raised,[4] cannot be acquired as an easement. Similarly, a right to a profit *a prendre* over the soil of another, such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject-matter, cannot be acquired as an easement.[5] A right to take *all* the minerals under a man's land is similarly not an easement but a right in the soil itself.[6] A right to take *all* the water flowing in a natural stream to the exclusion of the lower riparian owners would seem not to be an easement.[7]

7. Easement is a specific right. — Since an easement is a right subtracted from the general rights of user constituting ownership, it must be a *definite* and limited right.[1] Thus, there cannot be an easement to walk on the servient tenement in whatever manner the dominant owner pleases. He can only have a way from a particular point to another particular point in the servient tenement.[2] Similarly, there can be no easement in surface water not flowing in any defined channel.[3]

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[5] ('21) 8 AIR 1921 Cal 569 (570): 66 Ind Cas 640 (DB), *Gopal Krishna* v. *Abdul Samad*. (Such a right is not an easement on other grounds also: See Note 9.)

Note 6

[1] ('35) 22 AIR 1935 Rang 56 (57) : 154 Ind Cas 468, *Daw Tint* v. *Maung Kywe*.

[2] (1852) 1 Macq 305 : 149 R R 11, *Dyce* v. *Lady James Hay*.

[3] ('71) 15 Suth W R 295 (296) (DB), *Joy Doorgo Dossia* v. *Juggernath Roy*.
('21) 8 AIR 1921 All 206 (207) : 43 All 345 : 60 Ind Cas 990 (DB), *Lal Bahadur* v. *Rameshwar Dayal*. (15 W R 295 followed.)

[4] (1873) 20 Suth W R 237 (237), *Sreedhur Dey* v. *Adoyto Kurmokar*. (There can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user.)

[5] ('33) 20 AIR 1933 Cal 539 (541): 146 Ind Cas 427 (DB), *Brajendra Kishore* v. *Iswar Kaibarta*.

[6] (1843) 12 L J Ex 227 (229) : 11 M & W 33: 7 Jur 284 : 63 R R 507, *Wilkinson* v. *Proud*.

[7] (1906) 1906 App Cas 72 (83) : 75 L J P C 14 : 94 L T 65, *John White & Sons* v. *J. & M. White*.
[But see ('26) 13 AIR 1926 Pat 187 (188): 94 Ind Cas 929 (DB), *Jugal Sarkar* v. *Raj Mangal Prasad*.]

Note 7

[1] Austin, Lectures on Jurisprudence, abridged by Robert Campbell, 1899 Edition, pages 390 and 391.

[2] ('25) 12 AIR 1925 Nag 168 (171) : 85 Ind Cas 84, *Wasudeo* v. *Shankar*.

8. Right of easement can be vested only in determinate individual. — As seen in Note 1, an easement is a private servitude vested in a *determinate* individual. It follows, therefore, that there can be no *easement* in favour of a fluctuating and indeterminate body of individuals,[1] though a right in the nature of an easement may be acquired by a fluctuating body by *custom*,[2] or by long user from which a legal origin for such right may be presumed.[3]

9. Only certain rights are recognized as easements. — Theoretically there can be no limit to the varieties of rights of user that may be separated from the rights constituting ownership and be created as easements. But the law does not recognize every such right as an easement. The number of easements that can be acquired is limited to certain well known and well defined rights, and the law does not permit obligations of a novel and fanciful character to be created as easements. This limitation seems to be based on grounds

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(1865) 4 Suth W R 49 (50) (D B), *Goluck Chunder Chowdhary* v. *Tarinee Churn Chuckerbutty.* (A right of way is a right of passing in a particular line, and not the right to vary it at pleasure.)

[3] ('29) 16 AIR 1929 Rang 300 (302) : 7 Rang 487 : 120 Ind Cas 658 (DB), *Maung Pwe* v. *Maung Chan Nyein.*

('23) 10 AIR 1923 Pat 65 (68) : 69 Ind Cas 947 : 2 Pat 110 (D B), *Mt. Sarban* v. *Phudo Sahu.*

('27) 14 AIR 1927 Mad 144 (147) : 97 I. C. 832, *Raghavalu Naidu* v. *Secretary of State.* (No prescriptive right to throw back surface water not flowing in any defined course, on the land of another and to keep it standing there.)

('14) 1 AIR 1914 Mad 507 (508) : 37 Mad 304 : 17 Ind Cas 648 (DB), *Adinarayana* v. *Ramudu.*

('88) 11 Mad 16 (22) (D B), *Perumal* v. *Ramasami Chetti.*

[*See* ('13) 18 Ind Cas 824 (825) : 40 Cal 458 (F B), *Munshi Misser* v. *Bhimrajmam.* (But the fact that the water flows over the surface of the servient tenement without a defined channel for its carriage cannot prevent the acquisition of an easement by the dominant owner to send the water from his land on to the servient tenement. 8 Cal W N 244 overruled.)]

Note 8

[1] ('39) 26 AIR 1939 Lah 191 (192) : 184 I. C. 76, *Walaiti Ram* v. *Nathi Ram.* (On appeal from A I R 1939 Lah 12 — The right of the residents of a mohalla to take water from a certain well cannot be acquired as an easement under S. 26.)

('83) 9 Cal 698 (703) : 12 Cal L R 382 : 5 Shom L R 27 (D B), *Luchmeeput Singh* v. *Sadaullah Nushyo.*

('26) 13 AIR 1926 Mad 625 (627) : 92 Ind Cas 465 (D B), *Pakkir Muhammad* v. *Pichai Thevan.* (Following 9 Cal 698 and distinguishing 14 Bom 213.)

('17) 4 AIR 1917 Pat 640 (643) : 39 Ind Cas 868 (D B), *Maharajah Bahadur Singh* v. *Gandauri Singh.* (Indeterminate and fluctuating body is not "a person" and cannot prescribe.)

[*See* ('22) 9 AIR 1922 Upp Bur 23 (24) : 4 Upp Bur Rul 90 : 70 Ind Cas 915, *Maung Po Hla* v. *Maung Po Sein.* (Person does not include indeterminate body.)]

[2] ('26) 13 AIR 1926 Mad 625 (627) : 92 Ind Cas 465 (D B), *Pakkir Muhammad* v. *Pichai Thevan.*

('17) 4 AIR 1917 Pat 640 (646) : 39 I. C. 868 (D B), *Maharajah Bahadur Singh* v. *Gandauri Singh.*

[3] ('04) 31 Cal 503 (509) : 31 Ind App 75 : 8 Cal W N 425 : 14 Mad L Jour 152: 8 Sar 611 (P C), *Bhola Nath Nandi* v. *Midnapore Zamindari Co.*

of expediency. The leading case on the subject is *Keppell* v. *Bailey*,[1] where Brougham, L. C., observed as follows :

> " But it must not therefore be supposed that incidents of a novel kind can be devised and attached to the property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote."

On this principle it has been held that no easement can be acquired in the following cases :

1. Right to build latrines on another man's land and to use it as such.[2]
2. Right to rear fish in another man's tank.[3]
3. Right to go on another man's land for gathering fruits that fall there.[4]
4. Right to hold a musical festival on a particular plot of land.[5]
5. Right to throw back water and keep it standing on another's land, where the water is surface water not flowing in a defined channel.[6]

The following are all recognized as rights which can be acquired as easements :

1. Right to light and air, right to user of a way or watercourse, right to use water and right of support.[7]
2. Right to exercise a noxious or injurious or offensive occupation.[8]
3. Right of pasturage.[9]

Note 9

1. (1834) 39 R R 264 (277) : 2 M & K 517.

2. ('16) 3 AIR 1916 Cal 787 (787) : 29 Ind Cas 865 (DB), *Hara Lal Roy* v. *Lokenatha Shaha*.

3. ('24) 11 AIR 1924 Cal 667 (668) : 80 I. C. 805 (DB), *Chand Mia* v. *Tukamia*. (Novel right and a vague one.)

4. ('22) 9 AIR 1922 Mad 398 (398) : 68 I.C. 968 (DB), *Sarangapani* v. *Sadagopa*. ('93) 17 Bom 745 (747) (DB), *Naik Parsotam Ghela* v. *Gandrap Fatelal Gokuldas*. (The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have those branches overhanging the land, and cannot be said to be accessory to the latter right.)

5. ('09) 1 Ind Cas 108 (109) : 36 Cal 615 (DB), *Gopinath Jew Thakur* v. *Radhakanta Thakurji*. (It may be considered a customary right, but not a right of easement.)

6. ('27) 14 AIR 1927 Mad 144(147): 97 I.C. 832, *Raghavalu* v. *Secretary of State*.

7. ('29) 16 AIR 1929 All 885 (886) : 118 Ind Cas 715 (DB), *Bhagwan Das* v. *Iqbal Sultan Banu*. (Case of right of easement of support.)

8. ('15) 2 AIR 1915 Bom 284 (285) : 40 Bom 401 : 33 Ind Cas 192, *Bai Bhicaji* v. *Perojshaw Jiwanji Kerawalla*. ('98) 22 Bom 831 (832) (DB), *Kashinath Dada Shimpi* v. *Narayan Bapu Shimpi*. (Right to discharge smoke over defendant's land.)

9. ('90) 14 Bom 213 (221) (D B), *Secretary of State* v. *Mathurabhai*.

4. Right to carry on private ferry.[10]
5. Right to keep a bund at a particular height.[11]
6. Right to stack manure on a certain plot of waste land.[12]
7. Right to use land for storing, for thrashing floor and for using it as courtyard.[13]
8. Right of fishery as a profit *a prendre*.[13a]

See also the undermentioned cases.[14]

Right of privacy :

A right of privacy is not one which can under law be acquired as an easement. Such a right can however be acquired by *custom*,

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[*See* ('04) 31 Cal 503 (509, 510) : 31 Ind App 75 : 8 Cal W N 425 : 14 Mad L Jour 152 : 8 Sar 611 (P C), *Bhola Nath Nandi* v. *Midnapore Zamindari Co. Ltd.*]

10. ('92) 19 Cal 253 (262) : 19 Ind App 48 : 6 Sar 133 (PC), *Lachmeswar Singh* v. *Manowar Hossein.*

('81) 6 Cal 608 (610, 612, 613, 618) : 7 Cal L R 504 : 4 Shom L R 24 : 5 Ind Jur 417 (DB), *Permeshari Proshad* v. *Mahomed Syud.* (Such a right is more akin to an easement than to immovable property.)

[But see ('91) 18 Cal 652 (663) (DB), *Nithyhari Roy* v. *Dunne.* (6 Cal 608 not approved, but the opinion was held not necessary for the decision.)

('22) 9 AIR 1922 Bom 245 (245) : 67 Ind Cas 419 : 46 Bom 952 (DB), *Shama Durgaji Bhoi* v. *Gangadhar Narayan Muzumdar.* (Right of ferry can only be acquired by grant express or implied and not by prescription.)]

11. ('71) 15 Suth W R 216 (216) (DB), *Shunker Sahoo* v. *Gurbhao Sahoo.* (Claim to repair a bund for purpose of securing water for irrigating land.)

('71) 15 Suth W R 516 (516) (DB), *Heeranund* v. *Mt. Khubeeroonissa.* (Right to erect a bund in a natural stream so as to cut off the water from another party.)

12. ('27) 14 AIR 1927 All 115 (115) : 98 Ind Cas 460, *Dhaneshwar Tewari* v. *Antu Tewari.*

13. ('30) 17 AIR 1930 All 410 (412): 123 Ind Cas 757, *Ram Phal Singh* v. *Bachchu Ram.* (14 Bom 213 and 5 Cal 945 referred.)

13a. ('80) 5 Cal 945 (947) : 6 Cal L R 269 : 3 Shom L R 123 (DB), *Chundee Churn Roy* v. *Shib Chunder Mandal.*

('11) 12 Ind Cas 305 (306) (Cal) (DB), *Lokenath Bidyadhar* v. *Jahania Bibi.* (5 Cal 945 followed.)

('32) 19 AIR 1932 Cal 300 (302) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nandi* v. *Lokenath Mookerjee.*

('23) 10 AIR 1923 Pat 58 (61, 62) : 1 Pat 674 : 67 Ind Cas 954 (DB), *Henry Hill & Co.* v. *Sheoraj Rai.*

14. ('03) 30 Cal 1077 (1082) (DB), *Budh Mandal* v. *Maliat Mandal.* (An easement may exist and may be established in the nature of a right to have water passed from a river through a servient tenement for irrigation purposes of the dominant tenement by means of bund created in the dominant tenement.)

('22) 9 AIR 1922 Bom 79 (79) : 76 Ind Cas 754 (DB), *Yusuf David Varulkar* v. *Moses Soloman Talker.* (Right of passage by sweeper for plaintiff's privy can be acquired by twenty years' user.)

('26) 13 AIR 1926 Bom 282 (283) : 95 Ind Cas 170 (DB), *Ramchandra* v. *Anant Laxman.* (Passage for sweeper can be acquired by prescription though sweeper is municipal servant — But see contra AIR 1939 Rang 34.)

('22) 9 AIR 1922 Bom 378 (379) : 46 Bom 115 : 64 Ind Cas 418 (DB), *Baswantappa Irrappa Desai* v. *Bhimappa Yellappa Koppad.* (Right to receive water falling on higher land can be acquired by prescription.)

('97) 1897 Pun Re No 14, *Ilahi Bakhsh Khan* v. *Din Muhammad.* (Right to dry tobacco on certain adjacent land.)

('99) 23 Bom 397 (402) (DB), *Sundarabai* v. *Jayawanti.* (Right of growing rice-plants in another's land to be afterwards transplanted to his own is an easement of the nature of profits *a prendre.*)

and such custom is recognized in some parts of India,[15] but not in other parts.[16]

Right to bury the dead in another man's land :

In the undermentioned cases[17] it was held that a right to bury the dead in a particular spot cannot be acquired as an easement as such a right is unknown to law. As has been seen in Notes 4 and 5, such a right is even otherwise not an easement.

Right to project building over neighbour's land :

There is a difference of opinion as to whether the projection of a building over the land of the neighbour is an occupation of space constituting an occupation of property or is the enjoyment of an easement. In the undermentioned case,[18] the projection of a cornice merely for the purposes of ornamentation was held not to be an easement as it was considered not to be for the *beneficial enjoyment* of the dominant tenement. According to the High Court of Madras, such projection is an occupation of space rather than an enjoyment of an easement and the right to maintain the projection can be

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15. ('35) 22 AIR 1935 All 754 (755) : 155 Ind Cas 1056, *Tika Ram* v. *Ram Lal.* (Almora.)
('21) 8 AIR 1921 Sind 155 (158) : 16 Sind L R 17 : 66 Ind Cas 833 (DB), *Shah Muhammad* v. *Ramzan.*
('29) 16 AIR 1929 All 809 (810):119 Ind Cas 834, *Mt. Karimun-nissa Bibi* v. *Mira Bakhsh.*
('01) 5 Cal W N 147 (149) (DB), *Sri Narain Chowdhury* v. *Jodoo Nath Chowdhury.* (Right of privacy can arise only by express local usage, by grant or by special permission.)
('93) 16 All 69 (71, 72) : 1893 All W N 217 (DB), *Abdul Rahman* v. *D. Emile.* (The customary right of privacy is a right which attaches to property and is not dependent on the religion of the owner thereof : 10 All 358 relied on.)
('06) 29 All 64 (65) : 3 All L Jour 670 :1906 All W N 283, *Kundun* v. *Bidhi.* (Not only the owner, but the lessee or other person in lawful possession of a house may maintain an action if his right of privacy is interfered with:10 All 358 referred to.)
('68) 3 Agra 253 (253) (DB), *Ram Buksh* v. *Ram Sookh.* (The fact that the plaintiff does not observe a strict purdah, is not sufficient to deprive him of the right to object to an innovation by which his comfort is affected.)
('67) 2 Agra 269 (270) (DB), *Goor Dass* v. *Manohur Dass.*
('88) 10 All 358 (385, 386, 387) : 1888 All W N 135 (DB), *Gokul Prasad* v. *Radho.*
('69) 6 Bom H C R A C J 143 (145), *Kuvarji Premchand* v. *Bai Javer.*
('68) 5 Bom H C R A C J 42 (45), *Mani Shankar* v. *Trikam.* (Guzerat.)
('69) 1869 Pun Re No. 21 page (109 (110), *Nanuck Chand* v. *Lalla.*
[*See also* ('72) 9 Bom H C R 266 (269) (DB);, *Srinivas* v. *Reid.*
('26) 13 AIR 1926 Oudh 541 (542, 543) : 29 Oudh Cas 136 : 94 Ind Cas 914, *Mt. Subhaga* v. *Mt. Janki.* (Customary right of privacy is not only personal but also attaches to property.)
('69) 1869 Pun Re No. 91, page 135 (135), *Gohree* v. *Jaintee.*]

16. ('95) 18 Mad 163 (164):5 Mad L Jour 26 (DB), *Sayyad Asuf* v. *Ameeru Bibi.* (3 M H C R 141 followed, which case followed the English law on the subject.)

17. ('21) 8 AIR 1921 Cal 569 (570) : 66 Ind Cas 640 (DB), *Gopal Krishna Sil* v. *Abdul Samad Chaudhuri.* (Such right may be acquired through purchase or dedication.)
('27) 14 AIR 1927 Lah 664 (664) : 103 Ind Cas 678, *Jiwan Singh* v. *Karam Din.* (AIR 1921 Cal 569 and AIR 1924 Lah 492 followed.)
('28) 107 Ind Cas 769 (769) (Lah), *Nathu Lal* v. *Nur Muhamad.* (A I R 1921 Cal 569 and A I R 1924 Lah 492 relied on.)
('24) 11 AIR 1924 Lah 492 (493) : 78 Ind Cas 152, *Mangat Ram* v. *Siraj-ul-Hasan.* (AIR 1921 Cal 569 followed.)

18. ('03) 30 Cal 503 (504, 505), 7 Cal W N 649 (DB), *Nritta Kumari Dassi* v. *Puddo Moni Bewah.*

acquired by adverse possession of the space for twelve years.[19] In *Mohanlal Jechand* v. *Amratlal Bechardas*,[20] the projection of the eaves of a house on the neighbour's land was held to be an occupation of space and not an easement. In *Chhotalal Hirachand* v. *Manilal Gagalbhai*[21] it was held by the High Court of Bombay that the possession of eaves overhanging the neighbour's land *for the discharge of water* was an easement and not an occupation of his property.

Other miscellaneous rights :

A builds a room adjoining B's wall so that B's wall is one of the walls of the room. But no beams are placed on the wall and no support of any kind is received therefrom. A acquires no right of easement so as to compel B to allow the wall to exist.[22]

A right of *prospect, e.g.*, an unobstructed view of shop from the road is not an easement.[23]

A right to a *current of wind* as distinguished from air cannot be acquired as an easement.[24]

9a. Extent of easement.— The general rule is that the extent of the easement acquired is determined by the *accustomed user*. In the case of certain easements, however, the extent of the easement that may be acquired has also been limited by law. Thus, the extent of the easement of *light*, under the English law, (and the same applies to cases arising under this Act) is that amount of light which is sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the premises for the business for which it is used.[1] In other words, no obstruction is actionable unless there is such a diminution as to amount to a nuisance.[2] In this view, it differs somewhat from the provisions of the Easements Act under which the extent of such easement is the *accustomed* user. At the same time it is also provided that no suit is maintainable in respect of any disturbance of such easement unless such disturbance has caused *substantial damage* to the plaintiff.[3]

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[19] **19.** ('06) 29 Mad 511 (512, 513, 514) : 16 Mad L Jour 281 (DB), *Rathnavelu Mudaliar* v. *Kolandavelu Pillai*. (3 Bom 174 followed.)

[20] **20.** ('78) 3 Bom 174 (175, 176) (DB).

[21] **21.** ('13) 20 Ind Cas 246 (246, 247) : 37 Bom 491 (DB).

[22] **22.** ('89) 13 Bom 79 (82) (DB), *Gordhan* v. *Cholalal*.

[23] **23.** ('06) 29 All 22 (23) : 3 All L Jour 637 : 1906 All W N 257, *Gopi Nath* v. *Munno*. ((1866) 35 L J Ch 317 and (1866) L R 2 Ch 158 relied on.)

[24] **24.** ('87) 14 Cal 839 (854), *Delhi & London Bank Ltd.* v. *Hem Lall Dutt*. (Following 3 Beng L R O C 45.)

Note 9a

[1] **1.** ('35) 22 AIR 1935 Lah 865 (866) : 159 Ind Cas 702, *Umar Hayat Khan* v. *Mohammad Zaman*.
(1904) 1904 App Cas 179 (208) : 73 L J Ch 484 : 90 L T 687 : 20 T L R 475 : 53 W R 80, *Colls* v. *Home and Colonial Stores, Ltd.*
('27) 14 AIR 1927 Cal 345 (348) : 102 Ind Cas 370 (DB), *Debendra Nath Bagchi* v. *Surendranath Sur*.
('33) 20 AIR 1933 Rang 351 (352, 353) : 150 Ind Cas 252, *Ellerman Arracan Rice & Trading Co. Ltd.* v. *Pazundaung Bazar Co., Ltd.*
('14) 1 AIR 1914 P C 45 (47) : 42 Cal 46 : 41 Ind App 180 : 24 Ind Cas 300 (PC), *P. C. E. Paul* v. *W. Robson*.
('14) 1 AIR 1914 Cal 374 (375) : 23 Ind Cas 959 (DB), *Banomali Rooj* v. *Mokunda Lal Ghose*.
('05) 9 Cal W N 543 (546) (DB), *John Alexander Anderson* v. *Har Dut Roy Chamaria*.
('08) 35 Cal 661 (669) : 12 Cal W N 519, *Anath Nath Deb* v. *Galstaun*.
('20) 7 AIR 1920 Cal 375 (376) : 57 Ind Cas 706 (DB), *Hira Lall Dutta* v. *Mohendra Nath Banerjee*.

The extent of an easement to *air* is that amount of air which is necessary to prevent injury to health or something very nearly approaching it.[4] Ordinarily, where there is sufficient adit for light, it is sufficient adit for air also.[5]

The extent of the *support* is that it shall not cause damage to the servient owner.[6]

('75) 15 Beng L R 361 (369), *Modhoosoodan Dey* v. *Bissonath Dey*.
('69) 3 Beng L R O C 18 (46) (DB), *John George Bagram* v. *Khettranath Karformah*.
('87) 14 Cal 839 (854), *Delhi & London Bank Ltd.* v. *Hem Lall Dutt*. (3 Beng L R O C 18 followed.)
('83) 1883 All W N 256 (256) (DB), *Nur Muhammad* v. *Alimullah*.
('96) 20 Bom 788 (790) (DB), *Bala* v. *Maharau*.
[*See* ('39) 26 AIR 1939 Sind 39 (43) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi*. (Case under Easements Act.)]
[*See also* ('89) 13 Bom 674 (676) (DB), *Kadarbhai* v. *Rahimbhai*.]

[2] ('14) 1 AIR 1914 P C 45 (46, 47) : 42 Cal 46 : 41 Ind App 180 : 24 Ind Cas 300 (PC), *P. C. E. Paul* v. *W. Robson*.
('26) 13 AIR 1926 Nag 474 (475) : 96 Ind Cas 546, *Badri* v. *Jafarbhai*.
('11) 12 Ind Cas 60 (62, 64) : 39 Cal 59 (DB), *P. C. Paul* v. *William Robson*. (1904 A C 179 relied on.)
('19) 6 AIR 1919 Low Bur 75 (77) : 49 Ind Cas 458, *Balthazar & Sons* v. *M. A. Patail*. (AIR 1914 P C 45 followed.)
('09) 4 Ind Cas 425 (426, 427) : 33 Mad 327 (DB), *Esa Abbas* v. *Jacob Harron*. (The English law laid down in 1904 A C 179 does not apply to India.)
('08) 35 Cal 661 (670) : 12 Cal W N 519, *Anath Nath Deb* v. *Galstaun*.
('05) 29 Bom 157 (162) : 6 Bom L R 633 (DB), *Chotalal Mohanlal* v. *Lallubhai Surchand*.
('75) 15 Beng L R 361 (368, 371), *Modhoo Soodan Dey* v. *Bissonath Dey*.

[3] ('05) 7 Bom L R 73 (76, 82), *Framji Shapurji* v. *Framji Edulji*. (1904 A C 179 followed.)
('05) 29 Bom 157 (161) : 6 Bom L R 633 (DB), *Chotalal Mohanlal* v. *Lallubhai Surchand*. (Do.)
('27) 14 AIR 1927 All 191 (192) : 99 Ind Cas 5, *Dwarka Prasad* v. *Bishambhar Dayal*. (AIR 1914 P C 45 followed.)
('26) 13 AIR 1926 All 764 (766) : 97 Ind Cas 500, *Lachhmi Narain* v. *Ram Bhorosey*.
('15) 2 AIR 1915 All 151 (153) : 28 Ind Cas 962, *Gajadhar* v. *Kishorilal*.
('24) 11 AIR 1924 All 394 (395) : 78 Ind Cas 563, *Durga Prasad* v. *Lachmi Narain*. (AIR 1915 All 151 followed.)
('29) 16 AIR 1929 Bom 388 (389, 390) : 120 Ind Cas 365 (DB), *Bhimaji Vasudev* v. *Yeshvant Changagouda*. (1904 A C 179 followed.)
('94) 18 Bom 474 (486), *Ghansham Nilkant* v. *Moroba Ramchandra*.
('16) 3 AIR 1916 Sind 29 (33) : 9 Sind L R 101 : 33 Ind Cas 615 (DB), *Premji Ladha* v. *Visram Amul*. (The requirement of substantial damage tends to approximate the law under the Easements Act to the English rule.)
('99) 23 Bom 786 (788) : 1 Bom L R 459, *Kaliandas* v. *Tulshidas*.
('09) 1 Ind Cas 961 (962, 963) : 3 Sind L R 36, *David Sassoon & Co.* v. *Edulji Dinshaw*.
('09) 4 Ind Cas 425 (426) : 33 Mad 327, *Esa Abbas* v. *Jacob Harron*.

[4] See Peacock on Easements, 3rd Edition, pages 97, 98.

[5] ('09) 1 Ind Cas 961 (963) : 3 Sind L R 36, *David Sassoon & Co.* v. *Edulji Dinshaw*.

[6] Peacock on Easements, 3rd Edition, page 136.

A right of way over the servient tenement is generally the right of passage between two fixed terminii in a particular line,[7] though the servient owner can, it has been held generally, point out the route.[8] As to the extent of a right of way, see Peacock on Easements, 3rd Edition, pages 504 to 516 and also the undermentioned cases.[9]

10. Easement, if an interest in immovable property. — An easement is only a privilege and is only a right to the *limited use* of a piece of land without the *possession* of it.[1] It does not exclude the owner of the servient tenement from using his property.[2] It is not an

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[7] ('15) 2 AIR 1915 Cal 199 (200, 201) : 26 Ind Cas 213 : 42 Cal 161 (DB), *Jibananda Chakraburti* v. *Kalidas Mullik.* (Where the right of way is acquired by a particular track by the dominant owner, the servient owner cannot force upon him, in lieu thereof a different track.)
('67) 1867 Pun Re No. 80, *Khewan* v. *Dewan Jowahir Mull.*
(1865) 4 Suth W R 49 (50) (DB), *Goluk Chunder Chowdhury* v. *Tarinee Churn Chukerburty.*

[8] ('25) 12 AIR 1925 Nag 168 (171) : 85 Ind Cas 84, *Wasudeo* v. *Shanker.*
('19) 6 AIR 1919 Cal 976 (977) : 46 Ind Cas 374 (DB), *Lakhi Kanta* v. *Rajchandra.*
('88) 1888 Pun Re No. 22, *Buta Singh* v. *Hamir Singh.* (Servient owner can close up old way and substitute new way provided the right is not rendered less easy of exercise.)
('29) 16 AIR 1929 Pat 124 (125) : 115 Ind Cas 884 (DB), *Nasiruddin* v. *Deokali.*

[9] ('83) 9 Cal 778 (786) : 13 Cal L R 146 (DB), *Gopal Chunder Mukerjee* v. *Jaddoo Lall Mullick.* (Right of way for cleaning privy and drain is as often as is necessary for such cleaning. Affirmed by 13 Cal 136 (P C).)
('74) 1874 Bom P J 3 (DB), *Raghupathi* v. *Bapuji.* (Right of way for one purpose cannot extend to any other purpose whatever.)
('75) 1875 Bom P J 172, *Saloji* v. *Pandoji.* (Right of way may be limited to a particular season.)
('26) 13 AIR 1926 Bom 537 (538) : 98 Ind Cas 239 : 50 Bom 635 (DB), *Manchershah Sorabji* v. *Virji Vallabhdas.* (A right of way enjoyed for agricultural purposes may be used for other purposes provided no additional burden is thereby imposed on the servient heritage.)
(1864) 1 Suth W R 217 (218) (DB), *Ramsoondar* v. *Woomakant Chuckerbutty.* (Right of passage during a particular season.)
('68) 10 Suth W R 363 (364) (DB), *Oomur Shah* v. *Rumzan Ali.* (Do.)
('77) 1 Cal L R 425 (428) (DB), *Toolseemony Dabee* v. *Jogesh Chunder Shah.* (Right of way — The dominant owner is not necessarily entitled to the use of the whole width of the road, but is merely entitled to pass with the conveniences to which he has been accustomed.)
('71) 15 Suth W R 46 (47) (DB), *Rajmanik Singh* v. *Ruttun Manik Bose.* (A general right of way includes a right to carry marriage and funeral processions.)
('73) 20 Suth W R 293 (293) (DB), *Lokenath Gossamee* v. *Monmohan Gossamee.* (A general right of way, *i. e.*, a way usable for all purposes includes a way for marriage and funeral processions as well.)
('15) 2 AIR 1915 P C 131 (137) (P C), *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (Case from Southern Nigeria—Easement to take river water includes right to storage.)
('04) 28 Bom 428 (431) : 6 Bom L R 356 (DB), *Ranchod Shamji* v. *Abdulabhai.*
('20) 7 AIR 1920 Bom 233 (233, 234) : 59 Ind Cas 426 (DB), *Chintamani Hargovan* v. *Ratanji Bhimbhai.* (Right of way of any one kind does not include a right of way of another kind.)

Note 10

[1] See Note 1.

[2] ('23) 10 AIR 1923 Pat 58 (60, 61, 62) : 1 Pat 674 : 67 Ind Cas 954 (DB), *Henry Hill & Co.* v. *Sheoraj Rai.*
('34) 21 AIR 1934 Pat 420 (421) : 148 I. C. 431, *Ramhary Pal* v. *Nidhi Mahanty.* (A mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in S. 2 (5) of the Limitation Act and may be acquired by twenty years' uninterrupted enjoyment under S. 26.)
[*See* ('32) 19 AIR 1932 Cal 300 (302) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nandi* v. *Lokenath Mookerjee.* (A I R 1923 Pat 58 relied on.)]

Section 2 (5)
Easement

interest in immovable property.[3] Where, however, the right claimed is an *exclusive* user of the property (*i. e.* excluding even the owner from using it), it is not an easement but is an interest in immovable property. Thus, it has been held that an *exclusive* right of jalkar,[4] or an *exclusive* right to maintain a ferry[5] on the property of another is a right in immovable property and may be acquired by twelve years' user.

11. Classification of easements.—Easements can be classified into —

1. *Affirmative and negative easements :*

   Affirmative easements are those which entitle the dominant owner to make *active* use of the servient tenement or to do some act which in the absence of an easement would be a nuisance or a trespass. A negative easement is one which restrains the servient owner from exercising an ordinary right of ownership over his land.[1]

2. *Continuous and discontinuous easements :*

   A continuous easement is one whose enjoyment is, or may be, continual without the act of man. Thus, a right annexed to B's house to receive light by the windows without obstruction by his neighbour A is a continuous easement. A discontinuous easement is one that needs the act of man for its enjoyment, *e. g.* a right of way.[2]

3. *Apparent and non-apparent easements :*

   An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him, *e. g.*, right of A to overhang the eaves of his house over B's land and the right of A to lead water to his land across B's land by an aqueduct. A non-apparent easement is one that has no such sign, *e. g.*, a right annexed to A's house to prevent B from building on his own land.[3]

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[3] See the cases cited in foot-note 2.

[4] ('23) 10 AIR 1923 Pat 58 (60, 61, 62) : 1 Pat 674 : 67 Ind Cas 954 (DB), *Henry Hill & Co.* v. *Sheoraj Rai.*
('17) 4 AIR 1917 Pat 528 (529) : 2 Pat L Jour 289 : 39 Ind Cas 777, *Baker Husain* v. *Ranjit Koer.*
('32) 19 AIR 1932 Cal 300 (302) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nandi* v. *Lokenath Mukerjee.* (3 Cal L R 509 and 3 Cal 276 referred to.)
('79) 3 Cal L R 509 (510), *Lukhimoni Dasi* v. *Koruna Kant Moitro.*
('30) 17 AIR 1930 Mad 679 (680, 683) : 125 Ind Cas 545, *Secretary of State* v. *District Board of Tanjore.*
('11) 12 Ind Cas 305 (307, 308) (DB) (Cal), *Lokenath Bidyadhur* v. *Jahania Bibi.* (Exclusive right of fishery is an interest in immovable property.)
('77) 3 Cal 276 (279) : 1 Cal L R 592 (DB), *Parbutty Nath* v. *Mudho Parol.*
See also S. 28 Note 5; Art. 39 Note 10 and Arts. 142 and 144 Note 7.

[5] ('20) 7 AIR 1920 Pat 38 (40) : 57 Ind Cas 516 : 5 Pat L Jour 500 (DB), *Pardip Singh* v. *Secretary of State.*
('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat* v. *Hem Chandra Roy.*

Note 11

[1] Sweet's Law Dictionary, page 303.

[2] *Compare* S. 5 of the Easements Act, 1882.

[3] *Compare* S. 5 of the Easements Act, 1882.

Section 2 (5)
Easement

4. *Permanent and limited easements :*

A permanent easement is one which is acquired for all time; while a limited easement is one that will last for a term of years or other limited period. The latter cannot be acquired by prescription but may be acquired by contract or grant.[4]

12. **"Growing in, or attached to, or subsisting upon, the land of another."** — The legal meaning of the word 'land' is not only dry land but also land covered by water. Taking land to have this meaning, fish may properly be said to 'grow or subsist' upon it.[1] A right of fishery on the land of another (not being an *exclusive* right) is therefore an easement within the meaning of this clause.[2] A right to take water from a well situated in another man's land,[3] the right to catch fish in a tidal river by placing stake nets in certain places, the right of pasturage over the land of another, are other examples in the nature of profits *a prendre in gross.* The right to hunt and to appropriate the game is in the nature of the right of fishery and of grazing.[4]

Section 2 (6)
Foreign country

(6) "Foreign country" means any country other than British India.

"Foreign country." — See Note 1 to Section 1.

Section 2 (7)
Good faith

(7) "Good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention.

1. **"Good faith."** — The following illustrations will bring out the meaning of the term "good faith" as defined in this Act :

(1) A, who had a right to prefer a second appeal against a certain decree, applied in revision instead. The revision petition was later on converted into a second appeal, but on the date on which this was done the time for second appeal had expired. No affidavit was filed to show the circumstances which misled the counsel to give wrong advice to file a revision instead of a second appeal. It was held that the application in revision could not be said to have been made in good faith.[1]

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[4] *Compare* S. 6 of the Easements Act, 1882.

Note 12

[1] ('80) 5 Cal 945 (947) : 6 Cal L R 269 : 3 Shom L R 123 (DB), *Chundee Churn Roy* v. *Shib Chunder Mundul.*

[2] ('80) 5 Cal 945 (947) : 6 Cal L R 269 : 3 Shom L R 123 (DB), *Chundee Churn Roy* v. *Shib Chunder Mundul.* See also Note 10.

[3] See however ('39) 26 AIR 1939 Lah 191 (192) : 184 I. C. 76, *Walaiti Ram* v. *Nathi Ram.* (Letters Patent appeal from AIR 1939 Lah 12—In this case it was held that the right of the residents of a mohalla to take water from a certain well cannot be acquired as an easement under S. 26. The decision proceeds on the ground that there cannot be an easement in gross. It is submitted that in view of the definition in this clause the decision is open to doubt.)

[4] ('17) 4 AIR 1917 Pat 640 (651) : 39 Ind Cas 868 : 2 Pat L Jour 323 (DB), *Maharaj Bahadur Singh* v. *Gandauri Singh.*

Section 2 (7) — Note 1

[1] ('18) 5 AIR 1918 Lah 67 (67) : 1917 Pun Re No 95 : 43 Ind Cas 317 (DB), *Resal Singh* v. *Shadi.*

Section 2 (7)
Good faith

(2) Where the case was such that it must have been obvious to anyone with ordinary legal knowledge that court-fee should be paid *ad valorem* on the property, but the legal practitioner paid a fixed fee of Rs. 10 on the memorandum of appeal, and after its being pointed out by the office, paid the court-fee after the period of limitation had expired, it was held that the filing of the appeal with a court-fee of Rs. 10 was not done in good faith, and that the delay could not be excused under S. 5 of the Act.[2]

(3) A decree on the face of it showed that it was passed by a Subordinate Judge's Court. There had been two petitions in the said Court for execution of the decree. Nevertheless the decree-holder filed the next execution petition in the Munsif's Court, and when it was returned, re-filed the same in the Court of the Subordinate Judge. By that time, however, the time for making such application had expired. It was held that the application was not prosecuted in good faith in the Munsif's Court and that therefore the period during which it was so prosecuted could not be excluded under S. 14 of the Act, in computing the period of limitation for the application.[3]

(4) A filed a suit for damages against B, a public officer, and the same was dismissed for want of notice to the officer under S. 80 of the Civil Procedure Code. A thereupon filed another suit against the same officer after giving the required notice and claimed to exclude from the period of limitation the time taken by the first suit. It was held that the first suit was not prosecuted in good faith and the time could not be excluded under S. 14 of the Act.[4]

See also the undermentioned case.[5] See also S. 14 Note 20.

Section 2 (8)
Plaintiff

(8) "Plaintiff" includes any person from or through whom a plaintiff derives his right to sue.

Synopsis

1. **Scope of definition.**
2. **"Derives his right to sue."**
3. **Hindu widow and reversioner.**
4. **Hindu widow and son adopted by her.** See Note 3.
5. **Whether one reversioner derives his right to sue from another.**
6. **Shebaits, trustees, hereditary officers, etc.**
7. **Vendor and purchaser.**
8. **Suit by aurasa son to set aside adoption by father.**
9. **Persons suing on same cause of action.** See Notes 1 and 5.

1. Scope of definition. — This clause defines "plaintiff" as including any person from or through whom the plaintiff derives his right to sue. Thus, under Art. 144 (suit for possession of immovable property) limitation begins to run from the time when the possession of the defendant becomes adverse to the "plaintiff." By virtue of the definition in this clause, the word "plaintiff" in article 144 will include any person from whom the plaintiff derives his right to sue; so that, if the defendant's possession becomes adverse to A, and B thereafter derives from A the right to sue for possession, limitation for the suit by B runs from the date on which the defendant's possession becomes adverse to A.

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[2] ('18) 5 AIR 1918 Pat 336 (337) : 46 Ind Cas 509 : 3 Pat L Jour 484 (DB), *Jodhan Pershad Singh* v. *Nanhku Pershad Singh.*

[3] ('27) 14 AIR 1927 Pat 256 (256): 101 I. C. 674 (DB), *Fazlul Jamil* v. *Helal-ud-din.*

[4] ('11) 13 Ind Cas 260 (261) : 5 Sind L R 181, *Manghan Mal* v. *Fernandez.*

[5] (1900) 22 All 248 (258) : 1900 All W N 64 (FB), *Mathura Singh* v. *Bhawani Singh.*

Thus, the effect of the definition is that time which runs against one person also affects another person who derives his right to sue from the former. It will be seen that in such cases *the cause of action* of both the persons is the *same*. In this view it is clear that the definition merely illustrates the general principle that when the *cause of action for a suit is the same,* limitation begins to run at the same time against all persons who are or who may become entitled to sue on such cause of action.[1] It is not necessary for the application of this principle that the person suing must have derived his right to sue from another. The principle will equally apply where the cause of action arises simultaneously in favour of several persons, so that none of them can be said to derive his right to sue from another.[2] It is for this reason that the word "includes" has been used indicating that the definition of "plaintiff" in this clause is not exhaustive.[3] The expression "plaintiff" as used in the Act includes, therefore, any person who is entitled to sue on the same cause of action, although he may not derive his right to sue from him. To take an example: A Hindu widow takes a son in adoption in 1910. At that time two persons, A and B, who are reversioners of the same degree, are the next reversioners to the estate, and a cause of action accrues simultaneously in favour of both of them for a suit for a declaration that the adoption is invalid. The period of limitation for such a suit is six years under Art. 118 and time begins to run from the date on which the alleged adoption becomes known to the plaintiff. The adoption in this case becomes known to A in 1911 and to B in 1920. A does not bring any suit to have the adoption declared invalid. B sues in 1924 (within six years of the adoption becoming known to him) for a declaration that the adoption is invalid. His suit is barred. The reason is that the cause of action of both A and B being the same, when time begins to run against A in 1911 on the adoption becoming known to him in that year, it begins to run against B also. In other words, the knowledge of A is sufficient to make limitation run against B also, though the article says that limitation will run from the time when the adoption becomes known to the "plaintiff." This shows that a person in the position of A is included within the expression "plaintiff" in the

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Section 2 (8) — Note 1

[1] ('19) 6 AIR 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma v. Gopaladasayya.*

[2] ('27) 14 AIR 1927 Mad 216 (216, 217) : 99 Ind Cas 668, *Neelakantamier v. Chinnu Ammal.*

[3] ('18) 5 AIR 1918 Mad 675 (678, 679) : 41 Mad 4 : 42 Ind Cas 22 (DB), *Raja of Palghat v. Raman Unni.* (Per Seshagiri Iyer, J.)

article. It will be seen that A is not a person from whom B *derives* his right to sue. The reason for B being affected by A's knowledge is only that both have the same cause of action.

See also Note 5 below.

2. **"Derives his right to sue."** — The words "right to sue" must be interpreted to mean right to seek relief. The question whether and when one person derives such a right from another is a matter of substantive law. There are three general rules governing the question —

(1) All rights of action and all demands whatsoever existing in favour of or against a person *at the time of his death*, survive to and against persons who in law represent his estate.

(2) All rights of action existing in favour of or against a person *in respect of any particular interest* vested in him are enforceable by or against persons who become entitled in any manner to such interest. (See Notes 3 and 7.)

(3) Where a right of action arises in favour of or against any person in a representative capacity, such right may be enforced by or against any person on whom such representative capacity devolves or by or against the person represented.[1] (See Notes 5 and 6.)

There are, however, some exceptions to the first general rule mentioned above. Rights intimately connected with the individuality of the deceased will not survive to his legal representatives. One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona*—a personal right of action dies with the person.

The said general rule coupled with the exception has been recognised by the Legislature in the following enactments dealing with particular classes of cases; they may be usefully referred to as illustrating the principles applicable to the generality of cases :

(1) Section 37 of the Indian Contract Act lays down that promises bind the legal representatives of the promisor in the case of the death of such promisor, unless a contrary intention appears from the contract. Such a contrary intention will be presumed when the contract is of a nature involving special skill or personal confidence, etc.

(2) Section 306 of the Indian Succession Act provides that "all demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

Note 2

1. ('18) 5 AIR 1918 Mad 464 (468) : 41 Mad 124 : 42 Ind Cas 366 (DB), *Chidambaranatha v. Nallasiva.* (Beneficiary derives his right to sue from trustee.)

3. Hindu widow and reversioner.— A reversioner succeeding to an estate on the death of a Hindu widow does so not by virtue of his heirship to the widow but by virtue of his heirship to the last full owner. Hence, if any right to sue has accrued to the widow in her lifetime, the reversioner cannot derive such right from *her as her heir*. But the question arises whether on any *other* ground it can be held that the reversioner derives such right to sue from the widow or is otherwise affected by the limitation that has run against the widow. On this question the important point seems to be whether the widow can be held to represent the estate fully for purposes of limitation. If the widow can be held to represent the estate fully for purposes of limitation, any right to sue accruing in her favour would accrue not for her benefit alone but also for that of others who would eventually become entitled to the estate (though not deriving their right to the estate from her), and the reversioner succeeding to the estate after her would derive the right to sue from her and would be bound by any limitation that has run against her. If, on the other hand, it be held that the widow does not fully represent the estate for purposes of limitation, any right to sue accruing to her would only be for her benefit and not for that of others who may succeed to the estate after her, and the latter would not derive such right from her. The law on the question whether the widow represents the estate fully for purposes of limitation has undergone a change from what it was under the Limitation Act of 1859 and prior to that Act.

The Act of 1859 did not contain any provision corresponding to the present article 141. Under that Act, limitation for a suit for possession of immovable property by a reversioner succeeding to an estate on the death of a Hindu widow was governed by the residuary provision contained in section 1, clause 12, which corresponds to article 144 of the present Act. The starting point of limitation under this clause was the date of the cause of action. Where the adverse possession of the defendant had commenced during the lifetime of the widow, the question would have been whether the cause of action for a suit by the reversioner was the *same* as that of the widow or whether he had a *fresh* cause of action on his succeeding to the estate. On this question it was held that the widow fully represented the estate and that the reversioner who succeeded to the estate on her death only derived his right to sue from her and did not get a fresh right to sue on the widow's death. So, it was held that the reversioner was bound to sue within the period of limitation calculated from the date of the accrual of the cause of action in favour of the widow and was not entitled to a fresh starting point of limitation on her death.[1] But where the possession of the defendant originated in an invalid

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Note 3

[1] ('75) 23 Suth W R 214 (215) : 15 Beng L R 10 : 2 Ind App 113 : 3 Sar 430 : 3 Suther 94 (PC), *Amritolal Bose v. Rajoneekant Mitter.*
('68) 9 Suth W R 505 (509) : Beng L R Sup Vol 1008 (FB), *Nobin Chunder v. Issur Chunder.*
('90) 13 Mad 512 (515), *Sambasiva v. Raghava.*

alienation by the widow, it was held that his possession became unlawful only on the death of the widow and therefore the cause of action for a suit for possession against him arose only on the death of the widow.[2]

On another aspect of the same theory of the representation of the estate by the widow, it was held that a decree passed against a widow in her capacity as representing the estate would, in the absence of fraud or collusion, bind the reversioner in the same manner and to the same extent as if he was a party to the decree.[3]

Under these circumstances, article 142 of Act IX of 1871 was enacted and it was enlarged and repeated in the Acts of 1877 and 1908 as article 141. This article gives the reversioner entitled to possession of immovable property on the death of a Hindu or Muhammadan female, twelve years from the death of the female within which to bring his suit for possession. Under this article, therefore, where a stranger is in adverse possession of immovable property to which a reversioner succeeds on the death of a Hindu female heir, the reversioner is entitled to sue for possession within a period of twelve years from the death of the female heir, in all cases irrespective of the question whether the possession of the defendant originated in an alienation by the female heir or not.[4] Even in cases where the adverse possession has continued for the full period of twelve years during the lifetime of the widow and her right to the property has been extinguished thereby, the reversioner will have a period of twelve years from the date of the widow's death within which to bring his suit, the bar of the widow's right not affecting the right of the reversioner.[4a]

The question arises whether in cases not falling within the purview of article 141 the old theory of the representation of the estate by the widow still holds good. In other words, the question is whether in cases not governed by article 141 the reversioner or other person becoming entitled to the estate which was previously vested in the widow is affected by limitation that has run against the widow or whether such reversioner or other person obtains a fresh right to sue on his succession to the estate. It has been held that even in cases not falling within the purview of article 141, limitation against a widow would not affect the person who subsequently becomes entitled to the estate.[5] Thus, it has been held that the cause of action for a suit by the reversioner for the recovery of *moveables* (to which article 141 will not apply) arises on the death of the widow and not before, and that limitation for such suit runs only from the date of the widow's death.[6] Similarly, where a widow adopts a son and the latter thereupon becomes entitled to the estate, it has been held that he will not be affected by adverse possession against the widow prior to the adoption and that limitation for a suit for possession by him would commence to run only from the time of his adoption, notwithstanding that article 141 does not apply to such cases.[7]

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[2] ('90) 13 Mad 512 (515), *Sambasiva* v. *Raghava*.
('69) 5 Mad H C R 428 (431), *Atchamma* v. *Subbarayadu*.

[3] (1865) 2 Suth W R 31 (37) : 9 Moor Ind App 539 : 1 Suther 520 : 2 Sar 25 (PC), *Katama Natchiar* v. *Srimut Rajah Mootoovijaya Ranganatha Bodha Gooruswami Peria Udaya Thevar*.

[4] See cases cited in Article 141 Note 13.

[4a] ('29) 16 AIR 1929 P C 166 (170) : 56 Ind App 267 : 117 Ind Cas 498 : 51 All 439 (PC), *Mt. Jaggo Bai* v. *Utsava Lal*.
('99) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (PC), *Runchordas Vandravandas* v. *Parvati Bai*.
('83) 9 Cal 934 (937) : 13 Cal LR 372 (FB), *Srinath Kur* v. *Prosunno Kumar Ghose*.
[**But see** ('28) 15 AIR 1928 Cal 670 (672) : 55 Cal 903 : 112 Ind Cas 496, *Aurabindo Nath Tagore* v. *Monorama Debi*. (Not good law.)].

[5] See cases cited in foot-notes (6) and (7) below.

The view upon which the above decisions proceed is that the widow does *not* represent the estate *for purposes of limitation* and that the reversioner or other person who becomes entitled to the estate subsequently is not a person who derives any right to sue from her.[8] The alterations made in the Act of 1871 and the later Acts have been taken to indicate a general scheme on the part of the Legislature to assimilate, *for purposes of limitation*, the position of a Hindu female heir to that of a life-tenant and that of a reversioner to that of a remainderman succeeding to the estate on the termination of the life-tenure. Just as adverse possession against a life-tenant will not affect the remainderman subsequently obtaining the estate, so it has been held that adverse possession against a Hindu female heir will not affect the reversioner or other person succeeding to the estate subsequently.[9] Article 141, in this view, merely gives legislative embodiment to a general principle, so that even in cases not coming within its express

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6. ('99) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 : 7 Sar 543 (PC), *Runchordas Vandravandas* v. *Parvati Bai.*
('22) 9 AIR 1922 Cal 321 (328) : 49 Cal 45 : 64 Ind Cas 980 (DB), *Pramatha Nath Bose* v. *Bhuban Mohan Bose.* (23 Bom 725 (PC) followed.)
[**But see** ('28) 15 AIR 1928 Cal 670 (674) : 55 Cal 903 : 112 I. C. 496, *Aurabindo Nath Tagore* v. *Monorama Debi.* (Not good law.)]
See also Article 120 Note 12.

7. ('05) 2 Cal L Jour 87 (94) : 9 C W N 795 (DB), *Harek Chand* v. *Bejoy Chand.* (Per Mukherjee, J.)
('15) 2 AIR 1915 Mad 539 (540) : 25 Ind Cas 692 (692, 693), *Kancharla Venkataratnam* v. *K. Venkataramiah.* (Applying the general principle that until plaintiff's right to immediate possession accrues his right to possession is not barred.)
('03) 26 Mad 143 (147) : 12 Mad L Jour 197 (DB), *Sreeramulu* v. *Kristamma.*
('21) 8 AIR 1921 Nag 111 (111) : 48 Ind Cas 230 (231) : 17 Nag L R 18 (DB), *Sitaram* v. *Rajaram.* (13 Bom 160 distinguished.)
(1900) 2 Bom L R 411 (414) (DB), *Hari Vithal* v. *Waman Hari.* (19 Bom 809, followed.)
('95) 19 Bom 809 (816) (DB), *Moro Narayan* v. *Balaji Raghunath.*
See also S. 9 Note 10, Art. 141 Note 7 and Arts. 142 and 144 Note 83.

8. See cases cited in foot-notes (6) and (7) above.
[**But see** ('35) 22 AIR 1935 Bom 420 (421) : 159 Ind Cas 272, *Mariyayya* v. *Chanvirangouda.* (Widow adopting son—Son suing for arrears of rent accumulated under lease executed by widow prior to adoption — Assumed that the son sues on the same cause of action and held that the suit was time-barred—Submitted that the assumption underlying the decision is not correct, though the decision itself is correct—The proper ground for rejecting the suit in such cases is that the adopted son has no right to sue for the arrears, such right being the widow's personal right and not forming part of the estate — In this view the decision does not militate against the general principle stated above, viz., that the adopted son or reversioner gets an independent cause of action to sue for the estate, on the estate falling in possession.)]

9. See cases cited in foot-notes (6) and (7) above.

provisions, the same principle is applicable and limitation against the reversioner or other person succeeding to the estate cannot run before the estate vests in him.

But as regards *decrees* passed against a widow, the old view that such decrees bind the reversioner in the absence of fraud or collusion is still good law.[10] Even if the decree against the widow was based on limitation it will bind the reversioner,[11] although as already seen, in the absence of such a decree the reversioner will not be affected by the limitation that has run against the widow. See also Art. 141 Note 13.

4. Hindu widow and son adopted by her. — See Note 3 above.

5. Whether one reversioner derives his right to sue from another. — A Hindu reversioner who succeeds to an estate on the death of a widow derives his right from the last full owner and not from any other *reversioner.* But any cause of action that may accrue in favour of a reversioner during the lifetime of the widow, such as the cause of action for a suit to set aside an alienation or an adoption by the widow, accrues to such reversioner in a *representative* capacity. The basis of such a suit is the common apprehended danger to the inheritance, and hence there is only one cause of action accruing in a representative capacity for the benefit of the entire reversionary body. Each of the reversioners entitled to sue has not an independent cause of action. Hence, where a cause of action arises in favour of a reversioner in his representative capacity, the same cause of action applies to any other reversioner who may become entitled to sue in respect of the same matter.[1]

Illustration.

S died leaving a widow and two daughters. The widow took one *D* in adoption. The daughters though aware of the adoption from the time when it was made did not sue to set aside the adoption within the period of six years allowed under Art. 118. Subsequently, *P*, a son of one of the daughters sued to set aside the adoption. It was held that the suit was barred, the reason being that the daughters as the immediate reversioners represented the inheritance and that *P* sued on the same cause of action as had accrued in favour of the daughters.[2]

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[10] ('25) 12 AIR 1925 P C 249 (251) : 52 Ind App 322 : 48 Mad 883 : 92 Ind Cas 85 (PC), *Vaithialinga* v. *Srirangath Anni.*
('29) 16 AIR 1929 P C 166 (170) : 56 Ind App 267 : 117 Ind Cas 498 : 51 All 439 (PC), *Jaggo Bai* v. *Utsava Lal.*

[11] See cases cited in foot-note (10) above.

Note 5

[1] ('38) 25 AIR 1938 Pat 510 (510, 511) : 178 Ind Cas 643, *Deebal Mahton* v. *Moti Mahton.*
('19) 6 AIR 1919 Mad 911 (920) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varama* v. *Gopala Dasayya.*
('22) 9 AIR 1922 All 301 (309) : 44 All 19 : 64 Ind Cas 248 (FB), *Kesho Prasad* v. *Shiva Prasad.*
('90) 14 Bom 512 (515, 516) (DB), *Chhaganram Astikram* v. *Bai Motigavari.*
('02) 4 Bom L R 893 (908), *Jamnabai* v. *Dharsey.* (14 Bom 512 followed.)
('25) 12 AIR 1925 Lah 654 (656) : 6 Lah 405 : 90 Ind Cas 1022 (DB), *Chirag Din* v. *Abdullah.*
('01) 24 Mad 405 (407) (DB), *Ayyadorai Pillai* v. *Solai Ammal.*
('26) 13 AIR 1926 Mad 1123 (1123) : 98 Ind Cas 435, *Siddareddy* v. *Deva Jarama Reddy.* (But the case of aurasa son challenging adoption is different from that of reversioners.)
('36) 23 AIR 1936 Lah 652 (654) : 166 Ind Cas 753 : I L R (1937) Lah 525 (DB), *Rameshwar* v. *Mt. Ganpati Devi.* (On the death of a reversioner-plaintiff pending suit, the right to sue survives to the next presumptive reversioner.)
('15) 2 AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 : 29 Ind Cas 298 (PC), *Venkatanarayana Pillai* v. *Subbammal.* (Do.)
[*See also* ('25) 12 AIR 1925 P C 249 (256) : 52 Ind App 322 : 48 Mad 883 : 92 Ind Cas 85 (PC), *Vaithialinga Mudaliar* v. *Srirangath Anni.*]

See also Note 1 above.

6. Shebaits, trustees, hereditary officers, etc. — Where a right to sue accrues in favour of a person in a representative capacity, the right would be derived by any person on whom the representative capacity devolves afterwards. On this principle, where adverse possession begins against the shebait of the idol or the trustee of a temple or other religious endowment, the successor of such shebait will be affected by such adverse possession and will not have a fresh right to sue or a fresh starting point of limitation from the date of his accession to office.[1] The same principle applies to holders of hereditary offices like *vatandars* in the Bombay Presidency, etc.[2] See also S. 10 Note 27 and Arts. 142 and 144 Note 49.

7. Vendor and purchaser.—Where A sells to B property which belongs to him but of which C is in adverse possession, B derives his right to sue from A and will be affected by the limitation that has run against A.[1]

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2. ('01) 24 Mad 405 (407) (DB), *Ayyadorai Pillai* v. *Solai Ammal*. (It is said in this case that *P* "claims through or from" the daughters. It is submitted that though *P's* suit is barred as being based on the same cause of action as accrued in favour of the daughters, he cannot be held to claim through or from them as one reversioner does not derive his right from the other.)
('81) 1881 All W N 83 (83), *Gopi Nath* v. *Sri Narain*.
See also Art. 118 Note 8.

Note 6

1. (1900) 23 Mad 271 (280, 281): 27 Ind App 69 : 4 Cal W N 329 : 10 Mad L Jour 29 : 2 Bom L R 597 : 7 Sar 671 (PC), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*.
('10) 37 Cal 885 (894) : 7 Ind Cas 240 : 37 Ind App 147 (PC), *Damodar Das* v. *Lakhan Das*.
('05) 28 Mad 197 (201) (DB), *Jagannath Rao* v. *Rama Dass Patnaik*.
('96) 23 Cal 536 (545) (DB), *Nilmony Singh* v. *Jagabandhu Roy*.
('18) 5 AIR 1918 Mad 675 (676, 677, 679): 41 Mad 4: 42 Ind Cas 22 (DB), *Rajah of Palghat* v. *Raman Unni*. (Sthani of Malabar Devaswom.)
('12) 16 Ind Cas 927 (928) (DB) (Cal), *Madhu Sudan Mandal* v. *Radhika Prosad*.
('12) 14 Ind Cas 142 (144): 39 Cal 887 (DB), *Jharula Das* v. *Jalandhar Thakur*.
2. ('04) 7 Bom L R 135 (137) (DB), *Rama Appa* v. *Shamrao Ganesh*. (Vatandar.)
('31) 18 AIR 1931 Bom 24 (27): 55 Bom 21 : 129 I. C. 145 (DB), *Tuka* v. *Ganu*. (Do.)
('85) 9 Bom 198 (212) (FB), *Radhabai* v. *Anantrav*. (Do.)
(1900) 10 Mad L Jour 114 (115) (DB), *Veerabudhra Varaprasada Rao* v. *Vellanki Venkatadri*. (Karnam — 9 Bom 198 followed.)
[But see ('95) 10 C P L R 78 (79), *Seetharam Brahmin* v. *Rambhaoo Patwari*. (Predecessor in office is not a "person from or through whom a plaintiff derives his title to sue.")]
See also S. 9 Note 10; Art. 124 Note 15.

Note 7

1. ('24) 11 AIR 1924 Cal 394 (394) : 81 Ind Cas 675 (DB), *Annada Mohan Roy* v. *Kina Das*.
('26) 13 AIR 1926 Mad 1155 (1157) : 97 Ind Cas 253 (DB), *Venkata Surya Narayana* v. *Makka Venku Naidu*.
[*See also* ('38) 25 AIR 1938 Lah 437 (439) : 181 Ind Cas 294 (DB), *Ishar Das* v. *Ralla Ram*. (Execution purchaser of plaintiff's interest is bound by same period of limitation.)]

Section 2 (8)
Plaintiff

Illustration.

The Government sells to *A* certain lands to which they are entitled. At the time of the sale *B* is in possession of the lands adversely to the Government. In calculating the period of limitation for a suit by *A*, the purchaser, for possession of the land, the period for which *B* has been in adverse possession against the Government must be taken into account.[2]

8. Suit by aurasa son to set aside adoption by father.—An *aurasa* son as a person whose chances of inheritance are affected has an independent right to challenge an adoption made by his father and such right is quite different from any right which the father himself may have to set aside the adoption. Hence, the son suing on his independent cause of action is not affected by the fact that his father has not sued within the period of limitation prescribed.[1]

9. Persons suing on the same cause of action.—See Notes 1 and 5 above.

Section 2 (9)
Promissory note

(9) "Promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight.

1. "Promissory note."—A "promissory note" is defined in the Negotiable Instruments Act, XXVI of 1881, S. 4, as —

> "an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Under the Indian Stamp Act, II of 1899, a promissory note is defined as meaning a promissory note as defined by the Negotiable Instruments Act, and as including also "a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any *condition or contingency which may or may not be performed or happen.*"

The said definitions are, however, applicable in construing those Acts only and are not applicable to a construction of the Limitation Act, which must be guided by the definition given in this clause.

Where A executed a note to B in these terms, namely, "The amount due to you is Rs. 1000. You being now a minor, I shall pay you in cash the whole sum of Rs. 1000 whenever you demand it, after attaining your majority," it was held that it was a promissory note within the meaning of this definition, and that it was payable after actual demand by the creditor after attaining majority.[1]

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2. ('24) 11 AIR 1924 Cal 394 (394) : 81 Ind Cas 675 (DB), *Annada Mohan Roy* v. *Kina Das.* (But the purchaser will not be entitled to the 60 years' period of limitation under Art. 149 as the suit is not by or on behalf of the Government.)
('26) 13 AIR 1926 Mad 1155 (1157) : 97 Ind Cas 253 (DB), *Venkata Surya Narayana* v. *Makka Venku Naidu.* (Do.)
See also Article 149 Note 7.

Note 8

1. ('26) 13 AIR 1926 Mad 1123 (1123) : 98 Ind Cas 435, *Siddareddy* v. *Deva Jayarami Reddi.*

Section 2 (9) — Note 1

1. ('93) 3 Mad L Jour 199 (200) (DB), *Kuttiassan* v. *Suppi.*

Section 2 (9)
Promissory note

A Government war-bond payable at a particular place is also a promissory note within the meaning of this definition.[2]

Section 2 (10)
Suit

(10) "Suit" does not include an appeal or an application.

1. "Suit." — The word "suit" has not been defined in the Act. This clause merely says that a "suit" does not include an appeal or an application. It has been held, however, that the term ought to be confined to such proceedings as, under that description, are directly dealt with by the Code of Civil Procedure, or such as, by the operation of the particular Acts which regulate them, are treated as suits.[1]

Under the Code of Civil Procedure, a suit is any proceeding which is instituted by the presentation of a *plaint*.[2] For an illustration of a proceeding which, by the operation of a particular Act, is treated as a suit, reference may be made to the Indian Succession Act, XXXIX of 1925, section 295.

A proceeding, therefore, which does not commence with the presentation of a plaint and which is not treated as a suit under any other Act is not a "suit" for the purposes of the Limitation Act.

Since by the definition a "suit" does not include an application,[3] it follows that the proceedings specified below are not "suits" :

(1) An application for execution of a decree.[4]

(2) An application under s. 214 of the Indian Companies Act, VI of 1882;[5] but an application under sub-s. (3) of s. 235 of the Act of 1913 (which corresponds to s. 214 above) was treated as a suit.[6] Sub-section (3) to s. 235 has however been repealed by Amending Act, XXII of 1936. (See also Article 36 Note 1.)

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[2] ('33) 20 AIR 1933 Mad 376 (377, 378) : 142 Ind Cas 286 (DB), *Secretary of State* v. *Kunhi Krishna.* (Under Negotiable Instruments Act also.)

Section 2 (10) — Note 1

[1] ('95) 22 Cal 943 (948), *M. M. Watkins* v. *N. Fox.*

[2] ('33) 20 AIR 1933 P C 63 (64) : 60 Ind App 13 : 54 All 1067 : 142 Ind Cas 7 (P C), *Hans Raj* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
[*See* ('27) 14 AIR 1927 Cal 281 (282, 283) : 54 Cal 126 : 100 Ind Cas 797 (DB), *Pran Kumar* v. *Darpahari Pal.* (Proceedings for grant of probate which are contested come within meaning of word "suit" in Letters Patent (Calcutta), Clause 13.)]

[3] ('77) 2 Cal 336 (339, 340) (FB), *Dhonessur Kooer* v. *Roy Gooder Sahoy.* (Distinguishing 9 Suth W R 402, a case under Code of 1859 under which application for ascertainment of mesne profits was held to be a suit within meaning of S. 14.)
('23) 10 AIR 1923 Pat 88 (88) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB), *Chandrika Roy* v. *Ramkuer Thakur.*

[4] ('75) 1 All 97 (101) (FB), *Jiwan Singh* v. *Sarnam Singh.* (Under Limitation Act, 1859, however, word "suit" may include application.)
('75) 2 Cal 336 (339, 340) (FB), *Dhonessur Kooer* v. *Roy Gooder Sahoy.* (Do.)

[5] ('96) 19 Mad 149 (150) (DB), *Ramaswami* v. *Streeramulu Chetty.*
('95) 18 All 12 (15) : 1895 All W N 136 (D B), *Connel* v. *Himalaya Bank.*

[6] ('23) 10 AIR 1923 Lah 58 (59): 71 Ind Cas 899 (DB), *Bank of Multan Ltd.* v. *Hukum Chand.*

Section 2 (10)
Suit

(3) A claim against a company in voluntary liquidation made by a proceeding not instituted by the presentation of a plaint.[7]

(4) An application under O. 9, R. 13, Civil Procedure Code.[8]

(5) An application under Para. 20, Sch. II, Civil Procedure Code.[9]

The word "suit" does not include an *appeal*.[10] But, the definition will only apply "unless there is anything repugnant in the subject or context." As has been seen already, (see Note "Definitions—General") the context of S. 31 (now repealed) shows that the word "suit" in that section included an appeal.

Where a suit consists of several independent claims which can be split up, it must, as regards each of such claims, be regarded as a separate suit for the purpose of applying the articles of the Act.[11] Thus, where a suit is for the price of medicines supplied and for fees for medical attendance, the former claim will be governed by Art. 52 and the latter by Art. 115.[12]

See also section 3 Note 4.

Section 2 (11)
Trustee

(11) "Trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

Synopsis

1. **Trust, meaning of.**
2. **Benamidar.**
3. **Mortgagee in possession after satisfaction of mortgage.**
4. **"Wrong-doer in possession without title."**

1. Trust, meaning of. — A "trust" in English law is "simply a *confidence*, reposed either expressly or impliedly in a person (hence

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[7] ('33) 20 AIR 1933 P C 63 (64) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.* (Application under S. 186, Companies Act, 1913.)

[8] ('23) 10 AIR 1923 Pat 88 (89) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB), *Chandrika Roy* v. *Ram Kuer Thakur.*

[9] ('23) 10 AIR 1923 Rang 226 (226, 227) : 1 Rang 256 : 76 Ind Cas 493 (DB), *Ma Thein Tin* v. *Maung Ba Than.* (Fact that application is numbered and registered as suit does not convert it into suit *for purposes of limitation.*)
[But see ('23) 10 AIR 1923 Oudh 91 (92, 93), : 74 Ind Cas 206, *Sheo Dutt Bahadur* v. *Bishunath Singh.*]

[10] ('98) 22 Bom 612 (617) (DB), *A (Husband)* v. *B (Wife).* (Case under Indian Divorce Act, 1869.)

[11] ('31) 18 AIR 1931 Lah 309 (310) : 130 Ind Cas 574 (DB), *Bhima Mal & Sons* v. *Rahmat Ullah.* (Agreement between *A* and *B* for purchase of three cars — *B* paying some earnest money and taking delivery of one car —Contract broken, but *B* neither returning car nor making further payment—Suit by *A* for balance of price of one car and for compensation for breach is governed by Art. 52 and Art. 115 respectively.)
('22) 9 AIR 1922 Lah 198 (199) : 66 Ind Cas 490 : 2 Lah 376 (FB), *Mahomed Ghasita* v. *Sirajuddin.*
('31) 18 AIR 1931 All 752 (753) : 133 Ind Cas 537 (DB), *Baroda Kant Sen* v. *Court of Wards, Baraon Estate.*
See also Art. 52 Note 6 and S. 3 Note 4.

[12] ('31) 18 AIR 1931 All 752 (753) : 133 Ind Cas 537 (DB), *Baroda Kant Sen* v. *Court of Wards, Baraon Estate.*

Section 2 (11)
Trustee

called the trustee), for the benefit of another (hence called the *cestui que trust*, or beneficiary), not, however, issuing out of real or personal property, but as a collateral incident accompanying it, *annexed in privity to (i. e. commensurate with) the interest in such property*, and also to the person touching such interest, for the accomplishment of which confidence the *cestui que trust* or beneficiary has his remedy in equity only."[1] The same idea may be expressed in a simpler way in the language of the Indian Trusts Act, II of 1882, by defining a "trust" as an obligation *annexed to the ownership* of property and *arising out of a confidence* reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

A trust, under the English law, may be created *expressly* by a declaration by the author of the trust in which case it is called an *express trust*,[2] or it may be created by *the operation of law* in which case it is called variously, constructive, resulting, or implied trust.[3]

The Indian Trusts Act, 1882, confines the word "trust" to what would be *express* trusts under the English law,[4] the constructive, resulting and implied trusts, under that law, being merely regarded as *obligations in the nature of trusts* and not as trusts at all.[5] This does not seem to be so under this Act. The fact that the definition of "trustee" in this clause excludes only *certain specified* persons who would be constructive trustees under the English law, seems to show that the word "trust" has been used in this Act in the wider sense in which it is used in the English law.

2. Benamidar. — Where A purchases property with his own money but in the name of B, or where A transfers his property to B without intending to benefit B, the purchase or transfer, as the case may be, is a *benami* transaction and B is a *benamidar*. Under S. 82, Indian Trusts Act, 1882, B must hold the property for the benefit of A, and this obligation is described as being in the nature of a trust. In

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Section 2 (11) — Note 1

[1] Wharton's Law Lexicon, 14th Edn., page 1014.
See also Halsbury's Laws of England (1914), Vol. 28, pages 5, 6, 7.
Lewin on Trusts, 12th Edn., pages 11 and 12.

[2] Wharton's Law Lexicon, 14th Edn., page 1014.
Snell's Principles of Equity, 12th Edn., page 52.
Halsbury's Laws of England (1914), Vol. 28, page 7.
Lewin on Trusts, 12th Edn., page 1125.

[3] Wharton's Law Lexicon, 14 Edn., page 1014.
Snell's Principles of Equity, 12th Edn., page 127. (A constructive trust is a trust which is raised by construction of equity, without reference to and irrespective of any intention of the parties, either expressed or presumed.)
Halsbury's Laws of England (1914), Vol. 28, page 7.
Lewin on Trusts, 12th Edn., page 1125.

[4] See Sections 3 and 5, Trusts Act, 1882.

[5] ('29) 16 AIR 1929 Nag 298 (302) : 116 Ind Cas 70, *Gaurishankar* v. *Ibrahim Ali*. (See Chapter 9, Trusts Act.)
('25) 12 AIR 1925 Rang 289 (290) : 3 Rang 206 : 86 Ind Cas 297 (DB), *Ma Thein May* v. *U Po Kin*.
[*See* ('98) 1898 Bom P J 380 (386) (DB), *Allima Gavsumiya* v. *Murari Shettappa*.
('21) 8 AIR 1921 Mad 125 (125) : 44 Mad 277 : 61 Ind Cas 907, *Rajeswara Dorai* v. *Ponnusami Tevar*.]
See also Pollock and Mulla's Indian Contract Act, 4th Edn., page 848.

Mt. Bilas Kunwar v. *Deoraj Ranjit Singh*,[1] their Lordships of the Privy Council observed that a *benami* transaction is a dealing that has a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase money and this again follows the analogy of the Common law that where a feoffment is made without consideration, the use results to the feoffor. Thus, a benamidar would be a *constructive* trustee under the English law. The definition, however, specifically states that a *benamidar* is not to be regarded as a "trustee" for the purposes of the Limitation Act.

3. **Mortgagee in possession after satisfaction of mortgage.** — A mortgagee remaining in possession after the mortgage has been satisfied is in the position of a *constructive* trustee for the mortgagor.[1] He is, however, under this clause, not a "trustee" for the purposes of the Limitation Act.[2]

4. **"Wrong-doer in possession without title."** — In *Viziaramarazu* v. *Secretary of State*,[1] a case before the passing of the Indian Trusts Act, 1882, Turner, C. J., observed as follows :

> "It is not every unlawful entry on, or continuance in, possession that creates a constructive trust. It is difficult to bring within the compass of a definition the principles by which the Courts have been guided in forcing *fiduciary* obligations on the consciences of wrongdoers by operation of law; but it may be asserted that the wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title, will not make the wrongdoer a constructive trustee unless he has been admitted into possession by a trustee so as to be affected with notice of the trust."

Under S. 94, Indian Trusts Act, 1882, the position of a wrongdoer in possession without title would appear to be that of a person whose obligation is in the "nature of a trust." See illustration (b) to that section. The Limitation Act, however, expressly lays down that such a person is not a "trustee" for its purposes.

Note 2

[1] ('15) 2 AIR 1915 P C 96 (97) : 37 All 557 : 42 Ind App 202 : 30 Ind Cas 299 (PC), *Mt. Bilas Kunwar* v. *Deoraj Ranjit Singh*.

Note 3

[1] See Halsbury's Laws of England (1912), Vol. 21, page 310.

[2] *See* ('68) 9 Suth W R civ 187 (189) (FB), *Babulall* v. *Jamal Ally*. (Code of 1859.) See also S. 10 Note 14.

Note 4

[1] ('82) 5 Mad 91 (105) (FB). (Decision confirmed by the Privy Council in 8 Mad 525, but without reference to observations cited.)

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

3.* Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suit etc., instituted, etc., after period of limitation.

Explanation. — A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

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* Act of 1877 : S. 4.

4. Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suits etc., instituted, etc., after period of limitation.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Illustrations.

(a) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(b) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

Act of 1871 : S. 4.

Same as S. 4 of Act of 1877.

Act of 1859 : S. 1.

1. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding.

Limitation of suits.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Subject to the provisions of Sections 4 to 25."
4. "Suit," meaning of.
5. Institution of suit, what constitutes.
6. Appeal, when preferred.
7. Application, when made.
8. "Period of limitation prescribed therefor by the first schedule."
9. "Shall be dismissed."
10. "Although limitation has not been set up as a defence."
11. Explanation to the section. See Notes 4 and 5.
12. Pauper proceedings and limitation.
13. Company in liquidation — Proceedings by or against.
14. Limitation bars remedy but does not destroy right.
15. Limitation does not bar defence.
16. Duty of Court to raise and decide question of limitation.
17. New plea as to limitation.
18. Duty of appellate Court under this section.
19. Res judicata and plea of limitation.
20. Consent decree for time-barred claim.
21. Admission on point of limitation — Effect.
22. Abandonment of plea of limitation. See Note 17.
23. Waiver of plea of limitation.
24. Contract or custom cannot override the statute.
25. Estoppel against pleading limitation.
26. Proceedings to which section applies.
27. Applicability of Act to arbitration proceedings.
28. Inherent power and limitation.
29. Set-off and counter-claim — Limitation.
30. Insolvency proceedings and limitation.
31. Plea of exemption from limitation.
32. Limitation only applies to institution of proceedings, not their continuation.
33. Amendment of plaint, etc.

33a. Conversion of proceedings.

34. Withdrawal of suit and institution of fresh suit.
35. Rejection of plaint.
36. Summary rejection of appeal.
37. Effect of non-compliance with section.
38. Onus of proof.
39. Plea of limitation, if technical.
40. Delay in filing suit.
41. Concurrent remedies, limitation for.
42. High Court, if can make rules inconsistent with provisions of the Act.
43. Revision, if lies on question of limitation.
44. Review, if lies on question of limitation.

Other Topics (miscellaneous)

Acts of Court *suo motu*—No limitation. See Note 26.

Companies Act, S. 186 — Application under—Not a suit. See Notes 4 and 26.

Consent of parties. See Note 24.

Crown—Not exempt. See Note 3.

Decree passed in Native State—Execution in British India—This Act applies. See Note 8.

Defendant in jail—Plaintiff not entitled to extension. See Note 3.

Executing Court — Power to extend. See Note 3.

Ignorance of law or fact—No ground for extension. See Note 3.

Limitation not pleaded—Court's duty. See Notes 1, 2, 10, 16, 18 and 23.

No exemption on equitable considerations. See Note 3.

Plea—Whether one affecting jurisdiction. See Notes 1, 37 and 43.

Presentation to Court having no jurisdiction. See Note 5.

Presidency Towns Insolvency Act, S. 7—Application under—Whether suit. See Note 26.

Provincial Small Cause Courts Act, S. 25—Revision under—Power of High Court. See Note 43.

Registration not necessary for institution. See Note 5.

'Reject' and 'dismiss.' See Notes 9 and 35.

Several reliefs—Limitation to be applied to each relief separately. See Note 4.

Signature and verification—Defects in. See Note 5.

Substance of claim and not mere form to be looked into. See Note 8.

1. Legislative changes.

(1) The section was first enacted in its *present* form in the Act of 1871. The material portion of the corresponding section (*viz.* S. 1) in the Act of 1859 ran as follows :

> " No suit shall be maintained . . . unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature . . . ."

It will be observed that the section differed from the corresponding section in the later Acts in two important respects :

(a) While the later Acts provided that a time-barred suit or other proceeding should be *dismissed*, the Act of 1859 provided that no such proceeding "shall be maintained."

(b) The section in the Act of 1859 did not contain the provision as to the bar of limitation being given effect to, although it was not set up in defence.

In these circumstances, there was a conflict of decisions as to whether the Court was entitled to go into the question of limitation if it was not raised by the defendant. One view was that the section made limitation a question of *jurisdiction* and hence the Court was entitled to go into such question of its own accord, although it had not been raised by the defendant.[1] The other view was that the provision as to limitation was intended for the *benefit of the defendant* and if he did not raise the point it was not for the Court to raise such point of its own accord.[2] The amendment of the section into its present form in the later enactments makes it clear that limitation is a material question although not relied on by the defendant and that the Court must dismiss a suit which has been instituted after the period of limitation, although the defendant has not pleaded limitation.

(2) The Act of 1859 did not contain any provision corresponding to the explanation to the section in the later Acts.

(3) The illustrations to the section which occurred in the Acts of 1871 and 1877 have been omitted in the present Act.

2. Scope of the section.— This section provides that a suit, appeal or application instituted after the prescribed period of limitation must be dismissed, although limitation has not been set up as a defence. This only means that where the Court *finds* that a suit or other proceeding has been instituted after the period of limitation, it must be dismissed, although limitation has not been set up as a defence. In other words, the section merely makes such question a *material* one

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Section 3 — Note 1

[1] ('66) 6 Suth W R 182 (182) (DB), *Purushnath Misser* v. *Shaikh Bundah Ali.*
('65) 3 Suth W R 184 (184) (DB), *Khettur Mohun Ghose* v. *Ramessur Ghose.*
('67) 7 Suth W R 46 (46, 47) (DB), *Giradharee Singh* v. *Kalika Sookul.*

[2] (1863) 1 Bom H C R 15 (15, 16), *Dattaji Narain* v. *Vamanrav.*
(1864) 1864 Suth W R Gap 207 (208), *Sreemutty Beedhoo Dossee* v. *Muddun Gopal Rukheet.*
(1865) 2 Mad H C R 238 (239), *Ramanatha Mudali* v. *Vaithilinga Mudali.*
[*See also* ('69) 12 Suth W R 215 (217) (DB), *Sheo Golam Singh* v. *Roy Dinkur Dyal.*]

for determination in every case, whether or not the point has been raised by the parties.[1] It does not oblige the Court in any case to *raise and decide* the question whether the suit or other proceeding has been instituted after the period of limitation. The reason is that a Court is not bound to raise and decide a question merely because it is material for the decision of the proceeding before it in the sense that the determination of the question one way or other would affect the decision of the proceeding. Whether the Court is bound to raise and decide such a question or is competent to do so depends on the law of *procedure*. For instance, it is a general rule of procedure that the Court is not bound to raise and decide a question of *fact* of its own motion, but must raise and decide a material question of *law* although not raised by the parties. Hence, where the question of limitation is one of *fact*, the Court is not bound to go into it unless raised by the parties. But, where the question is one of *law*, the Court is, as a general rule, bound to raise and decide such question although not raised by the parties. (See Note 16.) For other instances of rules of procedure bearing on the question when a point as to limitation may be raised, see Notes 16 to 20.

From the above it is clear that the view expressed in some decisions[2] that the Court is bound in *every* case to raise and decide the question of limitation is not correct. Similarly, the view expressed in certain decisions[3] that where the bar of limitation appears on the face of the proceedings the Court is bound under *this section* to go into the question of its own accord although not raised by the parties is not correct. In such cases, the question of limitation would be a material question of *law* capable of being disposed of on the facts before the Court and the duty of the Court to raise and decide such a question *suo motu* would arise under the general rule of *procedure* above referred to and not under *this section*, which, as already said, does not touch the question as to when the Court is bound to raise and decide a question of limitation. (See Note 16.) The importance of the section in this connection only consists, as has been seen before, in the fact that it makes the question of limitation a *material* question although not raised by the parties.

Note 2

[1] This view which was expressed in the First Edn. of this work has been adopted by the Rangoon High Court in ('40) 27 AIR 1940 Rang 207 (210) : 1940 Rang L R 273 : 193 Ind Cas 61 (DB), *Official Trustee* v. *Mrs. Raeburn.*

[2] *See* ('17) 4 AIR 1917 Pat 273 (274) : 40 Ind Cas 661 (DB), *Angrahit Ram* v. *Sitaram Das.*
('09) 2 Ind Cas 229 (229) : 5 Nag L R 50, *Chandrabhan* v. *Maruti.*
('90) 12 All 461 (483) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan-ullah Khan.* (The section irrespective of the pleadings of parties, casts upon Judge the duty of determining whether the appeal is within limitation.)
[*See also* ('29) 16 AIR 1929 All 485 (488) : 121 Ind Cas 552 (DB), *Baldeo Prasad Shukul* v. *Sukhdeo Prasad Shukul.* (Remark that the section imposes on the Court the duty of ascertaining if the proceeding before it has been filed in time is not correct.)]

[3] ('40) 27 AIR 1940 Rang 207 (211) : 1940 Rang L R 273:193 Ind Cas 61 (DB), *Official Trustee* v. *Mrs. Raeburn.*
[*See* ('94) 16 All 390 (393) : 1894 All W N 131 (DB), *Ramu Rai* v. *Dayal Singh.*
('12) 17 Ind Cas 638 (639) : 8 Nag L R 174, *Ganeshdas* v. *Mt. Nimbi.*]

Section 3
Notes 2-3

This section limits the time *after* which a suit or other proceeding would be barred. In some cases, there may be a limit of time *before* which a suit or other proceeding cannot be instituted. Thus, where a bond fixes a time for the payment of the money due thereunder, a suit for the recovery of the money cannot be instituted before the date fixed for payment.[4]

The Act *assumes* the existence of a cause of action and does not create or define one. The object of the Act is only to interpose a bar after a certain period to a suit to enforce an existing right. (See Note 15 to the Preamble.) The descriptions of various classes of suits and the specification of the points of time from which limitation would begin to run for such suits do not imply that a suit answering to any of these descriptions is necessarily based on a cause of action which is recognised as such by the law.[5]

3. "Subject to the provisions of Sections 4 to 25." — Under this section, the Court is bound to dismiss a proceeding if it is instituted after the period prescribed in the first schedule and this duty of the Court is only subject to the provisions of sections 4 to 25. The Court has no power, apart from the above provisions, to relieve a litigant from the bar of limitation.[1] Hence, the Court cannot grant an exemption from limitation on equitable considerations or on grounds of hardship.[2] Similarly, the mere fact that a case falls within the *reason* of any of the exceptions expressly recognized by the statute is not sufficient to extend such exception to the case.[3] So also, the inherent

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[4] ('24) 11 AIR 1924 Pat 135 (136): 74 Ind Cas 938, *Mt. Bibi Nasiban* v. *Eknam Narain Singh.*

[5] ('94) 21 Cal 8 (18) : 20 Ind App 183 : 6 Sar 334 : 17 Ind Jur 481 (PC), *Hari Nath Chatterjee* v. *Mothur Mohun Goswami.*
('11) 10 Ind Cas 477 (480) : 33 All 356 : 38 Ind App 87 (PC), *Khunni Lal* v. *Gobind Krishna Narain.*
('82) 5 Mad 253 (255) : 6 Ind Jur 465 (DB), *Karupam Zamindar* v. *Merangi Zamindar.* (Provisions of section apply only to periods named in second schedule.)
('79) 3 Bom 207 (209) : 3 Ind Jur 566 (DB), *Jivi* v. *Ramji.*
('11) 11 Ind Cas 540 (542) (DB) (Cal), *Jalim Singh* v. *Choonee Lal.*
('25) 12 AIR 1925 Oudh 400 (401) : 86 Ind Cas 725, *Ram Narain* v. *Barkandi.*
('24) 11 AIR 1924 Pat 721 (723) : 83 Ind Cas 812 : 3 Pat 880 (DB), *Kesho Prasad Singh* v. *Madho Prasad Singh.*
('09) 1 Ind Cas 647 (650) : 33 Bom 88 (DB), *Ram Krishna* v. *Tripurabai.* (Limitation Act being law of procedure should not be presumed to have effected any change in rights given by Hindu law.)
('01) 28 Cal 37 (46) : 5 Cal W N 195 (DB), *Surjyamoni Dassi* v. *Kalikanta Das.*
('27) 14 AIR 1927 Nag 10 (12) : 98 Ind Cas 22 : 22 Nag L R 147, *Secy. of State* v. *Bagmal Kissan Dayal.*
('78) 1878 Pun Re No 3 (FB), *Ratta Ram* v. *Mt. Nano.*

Note 3

[1] ('39) 26 AIR 1939 Bom 1 (16) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunathgouda.*
('71) 3 N W P H C R 318 (319) (DB), *Sadho Singh* v. *Mt. Kishnee.*
('35) 22 AIR 1935 Cal 333 (335) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra* v. *Rabatee Mohan Das.*
(1900) 5 Cal W N 259 (262), *Quazie Mahumdar Rohman* v. *Sarat Chundra Dutt.* (Suit under Chap. XXXIX (now Order 37), C. P. C. — Court has no power, after time fixed by summons for obtaining leave to appear and defend has expired, to extend time.)
('26) 13 AIR 1926 Lah 379 (381) : 7 Lah 161 : 95 Ind Cas 124, *Piroj Shah* v. *Qarib Shah.* (It is illegal assumption of jurisdiction to grant a prayer in time-barred application for which law does not permit extension of time.)
('20) 7 AIR 1920 Mad 1 (12, 13): 43 Mad 185: 54 Ind Cas 66 (FB), *Muthu Korakki* v. *Madar Ammal.* (Per Seshagiri Ayyar, J.)
('27) 14 AIR 1927 Lah 342 (343) : 100 Ind Cas 936, *Pal Singh* v. *Harnam Singh.*
('24) 11 AIR 1924 Lah 40 (41) : 4 Lah 90 : 71 Ind Cas 495 (DB), *Hukam Chand* v. *Shahab Din.*

('28) 15 AIR 1928 Mad 509 (512, 513) : 51 Mad 549 : 111 Ind Cas 210 (DB), *Ammalu Amma* v. *Narayanan Nair.* (Limitation Act is a complete Code).
('14) 1 AIR 1914 Mad 526 (529) : 37 Mad 186 : 18 Ind Cas 586 (D B), *Ramana Reddi* v. *Babu Reddi.* (Limitation being the result of statute law no exemption from it can be recognized except what the statute itself provides.)
('23) 10 AIR 1923 Sind 14 (15) : 73 Ind Cas 311 : 17 Sind L R 255 (DB), *Saker Chand Narsidas* v. *Yacoob.*
[*See also* ('74) 1874 Pun Re No. 58, *Bhai Swaya Singh* v. *Hira Nand.*
('25) 12 AIR 1925 Oudh 105 (106) : 80 Ind Cas 75, *Shamshad Medhi* v. *Mahbub Khan.* (Court of its own accord restoring suit beyond period of limitation.)]
See also Note 6 to Section 9.

[2] ('24) 11 AIR 1924 Lah 666 (666) : 76 Ind Cas 14, *Surjit Singh* v. *C. J. Torrie.* (Court has no discretion to enlarge the period of thirty days provided by Art. 164.)
('40) 27 AIR 1940 Rang 276 (278): 1941 Rang L R 1 : 192 Ind Cas 625 (FB), *Eng Gim Moh Firm* v. *Chinese Merited Banking Co. Ltd.*
('39) 26 AIR 1939 Bom 1 (16, 17) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jiraji* v. *Gurunathgouda.* (No principle can be invoked to add to or supplement provisions of the Act.)
('33) 20 AIR 1933 Lah 615 (618) : 146 I. C. 939, *Basheshar Das* v. *Diwan Chand.*
('35) 22 AIR 1935 P C 85 (88) : 62 Ind App 80 : 57 All 242: 155 Ind Cas 205 (PC), *Maqbul Ahmad* v. *Onkar Pratap Narain Singh.* (Section 3 is peremptory and it is Court's duty to notice the Act and give effect to it even though not referred to in pleadings.)
('29) 16 AIR 1929 All 677 (679) : 118 Ind Cas 670 (DB), *Maqbul Ahmad* v. *Pateshri Pratap Narain Singh.* (AIR 1921 Bom 379 not approved.)
('24) 11 AIR 1924 All 828 (830) : 75 Ind Cas 922, *Man Singh* v. *Ram Nath.*
('24) 11 AIR 1924 Bom 39 (40): 76 I. C. 557 (DB), *Somshikharswami* v. *Shivappa.*
('27) 14 AIR 1927 Cal 117 (122): 101 Ind Cas 62 (DB), *Panna Lal Ghose* v. *Adjai Coal Co.*
('28) 15 AIR 1928 Cal 646 (647) : 56 Cal 61 : 117 Ind Cas 543 (SB), *Hari Mohan Dalal* v. *Parmeshwar Sahu.*
('20) 7 AIR 1920 Lah 346 (347) : 55 Ind Cas 55, *Bano Mal* v. *Bano Mal.*
('94) 1894 Pun Re No. 128, *Jhandu* v. *Mohan Lal.*
('25) 12 AIR 1925 Mad 334 (337) : 85 Ind Cas 272 (DB), *Ammathayi Ammal* v. *Sivarama Pillai.* (Limitation Act is complete in itself and any ground of extension or suspension of time must be sought for within the four corners of it.)
('25) 12 AIR 1925 Oudh 369 (369) : 87 Ind Cas 17, *Ram Pher* v. *Ajodhia Singh.* (AIR 1914 Bom 201 dissented from.)
('36) 23 AIR 1936 Sind 169 (170): 30 Sind L R 242: 165 Ind Cas 91 (DB), *Tejumal Bhawandas* v. *Murad.*
('16) 3 AIR 1916 All 222 (223): 35 I C 292 (DB), *Mukund Ram* v. *Ramraj.*
('23) 10 AIR 1923 Mad 114 (116): 69 Ind Cas 724 (DB), *Govindasami Padayachi* v. *R. Sami Padayachi.* (A liberal view cannot be taken if it involves disregard of words of statute.)
(1864) 2 Mad H C R 268 (269) (DB), *K. J. S. Nayanivaru* v. *Venkataraya Chetty.* (No equitable construction can be put on statute of limitation.)
('26) 13 AIR 1926 Cal 65 (73) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal.* (Apart from provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions.)
('16) 3 AIR 1916 Mad 350 (363) : 38 Mad 321 : 19 Ind Cas 596 (DB), *Rajah of Ramnad* v. *Arunachallam Chettiar.*
[*See also* ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons.* (Express statutory provision overrides common law rule.)
('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara Sarma* v. *Venkatesa Ayyar.* (Equitable considerations are out of place when construing Limitation Act.)]
See also Note 6 to Section 9.

[3] ('26) 13 AIR 1926 Cal 65 (67) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dassee* v. *Nagendra Nath Pal.* (Per Mukerji, J.)
('16) 3 AIR 1916 Mad 350 (363) : 19 Ind Cas 596 (609) : 38 Mad 321, *Raja of Ramnad* v. *Arunachallam Chettiar.*

power of the Court under S. 151 of the Civil Procedure Code cannot be invoked to obtain an extension of limitation.[4] See also Note 28.

The following are instances of the application of the above principles :

(1) The mere fact that the plaintiff was by some arrangement or negotiation prevented from suing within the prescribed period is no ground for extending such period.[5]

(2) A mere mistake on the part of the plaintiff as to the date of the cause of action is not a ground for extending limitation in his favour.[6]

(3) Ignorance of the residence of the defendant is not a ground for extending limitation.[7]

(4) The fact that the defendant was in jail does not entitle the plaintiff to an extended period of limitation.[8]

(5) Time taken in obtaining the permission of the Government for suing a Native Prince under S. 86, Civil Procedure Code, cannot be deducted in computing the period of limitation for the suit.[9]

(6) The Crown as such is not entitled to any exemption from limitation.[10]

('28) 15 AIR 1928 Cal 646 (647) : 56 Cal 61 : 117 Ind Cas 543 (SB), *Hari Mohan v. Parameshwar.*

See also Note 6 to Section 9.

[4] ('24) 11 AIR 1924 All 668 (669):79 IndCas 997:46 All 631, *Totaram v. Pannalal.*
('35) 22 AIR 1935 Lah 60 (61) (DB), *Jai Kishan Dass v. Chiragh Din.*
('26) 13 AIR 1926 Lah 135 (135):89 Ind Cas 427, *Kundan Lal v. Kanshi Ram.*
('22) 9 AIR 1922 Lah 266 (266) : 66 Ind Cas 270, *Khairati v. Umar Din.* (Section 151, C. P. C., must not be used to defeat the imperative provisions of S. 3, Limitation Act.)
('20) 7 AIR 1920 Lah 261 (262) : 57 Ind Cas 15, *Mt. Lal Devi v. Amarnath.*
('20) 7 AIR 1920 Lah 309 (310) : 58 Ind Cas 789 : 1 Lah 363 (DB), *Bissa Mal v. Kesar Singh.*
('22) 9 AIR 1922 Mad 417 (421) : 70 Ind Cas 743 (DB), *Ganpathi Mudaliar v. N. Krishnamachari.*
('35) 22 AIR 1935 Rang 466 (471) : 13 Rang 595 : 159 Ind Cas 945 (DB), *K. P. L. S. S, Chettiar v. Official Receiver, Ramnad.* (The words "nothing in this Code" in S. 151, C. P. C., do not mean "nothing in this Code or any other law for the time being in force.")
('33) 20 AIR 1933 Rang 96 (98):142 I.C. 185 (DB), *Ma Sein v. S. T. R. M. Firm.*
('35) 22 AIR 1935 Pesh 146 (147) (DB), *Ajab Khan v. Alaf Gul.*
('22) 9 AIR 1922 Pat 479 (480):1 Pat 277:65 Ind Cas 341 (DB), *Ajodhya Mahton v. Mt. Phul Kuer.*
('24) 11 AIR 1924 All 446 (447) : 46 All 144 : 78 Ind Cas 416, *Shib Prakash v. Jhinguria.*
('24) 11 AIR 1924 Mad 114 (115, 116): 47 Mad 171: 76 Ind Cas 836 (DB), *Krishnaswami Naidu v. Chengalroya Naidu.*
See also Note 9 to Art. 164.

[5] ('67) 1 Agra 248 (249, 250) (DB), *Jehandar Khan v. Mt. Munnoo.*

[6] ('16) 3 AIR 1916 Cal 709 (709): 29 Ind Cas 399 (DB), *Mohendra Nath Mandal v. Narendra Krishna.*

[7] ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museeh-ood-deen Khan v. Clara Jane Museeh-ood-deen.*
See also section 18 Note 6.

[8] ('69) 1869 Pun Re No. 39, *Janee v. Warris.*
See also section 18 Note 4.

[9] ('29) 16 AIR 1929 Bom 14 (19): 53 Bom 12:115 Ind Cas 369, *Sayaji Rao Gaekwad v. Madhava Rao Raghunath Rao.*
See also section 9 Note 6.

[10] ('81) 4 Mad 155 (156) (DB), *Appaya v. Collector of Vizagapatam.*

Section 3
Notes 3–4

(7) An executing Court while rejecting an application for execution cannot extend the period of limitation by ordering that the decree-holder may file a fresh application within a certain period.[11]

(8) Juristic persons like other plaintiffs are subject to the law of limitation and enjoy no special privilege in this respect.[12]

See also S. 6 Note 23 and S. 9 Note 6.

4. "Suit," meaning of. — As seen in the Notes under S. 2, sub-s. (10), the word "suit" ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint.[1] The words "and . . . . . . liquidator" in the explanation to this section do not make a claim against a company in liquidation which is not instituted by the presentation of a plaint, a *suit* against the company so as to attract the provisions as to limitation applicable to such a suit. The explanation is not concerned with what is a suit but merely provides as to when a suit must be deemed to be instituted for purposes of limitation. The effect of the explanation is only that in the case of a *suit* against a company which is being wound up by the Court, the suit must be deemed to be instituted not on the date on which the plaint is actually presented to the proper officer of the Court but on the date on which the claim is first sent in to the official liquidator.[2]

Similarly, a claim *by* a company in liquidation which is not instituted by the presentation of a plaint, as for instance, an application under S. 186 of the Companies Act of 1913, by the official liquidator for recovery of money due from a contributory, is not a suit for the purposes of this section.[3]

Where a claim on which a suit is based is capable of being divided into parts, the suit is to be regarded as a separate suit in respect of each such part and the rule of limitation is to be applied to each such part separately. Thus, suppose rent is payable annually by A to B. B sues A for the arrears of rent due for five years. His suit is to be treated, for purposes of limitation, as a separate suit in respect of the rent for each year, so that, under article 110 the suit will be in time so far as regards the rent for the three years immediately preceding the institution of the suit and will be barred as regards the rent for the previous period.[4] In such cases, the entire suit must not be dismissed on the ground of limitation.[5]

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[11] ('09) 4 Ind Cas 958 (959) (Lah), *Rai Chand* v. *Jhande Khan.*

[12] ('38) 25 AIR 1938 Lah 369 (385):175 Ind Cas 945 (FB), *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.*

Note 4

[1] ('33) 20 AIR 1933 P C 63 (64) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (P C), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

[2] ('33) 20 AIR 1933 P C 63 (64) : 60 Ind App 13 : 54 All 1067 : 142 Ind Cas 7 (P C), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

[3] ('33) 20 AIR 1933 P C 63 (64) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (P C), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

[4] For cases, see Notes under Article 110.

[5] ('65) 3 Suth W R Act X Rul 131 (131) (D B), *Nobokishen Mukerjee* v. *Gopal Shamunt.*

Similarly, a suit which comprises several reliefs or claims should be treated as a separate suit in regard to each such relief or claim, and the rule of limitation must be applied to each such claim or relief separately. Thus, each distinct claim or relief in a suit will be governed by its own period of limitation, and although the suit may be dismissed with reference to such of the reliefs or claims as are time-barred, it may be decreed with reference to the other reliefs or claims.[6] For instance, a suit by a mortgagee which combines in itself both a claim against the mortgaged property as well as a claim for a personal decree against the mortgagor will be governed, as regards the claim against the mortgaged property, by article 132, and as regards the claim for a personal decree, by article 116, and although the suit may be out of time as regards the claim for a personal decree, it may be within time as regards the claim against the mortgaged property.[7]

See also Note 26.

5. Institution of suit, what constitutes. — The explanation to the section provides as to when a suit is to be deemed as instituted for purposes of limitation.

A comparison of the explanation with the provisions of the Civil Procedure Code[1] relating to the manner in which a suit can be instituted will show —

(1) that the Code does not contain any express provision embodying the two exceptions contained in the explanation, and,

(2) that while it may be possible under the Code to institute a suit even otherwise than by the *presentation of a plaint*, under the explanation to this section, a suit is instituted *only* on the presentation of a plaint to the proper officer except in the two cases specifically provided for.

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6. ('36) 23 AIR 1936 Mad 804 (807) : 170 Ind Cas 379 (D B), *Swami Kone* v. *Sankaravadia.* (Suit comprising prayer for declaration and for possession—Whole suit cannot be governed by Article 144.)

('27) 14 AIR 1927 Mad 350 (351) : 99 Ind Cas 1055, *Venkatasivaramdass* v. *Secretary of State.* (30 Mad 101 distinguished.)

('22) 9 AIR 1922 Lah 198 (199) : 2 Lah 376 : 66 I. C. 490 (F B), *Mahomed Ghasita* v. *Sirajuddin.* (It is nowhere laid down that only one article should govern whole suit though it may consist of several independent claims.)

('31) 18 AIR 1931 Lah 309 (309, 310) : 130 Ind Cas 574 (D B), *Bhima Mal & Sons* v. *Rahmatullah.*

('81) 1881 Pun Re No. 116, *Dowlat Ram* v. *Jiwan Mal.* (Suit by pawnee for money against defendant personally and against pawned property.)

('68) 10 Suth W R 71 (72) : 1 Beng L R A C 25, *Mazuffur Ally* v. *Girish Chandra Das.* (Plaintiff asking cancelment of survey award and also claiming to be restored to possession of land from which he was subsequently dispossessed—*Held* latter claim was entirely different cause of action.)

(1900) 24 Bom 260 (274) : 1 Bom L R 799 (F B), *Shrinivas Murar* v. *Hanmant Chavdu.* (Combination of several claims would not in general deprive each claim of its own specific character and description.)

See also section 2 (10) Note 1.

7. ('30) 17 AIR 1930 Lah 993 (994) : 129 Ind Cas 201 (D B), *Sahib Singh* v. *Gurdial Singh.*

('85) 7 All 502 (505) : 12 Ind App 12 (P C), *Ram Din* v. *Kalka Prasad.*

Note 5

1. See Section 26 and Order 4 Rule 1 of the Civil Procedure Code.

Thus, the explanation is not a mere reproduction of the provisions of the Civil Procedure Code as to the manner of instituting a suit.

According to the explanation, a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer. The word "plaint" has no statutory definition. It has been described as nothing more than a private memorial tendered to a Court in which a person sets forth his cause of action: the exhibition of an action in writing.[2] But the explanation contemplates the presentation of a *valid* plaint. The question as to what constitutes a valid plaint depends on other branches of law. Thus, a plaint on which the requisite court-fee has not been paid is not valid according to the Court-fees Act,[3] and its presentation, therefore, will not save limitation under this section. But, under S. 149 and O. 7, R. 11, Civil Procedure Code, the Court has power to allow the court-fee to be paid at any time after the presentation of the plaint and on such payment it will be validated retrospectively from its original presentation.[3a] But, a payment not made within the time allowed by the Court, but made afterwards, cannot validate the plaint retrospectively.[4] For a discussion of the power of the Court under the above provisions, see the Authors' Commentary on the Civil Procedure Code, 3rd Edition, Notes under S. 149 and O. 7, R. 11.

The Civil Procedure Code prescribes various rules as to the form of the plaint and other particulars. But a non-compliance with these rules will not necessarily make the plaint invalid.[5] Thus, a mere defect as to the signature and verification of the plaint does not invalidate the plaint so as to make its presentation useless for the purpose of saving limitation.[6]

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[2] ('99) 22 Mad 494 (502) : 9 Mad L Jour 37 (DB), *Assan* v. *Pathumma.*
('21) 8 AIR 1921 Sind 166 (168) : 17 Sind L R 223 : 85 I. C. 893, *Mitsui Bussan Kaisha Ltd.* v. *Totaram Bhagwandas.*
See Authors' Commentary on the Civil Procedure Code 3rd Edn. S. 26 Note 3.

[3] See Court-fees Act, Sections 4, 6 and 28.

[3a] ('38) 25 AIR 1938 Mad 560 (562) : 178 I. C. 238 (DB), *Durairangam Pillai* v. *Govindarajulu.*
('37) 24 AIR 1937 Pat 550 (551, 553) : 16 Pat 600 : 172 I. C. 138 (SB), *Baijnath Prasad* v. *Umeshwar Singh.*
('10) 7 Ind Cas 578 (579) (DB) (Cal), *Budhan Shah* v. *Sita Nath Shah.*
('08) 3 M L T 63 (70) : 1907 Pun Re No. 123 (DB), *Saif Ali Khan* v. *Fazal Mehdi.* (Court cannot be prevented from receiving deficient court-fee and thereby validating plaint from original date of presentation because possible plea of limitation would be defeated thereby.)

[4] ('05) 2 Cal L Jour 70 (72, 73) : 9 Cal W N 844 (DB), *Hara Kumar Pal Chowdhury* v. *Sheikh Safatullah.* (But the date on which the deficiency is made up may be treated as the date on which the suit is instituted and if at that date it is not barred by limitation, it must not be dismissed on the ground of limitation.)
(1900) 27 Cal 376 (378) (DB), *Brahmomoyi Dasi* v. *Andi Si.*
('10) 7 Ind Cas 578 (579) (DB) (Cal), *Budhan Shah* v. *Sita Nath Shah.*
('37) 24 AIR 1937 Pat 550 (553) : 16 Pat 600 : 172 Ind Cas 138 (SB), *Baij Nath Prasad* v. *Umeshwar Singh.*
[*See* ('39) 26 AIR 1939 Cal 722 (722), *Dharma Nath* v. *Madhu Chandra.* (Extension to pay deficient court-fee granted under S. 149, Civil P. C., even after rejection of plaint—Order granting extension not set aside by superior Court in review or revision — Order whether right or wrong stands and suit cannot be dismissed as time-barred.)]

[5] ('21) 8 AIR 1921 Sind 166 (168) : 17 Sind L R 223 : 85 Ind Cas 893, *Mitsui Bussan Kaisha Ltd.* v. *Totaram Bhagwandas.*

[6] See Authors' Commentary on the Civil Procedure Code, 3rd Edn., Notes under O. 6 Rr. 14, 15.

Section 3
Note 5

The mere *presentation* of the plaint is sufficient to constitute the institution of a suit under the section;[7] the *registration* of the plaint is not necessary for this purpose.[8] But the presentation must be valid according to law. That is to say, the plaint must be presented by a duly authorized person[9] and in a manner and under conditions which make the presentation valid under the law. What constitutes a valid presentation depends on the Civil Procedure Code and other enactments. The undermentioned cases[10] illustrate the legal requirements in this respect.

('25) 12 AIR 1925 Mad 660 (668), *Govindoss Krishnadas* v. *Muthiah Chetty*.
('21) 8 AIR 1921 Cal 277 (279) : 66 Ind Cas 923 (DB), *Maharajah of Cooch Behar* v. *Mohendra Ranjan Rai*.
('25) 12 AIR 1925 All 79 (80, 81) : 46 All 637 : 87 Ind Cas 938 (DB), *Shib Deo Misra* v. *Ram Prasad*.
('32) 19 AIR 1932 Bom 367 (368) : 138 Ind Cas 797, *Nanjibhai* v. *Popatlal*.
[But see (1865) 4 Suth W R 81 (81), *Aboo Beebee* v. *Collector of Jessore*.
('05) 2 Cal L Jour 11 (14) (DB), *Baroda Prasad Bose* v. *Girijanath Roy*.]

[7] ('40) 44 Cal W N 604 (606) (DB), *Suprokash Chandra* v. *Amullya Chandra*. (Presentation of plaint within period of limitation— Suit will be deemed to be instituted on day when plaint is presented although leave under Cl. 12, Letters Patent, is granted beyond period of limitation.)
('27) 14 AIR 1927 Bom 480 (482) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co. Ltd.* v. *Ochhavlal Hargovandas*.
[*See also* ('29) 16 AIR 1929 Mad 480 (480) : 113 Ind Cas 550, *Ponnusamy Chettiar* v. *Kaliaperumal Naicker*. (Suit commences with presentation of plaint. See S. 26, O. 4, R. 1, C. P. C.)]

[8] (1865) 3 Suth W R 1 (1), *Juggobundhoo* v. *Gourmonee Dossia*.
('71) 3 N W P H C R 202 (203) (DB), *Hidayut Ali* v. *Mt. Maeraj Begum*.
('21) 8 AIR 1921 Cal 277 (279) : 66 Ind Cas 923 (DB), *Maharajah of Cooch Behar* v. *Mohendra Ranjan Rai*.
('73) 19 Suth W R 159 (159) (DB), *Young* v. *MacCorkindale*.
('67) 7 Suth W R 241 (241) (DB), *Syed Irtaza Hossein* v. *Hurry Pershad*.
('34) 21 AIR 1934 Bom 91 (93) : 148 Ind Cas 1038 (DB), *Ramgopal Chunilal* v. *Ramsarup*. (Admission of plaint does not affect presentation for purposes of limitation.)

[9] For a discussion of what constitutes valid authority for the presentation of plaints and other proceedings *see* the Authors' Commentary on the Civil Procedure Code, 3rd Edn., Notes under O. 3, Rr. 2 and 4.

[10] ('27) 14 AIR 1927 Cal 477 (477, 478) : 100 Ind Cas 469 (DB), *Narayan Chandra Das* v. *Dulal Chandra Dutta*. (Plaintiff major—Plaint signed by person as next friend—Plaint and presentation if valid.)
('24) 11 AIR 1924 All 54 (55, 56) : 45 All 701 : 77 Ind Cas 30 (DB), *Ruhul Amin* v. *Shankar Lal*. (Do.)
('94) 21 Cal 866 (868) (DB), *Taqui Jan* v. *Obaidulla*. (Do.)
('31) 18 AIR 1931 All 507 (511) : 134 Ind Cas 26 : 54 All 57 (SB), *Wali Mohamed Khan* v. *Ishak Ali Khan*. (Do.)
('18) 5 AIR 1918 Mad 916 (917) : 40 Mad 743 : 41 Ind Cas 510 (DB), *Shanmuga Chetty* v. *Narayana Iyer*. (Do.)
('97) 20 All 90 (91) : 1897 All W N 203 (DB), *Sheorania* v. *Bharat Singh*. (Do.)
('26) 13 AIR 1926 Lah 82 (82) : 89 Ind Cas 363, *Amritsaria* v. *Gamun*. (Do.)
('34) 21 AIR 1934 Bom 91 (93) : 148 Ind Cas 1038 (DB), *Ramgopal Chunilal* v. *Ram Sarup*. (When leave is required, plaint to be submitted to Chamber Judge and leave obtained from him under Cl. 12, Letters Patent.)
('75) 7 N W P H C R 5 (9) (DB), *Jaikuar* v. *Heera Lal*. (Place of presentation.)
('22) 9 AIR 1922 Nag 167 (167) : 65 Ind Cas 674 : 19 Nag L R 23, *Madhorao* v. *Manoharlal*. (Presentation after Court hours at residence of Judge is valid.)
('10) 5 Ind Cas 689 (690, 691) : 32 All 148 : 37 Ind App 39 (PC), *Ganpat Rao* v. *Sardar Anand Rao*. (Delay in filing a certificate under the Pensions Act condoned.)
('10) 7 Ind Cas 986 (989) (DB) (Bom), *Baudu Subrao* v. *Jambu Tavnappa*. (Conciliator's certificate under Dekkhan Agriculturists' Relief Act — Production of, is not condition precedent to institution of suit—Court is only forbidden to hear the suit in absence of such certificate.)

The explanation further requires that the presentation of the plaint must be made to the *proper officer*.[11] This necessarily implies that the presentation of a plaint to a Court having no jurisdiction is not sufficient to save limitation.[12] Hence, where a suit is first instituted

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('12) 15 Ind Cas 159 (160) (DB) (Cal), *Sajjad Hussain* v. *Ramlal Shahu.* (Failure to carry out statutory directions or judicial orders does not mean that Court should dismiss suit as improperly instituted.)

('93) 17 Bom 169 (172) (DB), *Jijaji Pratapji Raje* v. *Balkrishna Mahadev.* (Suit under Pensions Act, 1871, not bad *ab initio* because filed without Collector's certificate.)

(1900) 1900 Pun L R 126 (127) (DB), *Lakha* v. *Munshi Ram.* (Presentation to be in person or through agent and not by post.)

('70) 6 Mad H C R 136 (138) (DB), *Moparti Pitchi Naidu* v. *Vuppala Kondamma.* (Mode of presentation—Suit under S. 50, Madras Rent Recovery Act, 1865.)

('85) 8 Mad 411 (413) (DB), *Sankaranarayana* v. *Kunjappa.*

('01) 1901 Pun L R No. 31, p. 65 (66) : 1901 Pun Re No. 18, *Imami* v. *Saddan.* (Appointment of guardian *ad litem* for minor essential for commencement of suit.)

('05) 1905 Pun L R No. 179, p. 621 (624) : 1905 Pun Re No. 88, *Sayad Sharif Husain* v. *Mohammad Yusuf.* (Do.)

('27) 14 AIR 1927 All 787 (787) : 49 All 869 : 102 Ind Cas 624 (DB), *Har Lal Singh* v. *Rudra Singh.* (Do.)

('84) 1884 Bom P J 73 (74) (D B), *Parikh Gokaldas* v. *Raval Jalam.* (Do.)

('30) 17 AIR 1930 All 644 (646) : 128 Ind Cas 438 : 52 All 924 (D B), *Talib Ali Shah* v. *Piarey Lal.* (Do.)

('82) 4 All 37 (39) : 1881 All W N 129 (D B), *Khem Karan* v. *Hardayal.* (Do.)

('34) 21 AIR 1934 Cal 833 (833) : 153 Ind Cas 621, *Prosanna Ram Ghosh* v. *Anfar Ali.* (Do—Guardian for lunatic.)

('95) 19 Bom 135 (137) (D B), *Kirparam Jhumekram* v. *Modia Dayalji Jhumekram.* (Do—Suit by lunatic.)

('84) 1884 Pun Re No. 140, *Shivdial* v. *Aladia.* (Time of presentation.)

('71) 16 Suth W R 230 (231) (D B), *Ununto Ram Chattarjee* v. *Protab Chunder Shiromonee.* (Plaint may be received on holiday.)

('69) 11 Suth W R 537 (538) : 3 Beng L R App 72 (D B), *Gobind Coomar* v. *Har Gopal Nag.* (Revenue Courts cannot fix days when plaints shall not be received.)

('25) 12 AIR 1925 Mad 201 (201) : 82 Ind Cas 928, *Sinnappa Nadan* v. *Sinnappa Naicken.* (Plaint presented after office-hours to Munsif at his club—Refusal good.)

('24) 11 AIR 1924 Mad 448 (448) : 47 Mad 312 : 79 Ind Cas 1017 (F B), *Sattayya Padayachi* v. *Soundrathatchi.* (Presentation out of Court and office-hours valid if accepted by Judge.)

[11] *See the following cases as to when presentation is to the proper officer :*

('87) 1 C P L R 99 (99), *Vinayak Jogeshwar* v. *Madho.* (Clerk of the Court.)

('72) 18 Suth W R 172 (173) (DB), *Raj Chunder Gope* v. *Joogal Gope.* (Nazir—No.)

('12) 14 Ind Cas 221 (224) (DB) (Oudh), *Habib Saha* v. *Debi Bax Singh.* (Clerk of the Court in absence of Deputy Commissioner.)

('69) 6 Bom H C R A C 254 (256) (D B), *Nandvallabh* v. *Allibhai.* (Clerk in charge during vacation—No.)

('16) 3 AIR 1916 Mad 3 (4) : 29 Ind Cas 449 : 38 Mad 295 (F B), *The Receiver of the Nidadavole & Medur Estates* v. *Surapparazu.* (Collector's head-clerk if authorized.)

('18) 5 AIR 1918 Mad 1152 (1153) : 40 Ind Cas 587 (D B), *Radakrishna Iyer* v. *Swaminatha Aiyar.* (Head clerks in Revenue Courts, under Madras Estates Land Act, 1908, if authorized.)

('28) 15 AIR 1928 Lah 484 (486) : 110 Ind Cas 293 (D B), *Sharam Singh* v. *Sadhu Singh.* (Judge appointed to receive and distribute plaints.)

('34) 21 AIR 1934 Lah 622 (622) : 15 Lah 308 : 152 Ind Cas 618, *Nur Mahommad* v. *Ghulaman.* (Officer authorized in Judge's absence.)

('14) 1 AIR 1914 Mad 376 (376) : 23 Ind Cas 360 (D B), *Apparu Pillai* v. *Ameer Sahib.* (Head clerk authorized to receive during office-hours only.)

('21) 8 AIR 1921 Mad 654 (654, 655) : 44 Mad 817 : 63 Ind Cas 924 (D B), *Ummathu* v. *Pathumma.* (Chief Ministerial officer.)

('10) 5 Ind Cas 330 (331) (All), *Prabhu Narain Singh* v. *Sarju Misr.* (Munsarim of Court himself.)

[12] ('06) 9 Oudh Cas 1 (4) (DB), *Basant Singh* v. *Bijai Singh.*

('13) 18 Ind Cas 121 (122) (DB) (Cal), *Hari Das Roy* v. *Sarat Chandra Dey.* (16 Suth W R 47 distinguished.)

in a Court and on its being found that the Court has no jurisdiction the suit is filed in another Court which has jurisdiction, the suit must be deemed as instituted only when it is filed in the latter Court. In such a case, the suit in the latter Court cannot be considered as a *continuation* of the suit instituted in the wrong Court.[13] In such cases, however, the time taken in prosecuting the suit in the wrong Court can (in proper cases) be deducted under S. 14.[14] See also S. 14 Note 12.

But, where a plaint is presented in time to the proper Court but is returned for re-presentation to another Court to which the suit is transferred, the re-presentation of the plaint in the latter Court is only a continuation of the suit and the date of such re-presentation is

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('71) 1871 Pun Re No. 64, *Heera Lall* v. *Sheo Buksh*.
('11) 12 Ind Cas 58 (60) :36 Mad 131 (DB), *Mira Moiden Rowther* v. *Nalla Perumal Pillai*.
('73) 10 Bom H C R 495 (496) (DB), *Ramaya Elapa* v. *Mahomadbhai*. (5 Bom H C R A C 117 overruled.)
('94) 1894 All W N 159 (159) (DB), *Prag Das* v. *Kallu Mal*.
[*See* ('16) 3 AIR 1916 Nag 31 (33) : 40 Ind Cas 393 : 13 Nag L R 81, *Abu Baker Abdul Rahman & Co.* v. *Rambux*. (Observation.)]
[*See also* ('41) 1941-1 M L J 629 (631), *Ramaswami Aiyar* v. *Veerarayan Raja*. (Presentation of plaint to Court not having jurisdiction to try suit is no institution of the suit though the plaint has been accepted as being in order and registered — But presentation to a Court which *has jurisdiction* but which is not the Court of the lowest grade competent to try the suit under S. 15, C. P. C., stands on a different footing and, if subsequently, the plaint is returned for presentation to a lower Court and is presented in such Court, it is only a continuation of the suit.)]

[13] ('29) 16 AIR 1929 P C 103 (107): 56 Cal 1048 : 115 Ind Cas 713 : 56 Ind App 128 (PC), *Ramdutt Ramkissen Dass* v. *E. D. Sassoon & Co.* (Though subject-matter and parties are identical.)
('40) 27 AIR 1940 Mad 689 (690) (DB), *Chandrayya* v. *Seethanna*. (In this case the plaint was re-presented to same Court after striking out certain items of property so as to make suit within jurisdiction. AIR 1939 Mad 397 reversed.)
('29) 16 AIR 1929 Lah 877 (878) : 117 Ind Cas 900, *Surat Singh* v. *Mt. Nihal Kaur*.
('28) 15 AIR 1928 Bom 421 (422): 113 Ind Cas 511 : 52 Bom 548 (DB), *Hirachand Succaram* v. *G. I. P. Ry. Co.*
('30) 17 AIR 1930 Lah 394 (395) : 127 Ind Cas 708 (DB), *Madho Ram* v. *Dharam Singh*.
('12) 14 Ind Cas 157 (157, 158): 36 Mad 482, *Seshagiri Rao* v. *Vagra Velayudam*.
('28) 15 A I R 1928 Lah 484 (486) : 110 I. C. 293 (DB), *Sharam Singh* v. *Sadhu Singh*.
('12) 13 Ind Cas 377 (380) (DB) (Cal), *Hedlot Khasia* v. *Ka Ran Khasiani*.
('26) 13 AIR 1926 Cal 355 (356): 91 Ind Cas 862 (DB), *Bimala Prosad Mukerji* v. *Lal Moni Devi*. (If Court-fees Act is amended in the meantime, fees according to new Act to be paid.)
('95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen* v. *Madureswara*. (Plaint re-presented in the same Court after striking out part of claim so as to bring suit within jurisdiction,)
[But see ('15) 2 AIR 1915 All 344 (344):30 I. C. 544 (DB), *Ganga Prasad Rai* v. *Ramanand Gir*.]
See also section 14 Note 3.

[14] ('29) 16 AIR 1929 P C 103 (107, 108) : 115 Ind Cas 713 : 56 Ind App 128 : 56 Cal 1048 (PC), *Ramdutt Ramkissen Dass* v. *E. D. Sassoon & Co.*
('11) 12 Ind Cas 58 (60) : 36 Mad 131, *Mira Mohidin* v. *Nalla Perumal*.
[*See* ('40) 27 AIR 1940 Mad 689 (691) (DB), *Chandrayya* v. *Seethanna*. (*Held*, plaintiff could not claim benefit of S. 14 as he deliberately undervalued his relief when he presented the plaint in the first instance.)
('95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen* v. *Madureswara*. (*Held*, plaintiff was not entitled to benefit of S. 14.)]

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immaterial for purposes of limitation.[15] As to the power of the Court, while returning a plaint, to fix a time within which it may be re-presented, see the Authors' Commentary on the Civil Procedure Code (3rd Edition) O. 7 R. 10, Note 9.

6. Appeal, when preferred. — The question when an appeal is preferred is not dealt with by explanation to this section and depends on other branches of the law. Thus, O. 41, R. 1, Civil Procedure Code, provides for the manner in which an appeal from an original decree is to be preferred. Similarly, S. 419, Criminal Procedure Code, lays down the manner in which an appeal in criminal cases is to be preferred.

The following are illustrative of the requirements as to a valid institution of an appeal :

I. CIVIL APPEAL.

(1) Every memorandum of appeal must be accompanied by a copy of the decree appealed from and, unless the appellate Court dispenses therewith, of the judgment on which it is founded.[1]

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[15] (1865) 3 Suth W R 20 (21) (DB), *Thakuroodeen Mahomed Eshan Chowdhry* v. *Kurimbux Chowdhury.*
('95) 1895 Pun Re No. 7, *Seth Thandi Ram* v. *Mahdia.*
('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali* v. *Akhtar Hussain.* (Court in such cases should have itself sent case to transferee Court.)
[*See also* (13) 16 Ind Cas 979 (979) (Lah), *Khota Ram* v. *Mauj Din.* (Appeal.)]

Note 6

[1] ('32) 19 AIR 1932 Cal 589 (595) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan* v. *Mohendra Nath.*
('24) 11 AIR 1924 Nag 271 (273) : 20 Nag L R 131 : 78 Ind Cas 996, *Pandu* v. *Rajeshwar.*
('20) 7 AIR 1920 Pat 280 (281) : 54 I. C. 36, *Chaturbhuj Sahay* v. *Muhammad Habib.*
('96) 9 C P L R 109 (109), *Mt. Narbadi* v. *Mt Gajri.*
('26) 13 AIR 1926 Nag 57 (59, 60) : 90 Ind Cas 135 (DB), *G. I. P. Ry. Co.* v. *Radhakisan Jaikisan.* (Copy of judgment.)
('15) 2 AIR 1915 All 459 (460) : 31 Ind Cas 876, *Gurprasad* v. *Ram Samajh.* (Copy of decree in connected case filed.)
('18) 5 AIR 1918 All 394 (396) : 42 Ind Cas 888 : 40 All 12 (DB), *Quasin Ali* v. *Mt. Bhagwanta Kuer.*
('27) 14 AIR 1927 Lah 49 (49, 50) : 7 Lah 539 : 97 Ind Cas 187 (DB), *Nur Din* v. *Secretary of State.* (Award under S. 26, Land Acquisition Act, 1921, is decree —Hence copy is necessary.)
('27) 14 AIR 1927 Lah 103 (104) : 99 Ind Cas 770 : 8 Lah 257 (DB), *Morton* v. *Woodfall.* (Copy of judgment.)
('28) 15 AIR 1928 Lah 263 (264) : 112 Ind Cas 797 (DB), *Narasing Das* v. *Secretary of State.* (Award under Land Acquisition Act, 1921, is decree.)
('27) 14 AIR 1927 Lah 449 (451) : 104 Ind Cas 545 (DB), *Labha Singh* v. *Basant Singh.* (Copy of complete judgment.)
('27) 14 AIR 1927 Lah 451 (452): 109 I. C. 397 (DB), *Mt. Fazl-un-nissa* v. *Didar Hussain.* (Defective memo admitted—Objection at later stage may be barred.)
('22) 9 AIR 1922 Pat 580 (581) : 1 Pat 670 : 69 Ind Cas 686 (DB), *Rijan Thakur* v. *Charitar.*
('15) 2 AIR 1915 Mad 493 (493, 494) : 25 Ind Cas 28 (DB), *Arudai Ammal* v. *Ganapathi Iyer.*
('23) 10 AIR 1923 Mad 482 (483) : 72 Ind Cas 308, *Sundaram Iyer* v. *Muthuramalinga Sethupathi.*
('14) 1 AIR 1914 Lah 265 (265): 23 Ind Cas 319, *Achhar Singh* v. *Nikku.*
('21) 8 AIR 1921 Upp Bur 15 (15, 16): 4 Upp Bur Rul 75: 65 Ind Cas 68, *Maung Po Saung* v. *Ma Mun.*
('25) 12 AIR 1925 Nag 52 (53) : 81 Ind Cas 1001, *Baliram* v. *Ghasiram.* (Second appeal.)
('11) 10 Ind Cas 866 (868): 7 Nag L R 67, *Parashram* v. *Likhan.*

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(2) In case of second appeals, a copy of the judgment of the Court of first instance must also be filed along with the memorandum of the second appeal if the filing of such copy is prescribed by the rules of the particular High Court.[2]

('19) 6 AIR 1919 Lah 125 (125): 1919 Pun Re No. 19: 49 Ind Cas 673, *Mangal Singh* v. *Hirda Ram.* (Decree not framed, not filed—Appeal to be adjourned.)

('17) 4 AIR 1917 Lah 436 (437) : 41 Ind Cas 918 : 1917 Pun Re No. 67, *Dhanpat Mal* v. *Mela Mal.* (Copy of lower appellate Court's judgment.)

('28) 15 AIR 1928 Nag 131 (132): 106 Ind Cas 57, *Ramchandra Rao* v. *Mayaram.*

('30) 17 AIR 1930 Rang 182 (183): 127 Ind Cas 167, *U Po Thet* v. *Hauk Pat.* (No dispensation with copy of decree.)

('11) 9 Ind Cas 222 (223) (DB) (Lah), *Masum Begam* v. *Madan Mohan Lal.* (Copy of appellate decree.)

('11) 11 Ind Cas 8 (8) (Cal), *Keamat* v. *Abhooram Mistry.* (Do.)

('12) 15 Ind Cas 140 (141) : 1912 Pun Re No. 115 (DB), *Dhan Singh* v. *Khan Singh.* (Lower appellate Court's decree in cross-case.)

('12) 17 Ind Cas 155 (156) (DB) (Cal), *Prosonna Kumari Debi* v. *Ramchandra Singha.* (Copy of decree.)

('12) 17 Ind Cas 119 (120) (DB) (Cal), *Binapani Debi* v. *Shashibhushan.* (Do.)

('12) 17 Ind Cas 99 (100) (DB) (Cal), *Hemchandra Bakshi* v. *Jadubchandra Bakhshi.* (Do.)

('12) 14 Ind Cas 1006 (1006) (DB) (Cal), *Kamala Dasi* v. *Tarapada Mukerji.* (Appeal from order having effect of decree.)

('37) 24 AIR 1937 Oudh 65 (66): 12 Luck 472: 165 Ind Cas 578 (DB), *Lallu Ram* v. *Deputy Commissioner, Kheri.* (Decree filed late but within limitation.)

('25) 12 AIR 1925 Lah 438 (438, 439): 6 Lah 218: 94 Ind Cas 145 (DB), *Mubarak Ali* v. *Secretary of State.* (Award is decree. See S. 26, Land Acquisition Act, 1921.)

('28) 15 AIR 1928 Lah 216 (218) : 9 Lah 76: 104 Ind Cas 281 (DB), *Secretary of State* v. *Tirath Ram.* (Do.)

('15) 2 AIR 1915 Cal 666 (667) : 42 Cal 433 : 30 Ind Cas 165 (DB), *Abdul Hakim Chowdhury* v. *Hemchandra.* (Appellate decree.)

('95) 17 All 537 (553): 1895 All W N 212 (FB), *Bhavani Prasad* v. *Kallu.* (Observation.)

('79) 1879 Pun Re No. 7, *Bhag Singh* v. *Jhanda Singh.*

('79) 1879 Pun Re No. 147, *Nihal Singh* v. *Ishar Singh.*

('87) 1887 Pun Re No. 53, *Akbar Ali* v. *Ram Chand.*

('99) 1899 Pun Re No. 19, *Mt. Jaindi* v. *Kanshi Ram.*

('03) 1903 Pun L R No. 91, p. 237 (240) : 1903 Pun Re No. 22 (DB), *C.* v. *C. & B.* (Order rejecting petition for dissolution of marriage is decree and appealable; *vide* Ss. 45 and 55, Divorce Act, IV of 1869 and S. 2, C. P. C.)

('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Chiniot Municipal Committee* v. *Bashi Ram.* (Letters Patent Appeal.)

('22) 9 AIR 1922 Lah 191 (192), *Bashi Ram* v. *Chiniot Municipality.*

('21) 8 AIR 1921 Lah 266 (267) (DB), *Daim* v. *Hayat.* (Translation, instead of copy of decree.)

('92) 1892 All W N 47 (48) (DB), *Gulab Debi* v. *Shankar Lal.*

('97) 1897 All W N 15 (15), *Wahid Nur Khan* v. *Haqdad Khan.*

('15) 2 AIR 1915 Cal 693 (694): 27 Ind Cas 447 (DB), *Sitikantha Roy* v. *Bipradas Charan.* (Decrees if two, both to be filed.)

('90) 12 All 129 (138, 139): 1890 All W N 39 (FB), *Balkaran Rai* v. *Gobind Nath.*

[*See* ('13) 19 Ind Cas 438 (439): 1913 Pun Re No. 85 (DB), *Harjas Mal* v. *Kahni.* (Copy of deposition filed by mistake.)]

[But see ('94) 4 Mad L Jour 121 (Jour), See Critical Note on 16 All 77, *Chamela Kuar* v. *Amir Khan.*)

('29) 16 AIR 1929 All 858 (858) : 119 Ind Cas 4 (DB), *Santi Lal* v. *Raj Narain.* (Appeal from order under Provincial Insolvency Act, 1920.)]

See also Section 4 Note 14.

2. **('22)** 9 AIR 1922 All 490 (490) : 44 All 636 : 68 Ind Cas 812 (FB), *Shib Dayal* v. *Jagannath.* (The recent amendment of O. 42, R. 1, C. P. C., by Allahabad High Court, however, dispenses with the filing of such copy.)]

('21) 8 AIR 1921 All 23 (23) : 63 Ind Cas 338 : 43 All 660 (DB), *Bhairon Ghulam* v. *Ram Autar.* (Do.)

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(3) An appeal by or against a minor is preferred when the memorandum of appeal is filed and not when the next friend or guardian *ad litem* is appointed.[3]

(4) The memorandum of appeal must be signed by the appellant or his pleader.[4]

(5) The memorandum of appeal must be presented[5] by a duly authorised person.[6]

('21) 8 AIR 1921 All 242 (243) : 63 Ind Cas 344 (DB), *Bindeshri Pershad* v. *Afzal Khan.* (Do.)
('27) 14 AIR 1927 Lah 423 (424) : 101 Ind Cas 776, *Niadar* v. *Bhartu.* (Copy with High Court in another appeal not sufficient.)
('27) 14 AIR 1927 Lah 721 (722) : 104 Ind Cas 290, *Ghulam Muhammad* v. *Rura.*
('23) 10 AIR 1923 Lah 208 (208) : 79 Ind Cas 812, *Mt. Nazko* v. *Mt. Gopal.*
('30) 17 AIR 1930 Lah 935 (936) : 130 Ind Cas 519 (DB), *Arif* v. *Akbarali.*
('29) 16 AIR 1929 Lah 771 (772) : 123 Ind Cas 874 (DB), *Reasat Ali* v. *Mahfuzali.* (Copy to be certified under S. 76, Evidence Act.)
('21) 3 Lah L Jour 255 (256) : 67 Ind Cas 670, *Dyala* v. *Hiru.*
('37) 24 AIR 1937 Pesh 50 (50) : 168 Ind Cas 878 (DB), *Abdul Qayum* v. *Firm Maulvi Haji Md.*
('82) 4 Mad 419 (420) (FB), *Pirathi Singh* v. *Vencataramanayyan.*
('23) 10 AIR 1923 Lah 144 (144) : 73 Ind Cas 910, *Lakshmi Das* v. *Meharchand.*
('23) 10 AIR 1923 Lah 95 (95), *Mt. Rajan* v. *Kurria.* (AIR 1921 Lah 73 followed.)
('26) 13 AIR 1926 Lah 404 (404) : 94 Ind Cas 2, *Firm Chhota Lal* v. *Firm Basdeo Mal.* (Unattested copy allowed, attested being not available.)
('26) 13 AIR 1926 Lah 626 (626, 627) : 97 Ind Cas 773 (DB), *Naul* v. *Mula.* (Appellant cannot avail himself of copy filed by respondent in cross-appeal.)
('21) 8 AIR 1921 Lah 73 (73) : 2 Lah 227 : 63 Ind Cas 33, *Molu Mal* v. *Sri Ram.*
('24) 11 AIR 1924 Lah 41 (42) : 4 Lah 122 : 74 Ind Cas 451 (DB), *Mahomed Hassan-ud-din* v. *Saif Ali.*
('28) 109 Ind Cas 727 (727) (Lah), *Bahadur Singh* v. *Sain.*

3. ('26) 13 AIR 1926 Lah 186 (186) : 7 Lah 102 : 93 Ind Cas 355 (DB), *Ralla Singh* v. *Bishna.* (4 All 37 and 30 All 55 followed.)
('07) 30 All 55 (56) : 1907 All W N 290 (DB), *Rupchand* v. *Dasodha.*
('81) 4 All 37 (39) : 1881 All W N 129 (DB), *Khenkaran* v. *Hardayal.*
('36) 23 AIR 1936 Pat 153 (156) : 161 Ind Cas 579 (DB), *Satyadeva Narayan* v. *Tirbeni Prasad.* (Appointment, however, necessary for commencement.)
[*See* ('30) 17 AIR 1930 All 456 (457) : 124 Ind Cas 474 : 52 All 494 (DB), *Latafat Ali Khan* v. *Md. Yar Khan.* (Refusal by guardian *ad litem* to appeal—Next friend can appeal with application praying such appointment for himself.)]

4. See Civil Procedure Code, O. 41, R. 1.

5. ('39) 26 AIR 1939 Mad 669 (669, 670) : 184 Ind Cas 353, *Gonappala Basappa, In re.* (Presentation to second clerk of appellate Court as head clerk was on leave held sufficient.)
('1900) 1900 Pun L R No. 133 p. 363 (364), *Kaim Din* v. *Nihal Singh.* (Mode of presentation.)
('08) 1908 Pun W R No. 71 p. 251, *Mela Mal* v. *Natha Singh.* (Do.)
('95) 8 C P L R 93 (93), *Kripasindhudas* v. *Kunjabandas Mafidar.* (Sending by post, not presentation. 8 Mad 411 distinguished.)
('71) 3 N W P H C R 341 (342), *Taj Uldeen Khan* v. *Mt. Ghafoor-ul-nissa.* (Placing on table when Judge is absent is no presentation.)

6. ('26) 13 AIR 1926 Bom 336 (336) : 95 Ind Cas 266, *Mahomed Jafer* v. *Sheikh Ahmed.* (Vakalatnama.)
('20) 7 AIR 1920 Lah 212 (213) : 55 Ind Cas 990, *Khaira* v. *Nathu.* (Do.)
('21) 8 AIR 1921 All 210 (211) : 43 All 392 : 61 Ind Cas 410, *Shambhu Nath* v. *Badri Das.* (Do.)
('26) 13 AIR 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup* v. *Naik Ram.* (Do.)
('27) 14 AIR 1927 All 816 (816) : 102 Ind Cas 255, *Loknath Misir* v. *Sheo Saran Missir.* (Do.)
[*See* ('34) 21 AIR 1934 Pat 290 (292) : 149 I. C. 596 (DB), *Mt. Binda Kuer* v. *Lalita Prasad.* (Application for leave to appeal to Privy Council—Vakalatnama in two sheets on behalf of four parties one signed by one and other by other three—Extension given under S. 5.)]

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(6) The presentation must be to the proper Court.[7]

(7) A memorandum of appeal on which the requisite court-fee has not been paid is not valid.[8] But the Court has power under S. 149 of the Civil Procedure Code to allow court-fee to be paid after the date of the presentation of the appeal and where the Court does so, the memorandum of appeal becomes valid from the date of its original presentation.[8a]

See the following cases bearing on the authority to present an appeal :
('30) 17 AIR 1930 All 112 (112): 121 Ind Cas 546 (DB), *Mohammad Qamar Shah Khan* v. *Muhammad Salamat Ali.* (Vakil's name and signature necessary.)
('94) 1894 All W N 131 (131) (DB), *Muhammad Ghulam Moideen* v. *Muhammad Abdul Karim.* (Through mukhtar of appellant, irregular.)
('89) 16 Cal 250 (251) (DB), *Akshoy Koomar Nundi* v. *Chunder Mohan Chatthati.*
('70) 6 Mad H C R 38 (39), *In re Kristnappah.* (Jail appeal.)
('14) 1 AIR 1914 All 536 (537) : 36 All 46 : 23 Ind Cas 464 (DB), *Md. Ali Khan* v. *Jasram.* (Do.)
('13) 21 Ind Cas 444 (445) (All), *Habeeb* v. *Naush Ali.* (Party to sign vakalatnama.)
(1900) 22 All 331 (331, 332): 1900 All W N 96 (DB), *Shiam Karan* v. *Raghunandan Prasad.* (Authority to present, see cl. 8, Letters Patent, Allahabad.)
('11) 11 Ind Cas 387 (388) (Cal) (DB), *Sri Chandan Bhuya* v. *Haroo Sethi.* (Vakalatnama).
('26) 13 AIR 1926 Lah 223 (224): 92 Ind Cas 966, *Allah Baksh* v. *Rohtak Municipality.* (Power may be filed subsequently.)
('25) 12 AIR 1925 Lah 331 (332): 86 Ind Cas 207, *Kura* v. *Udami.* (Do.)
('30) 17 AIR 1930 Lah 68 (69): 116 Ind Cas 184, *Boora Mal* v. *Tulsi Ram.* (Power of attorney.)
('32) 19 AIR 1932 Lah 134 (135): 134 I.C. 114, *Mangal Singh* v. *Babu Singh.* (Do.)
('20) 7 AIR 1920 Pat 581 (582) : 55 Ind Cas 271 (DB), *Sheikh Palat* v. *Sarwan Sahu.* (Vakalatnama.)
('20) 7 AIR 1920 Nag 110 (111): 55 I.C. 415, *Mt. Masumbi* v. *Dongar Singh.* (Do.)
('21) 8 AIR 1921 Nag 27 (27, 28): 62 I. C. 259, *Chittar* v. *Lakshminarayan.* (Do.)
('32) 19 AIR 1932 Pat 3 (4): 133 Ind Cas 171 (DB), *Shyam Sunder* v. *Rahmatunnissa.* (Do.)
('32) 33 Pun L R No. 517 (517), *Mohamed Rafik* v. *Muhammad Yasin.* (Power may be filed subsequently.)
('09) 6 All L J 110*n* (110*n*), *Pokhpal Singh* v. *Damber Singh.*
('13) 19 Ind Cas 674 (674) (All), *Muhammad Ali* v. *Saktu.*

7. ('28) 110 Ind Cas 533 (535) (DB) (Lah), *Mahomed Amin* v. *Chanan Mal.* (Appeal refiled in proper Court after long delay.)
('04) 28 Bom 235 (237) : 5 Bom L R 947, *Daudbhai* v. *Emnabai.* (Execution proceedings appeal direct to High Court.)
('37) 24 AIR 1937 Nag 80 (82): I L R (1937) Nag 219: 171 Ind Cas 371, *Zumberlal Chhotelal* v. *Sitaram.* (Additional District Judge is part of District Court.)

8. ('36) 165 I. C. 57 (57) (DB) (Mad), *Ayyappa Naidu* v. *Mari Muthu Moopanar.*
('21) 8 AIR 1921 Lah 43 (44): 67 Ind Cas 901 (DB), *Shahu* v. *Bakri.*
('22) 9 AIR 1922 Lah 233 (234) : 56 Ind Cas 143 : 2 Lah 1 (DB), *Umed Ali* v. *Municipal Committee, Jhang-Maghiana.*
('24) 11 AIR 1924 Lah 401 (401) : 71 Ind Cas 736, *Shahadat* v. *Hukam Singh.* (Copy of order appealed against unstamped.)
('29) 16 AIR 1929 Nag 294 (295): 119 I. C. 700, *Patil Shyam Lal* v. *Gauri Shankar.*
('35) 22 AIR 1935 Lah 124 (125) : 153 Ind Cas 64, *Mohammad Fazal Elahi* v. *Ram Lal.* (Copy of decree insufficiently stamped.)
('34) 21 AIR 1934 Lah 272 (273): 147 Ind Cas 343, *Imam Din* v. *Sahib Din.* (Copy of order not stamped.)
('37) 24 AIR 1937 Lah 688 (688) : 172 Ind Cas 769, *Ihsan Ilahi* v. *Ata Ullah.* (Section 149, C. P. C.)
('35) 22 AIR 1935 Pat 201 (201): 156 I. C. 405, *Singasan Tewari* v. *Gaya Tewari.*
('31) 18 AIR 1931 Rang 38 (38) : 8 Rang 538: 129 Ind Cas 500 (DB), *U Shin* v. *Maung Tha Gywe.* (Section 28, Court-fees Act.)
[*See also* ('37) 39 P L R 502 (503), *Har Narain* v. *Jai Gopal.* (Where the copies of judgment and decree accompanying the memo of appeal were not properly stamped till after the period of limitation had expired, the appeal held time-barred.)]

8a. ('37) 24 AIR 1937 Lah 688 (688) : 172 Ind Cas 769, *Ihsan Ilahi* v. *Ata Ullah.*

(8) See also the undermentioned cases.[9]

II. CRIMINAL APPEAL.

See the undermentioned cases.[10]

7. Application, when made. — The section does not provide anything as to when an *application* is to be deemed as made for purposes of limitation. Hence, the question depends on the Civil Procedure Code and the rules made thereunder. For instance, under the rules of the various High Courts, an application to the High Court is sometimes required to be made by means of what is known as "a notice of motion." The procedure of a notice of motion consists in the fact that first, the proper officer of the Court is moved to issue a notice to the opposite party informing him that on a certain date therein specified, the person at whose instance the notice is issued will make a certain application to the Court. The question has arisen whether the date on which the application must be deemed as made for purposes of limitation is the date on which the proper officer of the Court is moved to issue the notice to the other side, or the date on which the application is made to the *Court*. There is a conflict of decisions on the question.[1] For full discussion of this point, see Note 3

('37) 24 AIR 1937 Oudh 414 (416) : 13 Luck 397 : 169 Ind Cas 794 (DB), *Husain Ali Khan* v. *Ambika Prasad.*

[9] ('23) 10 AIR 1923 Lah 484 (485) : 83 Ind Cas 543 (DB), *Mt. Shib Devi* v. *Ralla Ram.* (Memorandum written by a petition-writer is valid.)

('13) 18 Ind Cas 37 (39) : 1913 Pun Re No. 59 (DB), *Fakirchand* v. *Municipal Committee of Hazro.* (Respondent's name in memo necessary.)

('76) 1 All 260 (260) (DB), *Jagan Nath* v. *Lalman.* (Court to specify time for correction of memo.)

('12) 14 Ind Cas 744 (744): 34 All 482 (FB), *Thakur Din Ram* v. *Hari Das.* (Presentation at Judge's residence after Court hours, on last day of limitation, held sufficient.)

('23) 10 AIR 1923 Pat 150 (151) : 71 Ind Cas 426 : 2 Pat 264, *Anand Ram* v. *Ram Ghulam.* (Memo of appeal received on holiday.)

[10] ('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi* v. *Queen-Empress.* (Presentation of criminal appeal to Superintendent of jail is equivalent for purposes of limitation to presentation in Court.)

('92-96) 1 Upp Bur Rul 129 (129), *Nga Po Thaung* v. *Queen-Empress.* (Criminal appeal—Presentation to officer in charge of jail in which appellant is confined is equivalent for purposes of limitation, to presentation to Court.)

('90) 1890 Pun Re No. 29 Cr, p. 96 (97), *Muhammad* v. *Empress.* (Appeal by prisoner presented to officer in charge of jail in time under S. 420, Cr. P. C. — Delay in forwarding it to proper Court is no delay of appellant.)

('86) 9 Mad 258 (259) : 1 Weir 789 (D B), *Queen-Empress* v. *Lingayya.* (Jail appeal—Presentation to Jail Superintendent equivalent to presentation to Court.)

('92) 15 Mad 137 (138) : 2 Weir 468 (DB), *Queen-Empress* v. *Arlappa.* (By post —No presentation.)

('96) 19 Mad 355 (355) : 2 Weir 468 (DB), *Queen-Empress* v. *Vasudevayya.* (Deposit in petition box—No presentation.)

('98) 21 Mad 114 (115) : 2 Weir 470, *Queen-Empress* v. *Ramasami.* (Pleader through his clerk.)

Note 7

[1] ('24) 11 AIR 1924 Bom 36 (39) : 47 Bom 764:86 Ind Cas 440 (DB), *Venkapaiya* v. *Nazerally.* (Date of moving proper officer of Court is date of application.)

('29) 16 AIR 1929 Cal 193 (194) : 115 Ind Cas 83 : 55 Cal 1341, *Atarmoni Dasi* v. *Bepin Behari.* (Do.)

('07) 17 Mad L Jour 215 (216) (DB), *Kuttayan Chetty* v. *Manna Ellappa Chetty.* (Do—Even though affidavits supporting application are filed subsequently.)

to Art. 183. For further illustrations, see the undermentioned cases.[2]

8. "Period of limitation prescribed therefor by the first schedule." — The article in the first schedule applicable to a suit must be determined with reference to the nature of the plaintiff's claim.[1] Where the suit as framed falls under an article which allows a longer period of limitation, it is not for the defendant to say that

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('93) 20 Cal 899 (902, 903) (DB), *Khetter Mohun Singh* v. *Kassy Nath Sett.* (Date of application to Court is date on which it is made.)

('24) 11 AIR 1924 Bom 289 (289) : 85 Ind Cas 432, *Nazarally* v. *Venkapaiya.* (Do. —17 M L J 215 distinguished.)

('04) 31 Cal 150 (154) : 8 Cal W N 97, *Hinga Bibee* v. *Munna Bibee.* (Do.—20 Cal 899 followed.)

2\. ('38) 25 AIR 1938 Nag 46 (47) : I L R (1938) Nag 451 : 174 I. C. 597, *Kisanlal Ram Niwas* v. *Narain.* (Court or officer has discretion to accept application presented beyond office hours — Execution application to proper officer beyond office hours on last day of limitation—Presentation is proper.)

('37) 24 AIR 1937 Mad 239 (240) : I L R (1937) Mad 320 : 165 Ind Cas 659 (DB), *Nandamani Anangabhima* v. *Modono Mohono Deo.* (Application filed by pleader having no written authority — Pleader has no power or capacity to act—Application has no legal effect as not having been made in accordance with law.)

('78) 1 Cal L R 291 (291), *Desputty Singh* v. *Doolar Roy.* (Application may be made at any time in the day.)

('03) 26 Mad 101 (103) : 12 Mad L Jour 435 (DB), *Raghunatha Thathachariar* v. *Venkatesa Tawker.* (Order 21 Rule 17, C. P. C., no doubt contemplates that an unverified petition may be returned for amendment but it does not follow that a petition which is not verified is an application which will prevent the operation of the statute of limitation.)

('22) 9 AIR 1922 P C 225 (226) : 48 Ind App 534 : 70 Ind Cas 281 : 44 Mad 736 (PC), *Thiruvenkataswamy Iyengar* v. *Pavadai Pillai.* (Presentation of execution application — Pleader appointed by agent of party under special power held entitled to present on behalf of party.)

('24) 11 AIR 1924 All 804 (805) : 82 Ind Cas 65, *Santi Lal* v. *Raj Narain.* (Application should be allowed to be signed by parties by way of amendment where their signature is necessary but had not originally been made.)

('70) 1870 Pun Re No. 43, *Goor Charan Singh* v. *Roosee Goojur.* (Petition could be legally received on a Gazetted holiday, where the Court had given notice that it would receive such petitions on such holiday.)

('89) 12 All 57 (59) : 1889 All W N 197 (DB), *Munro* v. *Cawnpore Municipal Board.* (Presentation of application to Munsarim of the District Court instead of to the Judge *held* improper.)

('37) 24 AIR 1937 Lah 720 (720) : 173 Ind Cas 33, *Lorindchand Firm* v. *Firm Lorindchand Parmanand.* (Time given under S. 149, C. P. C., to pay court-fee on an application—Court-fee paid within time but beyond limitation—Application is not barred.)

Note 8

1\. ('26) 13 AIR 1926 Mad 1190 (1192) : 98 Ind Cas 31 (DB), *Narayana* v. *Venkataswamy.* (When applying law of limitation the pleadings and not result of suit is to be looked at.)

('33) 20 AIR 1933 Lah 404 (405) : 147 Ind Cas 57 (DB), *Des Raj Hukam Chand* v. *Lachhi Ram Prabh Dayal.* (And not on the basis of defence set up.)

('33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri* v. *Kalu.* (Limitation must be dependent to some extent on the form and substance of suit.)

('33) 20 AIR 1933 Bom 276 (281) : 145 Ind Cas 190 (DB), *Shri Sharada Peeth Math* v. *Shri Rajarajeswarashram.*

('27) 14 AIR 1927 Nag 10 (12) : 98 Ind Cas 22 : 22 Nag L R 147, *Secy. of State* v. *Bagmal Kisan Dayal.*

('32) 19 AIR 1932 All 358 (359) : 136 Ind Cas 829 (DB), *Zia Uddin Ahmed Khan* v. *Akbar Ali.*

[*See also* ('38) 25 AIR 1938 Nag 335 (339) : I L R (1939) Nag 1 : 177 Ind Cas 6 (FB), *Asaram* v. *Ludheshwar.*]

Section 3
Notes 8–9

the suit ought to have been framed in a different manner so as to make another article, which provides a shorter period, applicable.[2] But, in determining the nature of the plaintiff's claim, regard must be had to the *substance* of the claim and not merely to the formal and verbal expression of it.[3] Further, where the facts found are different from those alleged in the plaint, and the plaintiff asks for relief on the basis of facts found, the question of limitation must be determined with reference to such facts and not the facts alleged in the plaint.[4]

Where a decree passed by a Court in a Native State is transferred for execution to a Court in British India, an application to the latter Court for the execution of the decree is governed by the law of limitation contained in this Act and not by the law in force in the Native State: the principle being that a proceeding must be governed by the law of limitation applicable to the place wherein it is brought.[5] See Note 2 under section 11.

9. "Shall be dismissed." — The section requires that a suit or other proceeding instituted after the period of limitation shall be *dismissed*.[1] This, however, does not fetter any power that the Court may have under O. 23, R. 1 of the Civil Procedure Code, to allow a suit to be *withdrawn*.[2]

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[2] ('32) 19 AIR 1932 All 358 (359, 360) : 136 Ind Cas 829 (DB), *Zia Uddin Ahmed Khan* v. *Akbar Ali*.

[*See* ('75) 12 Bom H C R 97 (112), *Dayal Jairaj* v. *Khatav Ladha*. (Suit for contribution by one partner against some other partners — Suit held maintainable in the circumstances of the case — Defendant pleading that if general accounts are taken, it would be found that nothing was due from him but that the plaintiff's right to have such accounts taken was barred by limitation — *Held* that such a defence was not open to the defendant.)]

See also Preamble, Note 13.

[3] ('34) 21 AIR 1934 Lah 725 (727) : 16 Lah 237 : 154 Ind Cas 988 (D B), *Milkha Singh* v. *Ram Kishen*. (Case under Punjab Limitation (Custom) Act, I of 1920.)

('24) 11 AIR 1924 Nag 125 (126, 127, 128) : 20 Nag L R 80 : 80 Ind Cas 769, *Narbadaprasad* v. *Akbar Khan*.

('29) 16 AIR 1929 Mad 313 (317) : 118 I. C. 481 (D B), *Ramaswamy* v. *Govindammal*.

('25) 12 AIR 1925 Lah 385 (386) : 6 Lah 206 : 88 Ind Cas 945 (D B), *Kaura* v. *Ram Chand*.

('27) 14 AIR 1927 Lah 826 (827) : 106 Ind Cas 40, *Firm Kirpa Ram-Lachman Das* v. *Firm Sawan Mal-Gopi Chand*. (A plaintiff by wording of clever plaint cannot avoid the proper limitation for his suit.)

See also Articles 142 and 144, Note 3.

[4] ('29) 16 AIR 1929 Nag 124 (125) : 118 Ind Cas 62, *Ibrahim Khan* v. *Nagoji*.

See also Preamble, Note 23.

[5] ('16) 3 AIR 1916 Bom 200 (202) : 40 Bom 504 : 36 Ind Cas 369 (D B), *Nabibhai* v. *Dayabhai*.

Note 9

[1] ('35) 22 AIR 1935 Pat 177 (178) : 162 Ind Cas 490 (D B), *Nanak Ram Motilal* v. *Jugal Kishore Marwari*. (Appeal prohibited or barred by time—It cannot be treated as revision application.)

('17) 4 AIR 1917 Cal 79 (80) : 39 Ind Cas 356 (D B), *Barkat Ali* v. *Basant Nunia*. (Where proceeding is dismissed, law under which and facts on which suit is barred must be stated.)

('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi* v. *Queen-Empress*. (*Held* that returning an appeal on ground of limitation is not correct procedure—It must be *rejected*—Submitted that the proper procedure is to *dismiss* the appeal.)

[*See also* ('40) 27 AIR 1940 All 29 (31) : I L R (1939) All 990 : 187 Ind Cas 485 (D B), *Asharfi Lal* v. *Zamir Fatima Bibi*. (Even causes of action which have accrued before the enactment of a law of limitation are affected.)]

The procedure of *dismissal* on the ground of limitation applies only where a proceeding has been *duly* instituted. Where the proceeding has not been duly instituted, the proper procedure is to *reject* it and not to *dismiss* it.[3]

An order dismissing a suit or appeal from a decree as being barred by limitation is a decree.[4]

See also Note 35.

10. "Although limitation has not been set up as a defence." — Under this section where the Court finds that the suit, appeal or application before it has been instituted after the period of limitation, the Court is bound to dismiss such suit or other proceeding although limitation may not have been set up as a defence.[1] In other words, the bar of limitation under this section does not depend on its being set up by any party. See also Note 2 above.

11. Explanation to the section. — See Notes 4 and 5 above.

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2. ('18) 5 AIR 1918 Sind 6 (8) : 51 I. C. 570 : 13 Sind L R 1, *Ludhomal Purtomal & Co.* v. *Secretary of State.* (Withdrawal not allowed — Bar of limitation not formal defect under O. 23, R. 1 (2) (a), C. P. Code, and there was no sufficient ground for allowing withdrawal under clause (b) of that sub-rule.)
('10) 6 Ind Cas 285 (285) (Mad), *Valliammai* v. *Shanmugam Pillai.* (Withdrawal not allowed.)
[*See* ('82) 6 Bom 103 (107), *Narronji Bhimji* v. *Mugniram Chandaji.* (Court may allow the plaintiff to withdraw to enable him to sue in foreign country.)]

3. ('30) 17 AIR 1930 All 112 (112) : 121 Ind Cas 546 (D B), *Muhammad Qamar Shah Khan* v. *Muhammad Salamat Ali Khan.* (Presentation of memo of appeal by unauthorized person.)

4. ('84) 7 All 42 (43, 44) : 1884 All W N 223 (D B), *Gulab Rai* v. *Mangli Lal.*
('86) 12 Cal 30 (31) (DB), *Gunga Dass Dey* v. *Ramjoy Dey.*
('85) 9 Bom 452 (453) (DB), *Raghunath Gopal* v. *Nilu Nathaji.*
('04) 27 Mad 21 (22) : 13 Mad L J 300 (300) (D B), *Saminatha Ayyar* v. *Venkatasubba Ayyar.*

Note 10

1. ('35) 22 AIR 1935 P C 85 (88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC), *Maqbul Ahmed* v. *Onkar Pratap Narain Singh.*
('38) 25 AIR 1938 All 89 (90) : 173 Ind Cas 428 (DB), *Collector of Benares* v. *Jai Narain Rai.*
('35) 22 AIR 1935 All 946 (948, 949) : 58 All 261 : 159 Ind Cas 387 (FB), *Udeypal Singh* v. *Lakshmi Chand.*
('34) 21 AIR 1934 All 386 (387) : 149 Ind Cas 651 (DB), *Radha Mohan* v. *Amichand.* (12 All 461 followed.)
('35) 22 AIR 1935 All 92 (93) : 152 Ind Cas 939 (941) (DB), *Sudama Rai* v. *Bisheshar Prasad.* (Appeal.)
('16) 3 AIR 1916 All 324 (325) : 38 All 452 : 35 Ind Cas 63 (DB), *Beni Prasad* v. *Lajja Ram.*
('89) 11 All 438 (454) : 1889 All W N 155 (DB), *Parmanand Misr* v. *Sahib Ali.*
('26) 13 AIR 1926 Bom 54 (55) : 93 Ind Cas 930 (DB), *Visveshwar* v. *Sadashiv.*
('17) 4 AIR 1917 Cal 188 (192) : 38 Ind Cas 17 (DB), *Asutosh Goswami* v. *Upendra Prasad.*
('16) 3 AIR 1916 Cal 651 (652, 653) : 29 Ind Cas 476 (DB), *Tara Sankar Ghose* v. *Nasaruddi.* (Application to set aside *ex parte* decree.)
('02) 29 Cal 167 (185) : 8 Sar 154 : 1902 Pun Re No. 25 : 12 Mad L Jour 77 : 29 Ind App 51 : 4 Bom L R 161 : 6 Cal W N 226 (PC), *Ghoolam Gilani* v. *Mahammad Hasan.*
('75) 24 Suth W R 339 (340) (DB), *Wodoy Tara Chowdhrain* v. *Syed Abdul Jubbar Chowdhury.*

Section 3
Note 12

12. Pauper proceedings and limitation.—According to the explanation to the section, a suit by a pauper must be deemed as instituted on the day on which the application for leave to sue as a pauper is made.[1] Such application must be signed and verified in the manner prescribed for the verification of pleadings (O. 33, R. 2, C. P. C.). But such signature and verification are not essential for the constitution of the application and although they are made on a later day, the application must be deemed as made on the date on which it was originally presented.[2]

The provision in the explanation to the section as to a suit by a pauper applies only to cases where a person is allowed to sue as a pauper and does not apply to cases where leave to sue as a pauper is refused and full court-fee is paid thereafter[3] or where the applicant pays the full court-fee pending his application for leave. In such cases, the general rule mentioned in the explanation will apply and the suit must be deemed as instituted when the plaint is presented to the proper officer. The question arises whether in such cases the application for leave to sue as a pauper (which under O. 33, R. 2 of the Civil Procedure Code is required to contain all the particulars of a plaint) may be treated as a plaint so as to enable the Court under S. 149, Civil Procedure Code, to extend the time for the payment of the court-fees, so that the date of the presentation of the application could be treated as the date of the institution of the suit notwithstanding the omission to pay the court-fee at such date. For a discussion of the subject, see the Authors' Commentary on the Civil Procedure Code, 3rd Edition, O. 33, R. 7, Notes 5 and 6. See also S. 5 Note 29 and Art. 170, Note 6.

The explanation does not provide when an appeal in *forma pauperis* is to be deemed as preferred. But, under O. 41, R. 1 and O. 44, R. 1, Civil Procedure Code, such appeal must be deemed as preferred on the date on which the application for leave to appeal as pauper is filed. As to the date up to which limitation is to be calculated where

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('90) 12 All 461 (483) : 1890 All W N 149 (FB), *Bechi* v. *Ahsanullah Khan.*
[*See also* ('32) 19 AIR 1932 All 16 (18) : 135 Ind Cas 558 (DB), *Shariful Hasan* v. *Lachmi Narain.*]

Note 12

[1] ('39) 26 AIR 1939 Bom 418 (419) : 184 Ind Cas 804, *Keshavlal* v. *Bai Dahi.*
('36) 23 AIR 1936 Mad 853 (854) : 164 Ind Cas 1006, *Jogarao* v. *Chinnayya.*
(1864) 1864 Suth W R 53 (53) : 1 Ind Jur (O S) 66 : 1 Hay 378 (FB), *Golucknath Dutt* v. *Seetaram Gower.* (Case under Act of 1859 which did not contain any provision corresponding to the Explanation.)
('67) 4 Bom H C R A C 39 (40), *Dhavle* v. *Samvat.* (Do.)
[*See also* ('73) 1873 Bom P J 1, *Balwantrao* v. *Chabildas.* (Date of presentation and not of resgistration of petition after it is permitted, is commencement of suit.)
('40) 27 AIR 1940 Oudh 441 (442) : 190 Ind Cas 108 (DB), *Raisuddin* v. *Basti Sugar Mills Ltd.* (For the purposes of S. 10, C. P. C., the plaint in a suit in *forma pauperis* should be deemed to have been filed on the date when the application for leave to sue as pauper was presented and not on the date when the application was allowed and the suit registered.)]

[2] ('31) 18 AIR 1931 Bom 47 (49) : 128 Ind Cas 625, *R. M. Vora* v. *Japan Cotton Trading Co. Ltd.*

[3] ('39) 26 AIR 1939 Cal 394 (398) : ILR (1939) 2 Cal 68 : 184 Ind Cas 345, *Bisua Nath* v. *Khejerali Molla.*
('01) 28 Cal 427 (432) (DB), *Janakdhary Sukul* v. *Janki Koer.*

leave to appeal as pauper is refused and full court-fee is paid thereafter or where full court-fee is paid pending the application for leave, see the Authors' Commentary on the Civil Procedure Code, 3rd Edn., O. 44, R. 1, Note 7.

As to the power of the Court to consider whether the suit is barred by limitation while deciding whether a person should be allowed to sue as a pauper, see the Authors' Commentary on the Civil Procedure Code, 3rd Edition, O. 33, R. 5, Note 5.

13. Company in liquidation—Proceedings by or against. — Proceedings for the winding up of a company do not stop the running of limitation under the Limitation Act both with reference to suits and other proceedings *against* as well as those *on behalf* of the company.[1] Hence, with regard to such proceedings, limitation must be calculated up to the very date of their institution. But in the case of a *suit against* a company which is being wound up by the Court, the date of the institution is, for purposes of limitation, advanced to an earlier date, *viz.*, the date on which the claim was first sent in to the official liquidator[2] (*vide* explanation to the section).

An application by the official liquidator under S. 186 of the Companies Act, 1913, for the recovery of money due from a contributory is neither a suit nor an application which is governed by this Act and hence is not directly subject to any period of limitation. But, as the expression "money due" in the above section means money which is due and recoverable by suit, such an application will not be maintainable after the expiry of limitation for a *suit* for the money.[3]

The liability of a contributory to pay money due on shares in a company in liquidation is a statutory liability under section 156, Companies Act, 1913, and is enforceable even after a *suit* for such money may be barred by limitation.[4]

A claim against a company in liquidation which is not made by the presentation of a plaint is not a suit and is not directly subject to any period of limitation.[5] Such claim, however, would be allowed if a *suit* for its enforcement would have been within time at the date of the winding up order and would fail if such suit would have been time-barred at such date.[6]

Note 13

[1] ('33) 20 AIR 1933 P C 63 (66) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*

[2] ('33) 20 AIR 1933 P C 63 (64) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*

[3] ('33) 20 AIR 1933 P C 63 (64, 66): 142 Ind Cas 7: 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
('24) 11 AIR 1924 Lah 53 (54) : 74 Ind Cas 600 : 4 Lah 109 (DB), *Sri Narain* v. *Liquidator, Union Bank of India.* (The words "at any time" in S. 186, Companies Act, mean in course of liquidation proceedings.)
See also Note 26.

[4] ('16) 3 AIR 1916 All 317 (318) : 35 Ind Cas 159 : 38 All 347 (DB), *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co. Ltd.* See also Note 26.

[5] ('33) 20 AIR 1933 PC 63 (64): 142 Ind Cas 7: 54 All 1067: 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co. Ltd.*

[6] ('27) 14 AIR 1927 All 161 (162) : 49 All 520 : 101 Ind Cas 224 (FB), *Upper India Rice Mills Ltd.* v. *Jaunpur Sugar Factory Ltd.*

The order of a Court under the Companies Act, 1913, is enforceable as a decree (*vide* section 199 of that Act) and hence, an application for the execution of such an order is governed by this Act.[7]

See also Note 26.

14. Limitation bars remedy but does not destroy right. — This section only bars the *remedy* but does not destroy the *right* to which the remedy relates. Such right continues to exist notwithstanding that the remedy is barred by limitation. But there are certain special cases in which, on the remedy becoming barred by limitation, the right itself is destroyed. Thus, under section 28 of the Act, on a suit for possession of certain property becoming barred by limitation, the *right* to the property itself is destroyed. Except in such special cases, which are specifically provided for, the fact that a remedy is barred by limitation does not by itself put an end to the right to which the remedy relates.[1] But although the *existence* of the right is not affected by the remedy becoming barred by limitation, the fact that the remedy is so barred may prevent the right from being available in some *other* way also. In what other ways the right can be availed of and whether its availability in a particular manner is prevented by the suit or other proceeding being barred by limitation depend on other branches of law. The following are some of the points bearing on the subject :

(1) Although a *suit* to enforce a right may be barred by limitation, a *defence* based on such a right is not barred. (See Note 15.)

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7. ('26) 13 AIR 1926 Oudh 289 (290) : 1 Luck 153 : 93 Ind Cas 631 (DB), *Peoples Industrial Bank Ltd., Allahabad* v. *Mahesh Charan Sinha.*

Note 14

1. ('41) 28 AIR 1941 All 278 (279) : 1941 O W N 548 (549), *Thakur Prasad* v. *Official Liquidator Benares Bank, Ltd.* (The right remains, but the remedy is destroyed.)

('39) 26 AIR 1939 Bom 494 (496): I L R (1939) Bom 685: 185 Ind Cas 366, *Surat Borough Municipality* v. *Sarifa Karunnissa.*

('39) 26 AIR 1939 Cal 163 (166): I L R (1938) 2 Cal 328: 182 Ind Cas 389 (DB), *Nakul Chandra* v. *Kalipada Ghosal.*

('39) 26 AIR 1939 Pat 138 (139): 17 Pat 588: 180 Ind Cas 983 (DB), *Mt. Baskuar* v. *Gaya Municipality.*

('31) 18 AIR 1931 All 635 (649): 136 Ind Cas 145: 54 All 299 (FB), *Ram Karan Singh* v. *Ram Das Singh.*

('32) 19 AIR 1932 All 543 (544) : 54 All 525 : 138 Ind Cas 396 (DB), *Bhajja* v. *Muhammad Said Khan.*

('32) 19 AIR 1932 All 199 (206): 53 All 963 : 137 Ind Cas 243 (DB), *Abdul Rafiq* v. *Bhajan.*

('30) 17 AIR 1930 All 858 (860): 52 All 979: 132 Ind Cas 21 (DB), *Mahomed Raza Ahmed* v. *Zahoor Ahmed.*

('35) 22 AIR 1935 Bom 326 (328, 329) : 59 Bom 502 : 159 Ind Cas 213, *Gopal Bhaurao* v. *Jagannath Vasudeorao.* (Section 3 refers only to the remedy of plaintiff and not to his rights.)

('21) 8 AIR 1921 Lah 351 (352): 57 Ind Cas 348 (DB), *Akbar Hussain* v. *Ragnandan Das.*

('80) 5 Cal 897 (899): 6 Cal L R 489 : 3 Shom L R 154 (DB), *Nursing Doyal* v. *Hurryhur Saha.*

('31) 18 AIR 1931 Lah 668 (670) : 132 Ind Cas 661 (DB), *Dalip Singh* v. *Gurdwara Parbandhak Committee, Amritsar.*

('77) 1 Mad 267 (276): 1 Ind Jur 367: 1 Mad L R 343 (DB), *Administrator-General of Madras* v. *F. N. Hawkins.*

(2) Where after the expiry of limitation for a suit for the recovery of a debt the debtor pays the debt to the creditor, he cannot claim back the amount.[2]

(3) Where A, who owes several debts to B, pays a sum of money to him, the latter can adjust the payment towards any of these debts, although a suit for the recovery of such debt may be barred by limitation.[3]

(4) Under S. 25 (3) of the Contract Act, 1872, an agreement in writing undertaking to pay a time-barred debt is valid and binding.[4]

(5) A time-barred debt is a valid consideration for a transfer of property.[5] As to whether a transfer by the manager of a Hindu joint family, the guardian of a minor, etc., in consideration of a time-barred debt is valid, see the undermentioned cases.[6]

(6) As to whether the pious obligation of a Hindu son to pay off the debts of his father extends to time-barred debts, see the undermentioned cases.[7]

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[2] ('24) 11 AIR 1924 All 543 (545) : 78 I. C. 911 : 46 All 384 (DB), *Gauri Shankar v. Sheo Nandan Misra.*

('40) 27 AIR 1940 Lah 166 (169) : 188 Ind Cas 833, *Punjab National Bank Ltd. v. Official Receiver, Karnal.*

('39) 26 AIR 1939 Bom 494 (496) : ILR (1939) Bom 685 : 185 Ind Cas 366, *Surat Borough Municipality v. Sarifa Karunnissa.*

('32) 19 AIR 1932 All 543 (544) : 54 All 525 : 138 Ind Cas 396 (D B), *Bhajja v. Mahomed Said Khan.* (Such debt may furnish sufficient consideration if the amount is paid.)

See also Preamble, Note 16.

[3] ('40) 27 AIR 1940 Lah 166 (169) : 188 Ind Cas 833, *Punjab National Bank Ltd. v. Official Receiver, Karnal.*

('23) 10 AIR 1923 Bom 82 (84) : 76 I.C. 115: 47 Bom 128 (DB), *Satappa Jakappa v. Annappa Basappa.*

('30) 17 AIR 1930 Mad 594 (595) : 124 Ind Cas 51, *Krishnaswami Iyer v. Natesa.*

[4] ('29) 16 AIR 1929 All 586 (586) : 51 All 983 : 119 Ind Cas 109 (DB), *Asa Ram v. Karam Singh.* (But a Hindu son is liable on a bond for his father's time-barred debt only to the extent of joint family property.)

('22) 9 AIR 1922 All 402 (402, 403) : 68 Ind Cas 235 : 44 All 628 (D B), *Ram Kishen Rai v. Chhedi Rai.*

('23) 10 AIR 1923 Lah 481 (483) : 73 I. C. 652 (D B), *David Sutherland v. Rose Grim Shaw.* (23 Mad 94 followed.)

[5] ('25) 12 AIR 1925 Oudh 267 (268) : 78 Ind Cas 106, *Mt. Zohra Bibi v. Ganesh Prasad.*

('29) 16 AIR 1929 All 657 (657) : 122 Ind Cas 600 (DB), *Nathu Singh v. Girwarsingh.* (A I R 1924 All 551 followed.)

('24) 11 AIR 1924 All 551 (554) : 46 All 775 : 80 Ind Cas 684 (F B), *Gajadhar v. Jagannath.* (33 Mad 308 followed.)

[6] ('24) 11 AIR 1924 All 551 (554) : 80 Ind Cas 684 : 46 All 775 (FB), *Gajadhar v. Jagannath.* (Hindu law—Joint family—Alienation by father for debt barred at the date of alienation binds sons.)

('26) 13 AIR 1926 Oudh 266 (267) : 91 Ind Cas 189, *Bharath Singh v. Sheodat Sharma.* (Hindu law—Alienation by father—Though personal remedy against him is barred, debt can be regarded as antecedent debt.)

('27) 14 AIR 1927 Oudh 52 (52) : 99 Ind Cas 215 (DB), *Bramhadin v. Ram Lakhan.* (Mother as guardian of the minor son is not competent in law to revive time-barred debt due from the deceased father.)

('25) 12 AIR 1925 Nag 2 (5) : 79 Ind Cas 1002 : 20 Nag L R 106 (DB), *Chitnavis v. Nathu Sao.* (Do.)

[7] ('26) 13 AIR 1926 Pat 427 (430) : 95 Ind Cas 991 : 5 Pat 746 (DB), *Achutanand Jha v. Surja Narain Jha.* (Does not extend.)

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Note 14

(7) In a suit for accounts, a decree may be passed in favour of the defendant for the balance found due to him although a suit by him for such balance would have been barred by limitation.[8]

(8) In a suit for the administration of the estate of a deceased person, a debt due by an heir to the deceased may be deducted from the share payable to the heir although a suit for the recovery of such debt may be barred by limitation.[9]

(9) Under O. 34, R. 6, Civil Procedure Code, an application for a personal decree against the mortgagor can be made if the sale proceeds of the mortgaged property are not sufficient for discharging the mortgage debt. But such application will lie only if the personal remedy has not become barred by limitation at the date of the institution of the suit on the mortgage.[10]

(10) In a suit for the redemption of a mortgage, under which the mortgagee has been in possession of the mortgaged property, the mortgagee is bound to account for the rents and profits of the property although if a separate suit were to be brought for such rents and profits, it would have been barred by limitation.[11]

(11) The fact that a suit for the enforcement of the personal liability of a mortgagor for the mortgage debt is barred by limitation does not preclude a suit for the enforcement of the *mortgage*. (See Note 4.)

(12) An attorney's lien for costs against his client can be availed of although a suit for the recovery of such costs may be time-barred.[12]

('27) 14 AIR 1927 Oudh 52 (52, 53) : 99 Ind Cas 215 (DB), *Bramhadin* v. *Ram Lakhan*. (Do.)

8. ('16) 3 AIR 1916 Mad 720 (726) : 39 Mad 365 : 28 Ind Cas 221 (DB), *Chidambara Mudaliar* v. *Krishnaswamy Pillai*. (Suit against trustee for accounts—Claim of trustee against trust for moneys spent by him may also be considered and a decree may be passed in his favour for such sums although his right to sue in respect of those items is barred by limitation.)

See also Authors' Commentary on Civil Procedure Code, 3rd Edition, O. 20, R. 19, Note 3.

9. ('81) 7 Cal 644 (647), *Lokanath Mullick* v. *Odoychurn Mullick*. (6 Cal 340, followed.)

('12) 14 Ind Cas 508 (509, 510) : 6 Low Bur Rul 34, *Momein Bee Bee* v. *Ariff Ebrahim*. (Suit for administration of a Muhammadan estate.)

10. See Authors' Commentary on Civil Procedure Code, 3rd Edition, Order 34, Rule 6, Notes 12 and 17.

11. ('25) 12 AIR 1925 Mad 825 (829) : 90 Ind Cas 138, *Narasimha Rao* v. *Immani Seshaya*. (No question of limitation can arise so long as relation of mortgagor and mortgagee continues.)

[*See also* ('85) 8 Mad 381 (383) (DB), *Kanna Pisharodi* v. *Kombiachan*. (Suit to recover property demised on *kanom* to defendant—Plaintiff *jenmi* is entitled to deduct arrears of rent from the amount of kanom amount including rent for the years in respect of rent for which a suit would have been barred by limitation. It is no doubt true that, where a set-off is pleaded, only so much of it can be allowed as falls within the period of limitation, if the set-off consists of a debt resulting from an independent transaction—But the claim that a deduction should be made from the *kanom* amount on account of rent is not properly described as a set-off.)]

12. ('21) 8 AIR 1921 Cal 67 (68) : 66 Ind Cas 209 : 48 Cal 817, *Narendra Lal* v. *Tarubala Dasi*.

[*See also* ('23) 10 AIR 1923 Rang 84 (86) : 11 Low Bur Rul 326 : 77 Ind Cas 920 (DB), *Leiboak Syndicate* v. *Finlay Fleming & Co.* (Agent is entitled to a lien

(13) See also the undermentioned cases.[13]

See also Note 16 to the Preamble and Note 1 to S. 28.

15. Limitation does not bar defence. — As seen in Note 14 above, limitation only bars the *remedy* but generally does not destroy the *right*. Hence, although a *suit* to enforce a right may be barred by limitation, such right may be set up in *defence*.[1]

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or retainer upon moneys of his principal which are in his hands for all expenses properly incurred. There is no time limit for the exercise of lien.)]

See also Article 84 Note 6.

[13] ('39) 26 AIR 1939 Bom 494 (496) : I L R (1939) Bom 685 : 185 Ind Cas 366, *Surat Borough Municipality* v. *Sarifa Karunnissa*. (Bombay Municipal Boroughs Act — Powers of Municipality acting under Ss. 104 and 105 are not governed by Limitation Act — Municipality can recover amount by issuing distress warrants under S. 105 even if civil suit under S. 203 to recover it is time-barred.)

('10) 32 All 51 (54) : 4 Ind Cas 708 (DB), *Lalta Pershad* v. *Babu Pershad*. (Suit for dissolution of partnership — Receiver appointed to discharge the debts and liabilities of the firm—The mere fact that a claim, which was within time when made, is not adjudicated upon by the Court until after the expiration of more than three years, does not render the claim a bad claim against the partnership assets.)

('18) 5 AIR 1918 Mad 258 (261, 262) : 44 Ind Cas 428 (DB), *Vellayappa Moothan* v. *Krishna Moothan*. (Suit for partition — Plaintiff claiming sum in addition to his proper share on account of certain matters in respect of which a separate suit would have been barred by limitation — *Held* that the claim for the additional sum cannot be decreed—Set-off can be claimed only by a defendant.)

('29) 16 AIR 1929 Sind 230 (232, 233) : 118 Ind Cas 741, *Munshi Lal* v. *Bishen Lal*. (Suit for partnership accounts—Accounts of other partnerships may be gone into, if necessary, notwithstanding that a suit for such accounts may be time-barred.)

Note 15

[1] ('39) 26 AIR 1939 Cal 163 (165) : I L R (1938) 2 Cal 328 : 182 Ind Cas 389 (DB), *Nakul Chandra* v. *Kalipada Ghosal*. (There is no bar of limitation to defence under S. 53A, T. P. Act—Right of defence is not lost even if there is no present right to enforce contract.)

('38) 25 AIR 1938 Lah 286 (288) : 182 I. C. 510 (DB), *Nizam Din* v. *Ram Sukh Das*.

('16) 3 AIR 1916 P C 172 (179) : 34 Ind Cas 37 (P C), *Sri Kishen Lal* v. *Mt. Kashmiro*. (No bar of time to a plea of fraud set up by way of defence.)

('29) 16 AIR 1929 All 77 (78) : 113 Ind Cas 750, *Bengali Lal* v. *Panna Lal*.

('35) 22 AIR 1935 Bom 326 (328, 329) : 59 Bom 502 : 159 I. C. 213, *Gopal Bhaurao* v. *Jagannath Vasudeorao*. (Section 3 does not refer at all to a defendant.)

('26) 13 AIR 1926 Bom 33 (34) : 91 Ind Cas 426 (DB), *Dodbasappa Dharmappa* v. *Pradhanappa Venkappa*. (Judgment-debtor allowing confirmation of sale can set up defence of fraud in suit by auction purchaser for possession.)

('17) 4 AIR 1917 Cal 514 (515) : 35 I. C. 610 (DB), *Deodhari Panday* v. *Dayanad Pandey*. (Suit for possession on basis of document—Defendant can impugn document though his right to get the document set aside by suit is barred.)

('17) 4 AIR 1917 Mad 190 (191) : 34 Ind Cas 488 (DB), *Thiruvenkata Chariar* v. *Seshadri Iyengar*.

('16) 3 AIR 1916 Mad 350 (357) : 38 Mad 321 : 19 Ind Cas 596 (DB), *Rajah of Ramnad* v. *Arunachellam Chettiar*.

('07) 30 Mad 169 (178) : 17 Mad L J 19 (FB), *Lakshmi Doss* v. *Roop Laul*.

('06) 30 Bom 395 (408) : 8 Bom L R 296 (DB), *Minalal Shadiram* v. *Kharsetji*.

('04) 28 Bom 639 (642) : 6 Bom L R 592 (DB), *Rangnath Sakharam* y. *Govind Narasivn*.

('90) 14 Bom 222 (225, 226, 227) (DB), *Hargovindas Lakhmidas* v. *Bajibhai Gijibhai*.

('05) 32 Cal 1107 (1125) : 2 Cal L Jour 107 (DB), *Narendra Lal Khan* v. *Jogi Hari*. (Per Woodroffe, J.)

('98) 2 Cal W N 260 (262) (DB), *Mohendra Nath Mukerjee* v. *Jogendra Nath Chowdhury*. (Court should under S. 92, Evidence Act, allow oral evidence by defendant to prove mutual mistake though separate suit to rectify it is barred by time.)

Section 3
Note 15

Illustrations.

1. Where a transaction is voidable at the instance of *A*, he may defend, on this ground, a suit to enforce the transaction although the period of limitation for a suit to set aside the transaction may have expired.[2]

2. Although the period of limitation for a suit to set aside a decree obtained by fraud may have expired, the fraudulent character of the decree may be set up in defence when the decree is sought to be enforced.[3]

('78) 2 Cal L R 5 (6) (DB), *Ram Narain Chukerbutty* v. *Poolin Behary Lal Singh.*

('25) 12 AIR 1925 Lah 32 (34) : 84 Ind Cas 168 : 5 Lah 375 (DB), *Mt. Bholi Bai* v. *Dawarka Das.* (In suit for partition defendant can claim to be reimbursed for expenses incurred by him from his private property though suit on it would be barred.)

('16) 3 AIR 1916 Lah 229 (229) : 1916 Pun Re No 1 : 32 Ind Cas 485 (DB), *Gokalchand* v. *Niadar Mal.* (Plaintiff purchasing house sold by Receiver—Defendant's suit for cancellation of sale time-barred — He can still impeach the sale in plaintiff's suit for possession.)

('07) 1907 Pun L R No 26 p. 51 (52) : 1907 Pun W R No. 3, *Baldeo* v. *Gajwa.* (Plaintiff claiming land as adopted son—Defendant cannot be prevented from pleading invalidity of adoption by reason of lapse of time.)

('94) 17 Mad 255 (256) (DB), *Orr* v. *Sundra Pandia.* (Plaintiff suing for possession as lessee—Defendant can plead that lease was obtained by fraud though suit for cancellation of lease on that ground is time-barred.)

('19) 6 AIR 1919 Oudh 370 (373) : 51 Ind Cas 549 : 20 Oudh Cas 32, *Gaya Prasad* v. *Gur Dayal.*

('19) 6 AIR 1919 Oudh 379 (381) : 49 Ind Cas 115 (DB), *Meharban Singh* v. *Raghunath Singh.*

[*See also* ('38) 25 AIR 1938 All 497 (502) : 177 Ind Cas 824 (DB), *Beni Prasad* v. *Om Prakash.* (Decree-holder applying to enforce decree—Objection by defendant that decree is nullity owing to plaintiff's failure to comply with terms of decree can be raised at any time.)]

[But see ('39) 26 AIR 1939 Mad 678 (680) : 189 Ind Cas 200, *Krishna Aiyar* v. *Subba Reddiar.* (It is not the law that limitation can never affect a plea urged in defence.)

('88) 12 Bom 501 (504), *Jugaldas* v. *Ambashankar.* (Sale by landlord of land in possession of tenant—Fraud in sale—Suit by purchaser against tenant—Plea by tenant impeaching sale held could not be allowed as remedy by landlord to set aside sale deed was time-barred — The case can be distinguished on the ground that the fraud set up was not practised on defendant but his landlord who was not party to the suit.)

('05) 7 Bom L R 772 (787), *Mahomed Cassum Dharamsey* v. *Joseph Ezekiel.* (12 Bom 501 followed.)]

2. ('35) 22 AIR 1935 Bom 326 (328) : 59 Bom 502 : 159 Ind Cas 213, *Gopal Bhaurao* v. *Jagannath Vasudeorao.*

('18) 5 AIR 1918 Mad 1332 (1335) : 37 Ind Cas 756, *Athan Kutti* v. *Sutarjanam.*

('04) 28 Bom 639 (642) : 6 Bom L R 592 (DB), *Ranganath Sakharam* v. *Govind Narasinu.* (12 Bom 501 distinguished.)

('90) 14 Bom 222 (226), *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai.*

('18) 5 AIR 1918 Mad 751 (754) : 40 Ind Cas 820 (DB), *Sethurama Sahib* v. *Chotta Raja Sahib.* (A I R 1916 P C 172 relied on.)

('07) 30 Mad 444 (445) : 17 Mad L Jour 294 (DB), *Venkatachallapathi* v. *Robert Fischer*

('07) 30 Mad 248 (250) (DB), *Ramanasari* v. *Muthusamy Naik.*

('07) 30 Mad 169 (178) : 17 Mad L Jour 19 : 2 Mad L Tim 4 (FB), *Lakshimi Doss* v. *Roop Laul.* (12 Bom 501 distinguished.)

('97) 20 Mad 305 (311), *Krishna Menon* v. *Kesavan.* (17 Mad 255 relied on.)

('28) 15 AIR 1928 Nag 262 (264) : 107 Ind Cas 897, *Maroti Suryabhan* v. *Raiwant Rao.*

3. (1900) 27 Cal 11 (23) : 3 Cal W N 660 (DB), *Rajib Panda* v. *Lakhan Sendh Mahapatra.* (Per Banerji J.)

('28) 15 AIR 1928 Cal 810 (811) : 110 Ind Cas 571 (DB), *Bhola Nath* v. *Mt. Nagendra Bala.* (It is not necessary for him to bring a suit to set it aside.)
See also Art. 95 Note 18.

3. In a suit for the redemption of a mortgage against a mortgagee in possession, the latter can claim the mortgage money from the plaintiff although a suit for such money would have been barred by limitation.[4]

4. Where a puisne mortgagee sues to enforce his mortgage, the prior mortgagee or a person who is subrogated to his rights may set up the prior mortgage as a shield although a suit for enforcing such mortgage may be barred by limitation.[5]

5. Where a mortgagor expressly covenants with the mortgagee that he will not be entitled to redeem the mortgage unless he pays not only the amount due under the mortgage but also other debts owed by him which are charged on the same property, the mortgagee can defend a suit for the redemption of the mortgage by claiming also such (other) debts although a suit for the enforcement of their payment may be time-barred.[6]

6. Where in a sale deed the property intended to be sold is by a mistake wrongly described, but the vendee gets into possession of the right property and the vendor subsequently sues to eject him from such property on the ground of the property not having been sold to him according to the sale deed, the vendee can show that the property really intended to be conveyed was the one of which he was in possession and that by a mistake it was wrongly described in the sale deed, although a suit by him for the rectification of the deed may be time-barred.[7]

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[4] ('23) 10 AIR 1923 Bom 199 (200): 47 Bom 652 : 72 Ind Cas 404 (DB), *Rangappa v. Vithu.*
('18) 5 AIR 1918 Mad 657 (658, 659) : 40 Ind Cas 358, *Nathamuni Pillai v. Vengammal.*
('21) 8 AIR 1921 Lah 351 (352) : 57 Ind Cas 348 (DB), *Akbar Hussain v. Ragnandan.* (Limitation is not applicable to fix the period for which interest on the mortgage debt is payable by a mortgagor to a mortgagee.)
('22) 9 AIR 1922 Lah 254 (256) : 3 Lah 200 : 66 Ind Cas 771 (FB), *Motan Mal v. Mohammad Baksh.* (Do.)
[But see ('27) 14 AIR 1927 Mad 631 (634, 635) : 102 Ind Cas 316 : 50 Mad 626 (DB), *Kotappa v. Raghavayya.* (The decision simply lays down that the subrogee is bound by the same period of limitation as the mortgagee whom he has paid off. It overlooks the fact that in the particular case, the subrogee does not seek to enforce the mortgage to which he is subrogated, by means of a suit but only raises it by way of defence to the mortgagor's suit for redemption and in such a case, the defence cannot be barred by limitation.)]

[5] ('38) 25 A I R 1938 Lah 286 (288) : 182 Ind Cas 510 (DB), *Nizam Din v. Ram Sukh Das.*
('22) 9 AIR 1922 Mad 249 (254) : 70 Ind Cas 212 (DB), *Venkataramana Reddi v. Rangiah Chetti.*
('29) 16 AIR 1929 Mad 465 (467) : 116 Ind Cas 841 (DB), *Karuppan Chettiar v. Venkataperumal.* (AIR 1922 Mad 249 followed.)
('33) 20 AIR 1933 Oudh 9 (13) : 138 Ind Cas 206 : 7 Luck 655 (DB), *Kanhaiya Lal v. Gulab Singh.*
('31) 18 AIR 1931 Oudh 157 (159) : 132 Ind Cas 767 (DB), *Mathura Prasad v. Ghanshiyam Das.*
[But see ('39) 26 AIR 1939 Mad 678 (681) : 189 Ind Cas 200, *Krishna Aiyar v. Subba Reddiar.* (Right of subrogation cannot be set up as defence when mortgage discharged is time-barred—Following AIR 1927 Mad 631.)]
See also Art. 132 Note 26.

[6] ('28) 15 AIR 1928 All 99 (101) : 108 Ind Cas 149 (DB), *Ram Kishore Ahir v. Ram Nandan Ram.* (AIR 1915 All 480 not followed.)
('26) 13 AIR 1926 Lah 633 (634) : 96 Ind Cas 844 (DB), *Sultan Muhammad v. Ladha Singh.* (Do.)
('21) 8 AIR 1921 Lah 170 (171) : 65 I. C. 642 (DB), *Nathwa v. Kanhiya.* (Do.)
('26) 13 AIR 1926 Oudh 228 (229) : 92 Ind Cas 675 : 29 Oudh Cas 118 : 1 Luck 92 (DB), *Mt. Raisun Nisa v. Zorawar Sah.*
('28) 15 AIR 1928 Oudh 273 (276): 3 Luck 459: 112 Ind Cas 481 (DB), *Ram Ratan Lal v. Aditya Prasad.*
[But see ('17) 4 AIR 1917 All 405 (405): 40 Ind Cas 404 (DB), *Achhaibar Singh v. Mt. Radhi.* (AIR 1915 All 480 followed.)
('15) 2 AIR 1915 All 480 (480, 481): 37 All 634 : 30 I. C. 777 (DB), *Mt. Kesar Kunwar v. Kashi Ram.* (Because in effect this would mean that defendant is asking Court to enforce a barred claim.)]

[7] ('27) 14 AIR 1927 All 355 (356) : 100 I. C. 568, *Kesho Singh v. Roopan Singh.*

Section 3
Notes 15–16

7. Where a tenant is dispossessed of any portion of his holding by his landlord, he can set up such dispossession in defence to a suit for rent by the landlord although a suit by the tenant for recovery of possession may be barred by limitation.[8]

8. Where a person enters into possession of property under a contract of sale, he can set up his rights under the contract in defence to a suit for possession against him although a suit for the specific performance of the contract may be barred by limitation.[9]

But where the expiry of limitation destroys the right itself (*vide* section 28 of the Act), such right can neither be sued upon nor set up in defence to a suit.[10]

16. Duty of Court to raise and decide question of limitation. — As seen in Note 2 above, it depends on the law of procedure whether a Court is bound to decide or whether it is competent to decide if the suit or other proceeding before it has been instituted after the period of limitation. The following are some of the rules bearing on the subject :

1. Where on the facts proved or admitted before the Court the suit or other proceeding does not appear to be barred by limitation, the Court is not bound to raise the question of limitation *suo motu*.[1]
2. Where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound to raise the question *suo motu* and decide it.[2]
3. Where the defendant raises the question in his written statement, the Court is bound to go into it.[3]

[*See also* ('06) 30 Bom 395 (404) : 8 Bom L R 296 (DB), *Minalal Shadiram* v. *Kharsetji*. (Defendant who has sued for cancellation of a bond on ground of fraud and has failed on ground of limitation can set up in defence the same plea.)]

8. ('26) 13 AIR 1926 Pat 513 (514) : 96 Ind Cas 585, *Jagat Narain Singh* v. *Tulsi Chamar*.

9. (29) 16 AIR 1929 Rang 251 (252) : 7 Rang 288 : 119 Ind Cas 744 (DB), *Mg. Po Kywe* v. *Mg. Po Tin*. (Principle in AIR 1924 Rang 214 (FB) applied.)

10. ('21) 8 AIR 1921 Bom 257 (258) : 59 Ind Cas 118 : 45 Bom 45, *Mahadev Narain* v. *Sadashiv Keshav*. (30 Mad 444 followed.)

Note 16

1. *See* ('14) 1 AIR 1914 Cal 155 (157) : 23 Ind Cas 360 (DB), *Kali Das Bhanja* v. *Giri Bala Dasi*. (Court not bound to dismiss suit as barred if not pleaded and not apparent.)

2. ('40) 27 AIR 1940 Rang 207 (210) : 1940 Rang L R 273 : 193 Ind Cas 61 (DB), *Official Trustee* v. *Mrs. Raeburn*.
('18) 5 AIR 1918 Low Bur 140 (142) : 9 Low Bur Rul 71 : 39 Ind Cas 154, *Kaliyaparama Padiyachi* v. *C. U. A. R. Chetty*.
('25) 12 AIR 1925 Oudh 182 (183):80 I.C. 582, *Ram Chhor Bakhsh* v. *Ram Surat*. (Question of adverse possession being one of limitation Court is bound to raise it.)
('05) 9 Cal W N 56 (58), *Nadhu Mandal* v. *Kartic Mandal*.
('01) 28 Cal 86 (89):5 CalWN 160 (DB), *Deo Narain Chowdhury* v. *C. R. H. Webb*.
('94) 16 All 390 (393) : 1894 All W N 131 (DB), *Ramu Rai* v. *Dayal Singh*. (Execution application.)
('19) 6 AIR 1919 Mad 698 (699):47 I.C. 589 (DB), *Nagappa* v. *Sidda Lingappa*.
('30) 17 AIR 1930 All 815 (816) : 128 Ind Cas 753, *Nathu Ram* v. *Ganga Bux*. (Review application.)
('12) 17 Ind Cas 638 (639) : 8 Nag L R 174, *Ganeshdas* v. *Mt. Nimbi*.

3. ('67) 7 Suth W R 212 (213) (DB), *Boolee Singh* v. *Hurobuns Narain Singh*.
('22) 9 AIR 1922 Cal 544 (545) (DB), *Janendra Mohan Dutt* v. *Umesh Chandra Guha*. (Per Walmsley, J.)

4. Where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. 8, R. 2, Civil Procedure Code, to raise such question in his written statement. If he fails to do so, thereafter it is within the discretion of the Court to allow the question to be raised or not.[4]

5. It is open to a defendant to plead a substantive right or in the alternative that the plaintiff's suit is barred by limitation.[5]

6. Where a decree is transferred for execution by one Court to another Court, the question arises as to which of the two Courts is competent to decide whether application for execution is barred by limitation. For a discussion of the subject, the reader is referred to the Authors' Commentary on the Civil Procedure Code, 3rd Edn. S. 42, Note 1.

7. As to the order in which issues must be tried in cases in which an issue of limitation is raised, see the undermentioned cases.[6]

See also Notes 17 to 20 below.

[*See* ('11) 13 Ind Cas 792 (794) : 1911 Pun Re No. 84 (DB), *Shah Muhammad* v. *Piara Mal.* (In the original Court, if a plea of limitation is taken before the issues are fixed, it must be entertained and decided.)

('66) 6 Suth W R 79(79) (DB), *Mrs. M. Smith* v. *Kishen Chunder Roy Chowdhury.*

('66) 3 Bom H C R O C 164 (166) (DB), *Pirbhai Ravji* v. *Nenbai.*]

[4] ('40) 27 AIR 1940 Rang 207 (210, 211) : 1940 Rang L R 273 : 193 I C 61 (DB), *Official Trustee* v. *Mrs. Raeburn.*

('02) 25 Mad 367 (378) : 29 Ind App 76 : 6 Cal W N 641 : 4 Bom L R 543 : 8 Sar 258 (PC), *Venkatanarasimha* v. *Bhashyakarlu.*

See also Authors' Commentary on Civil Procedure Code, 3rd Edition, Notes under O. 8, R. 2.

[5] ('03) 7 Cal W N 294 (296) (DB), *Keamuddi* v. *Hara Mohan Moundul.* (Party can plead tenancy and limitation in the alternative.)

('74) 21 Suth W R 70 (74) : 12 Beng L R 274, *Dino Monee Debia* v. *Doorga Pershad.* (Do.)

[6] ('24) 11 AIR 1924 Rang 148 (151) : 77 Ind Cas 385 : 1 Rang 584, *Tin Tin Nyo* v. *Maung Ba Saing.* (Proper procedure, when a preliminary question of limitation is raised, is to hear that question and decide it as a preliminary point.)

('89) 11 All 176 (180) : 1889 All W N 27, *Husaini Begam* v. *Collector, Muzaffarnagar.* (Do.)

('66) 10 Moo Ind App 476 (488) : 5 Suth W R 63 : 2 Sar 184 : 1 Suther 631 (PC), *Tarakant Bannerjee* v. *Puddomoney Dossee.* (It is much to be desired that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on all the important points.)

(12) 15 Ind Cas 10 (12) (All), *Bhole Singh* v. *Bhagwant Singh.* (Defendant cannot be put to defence of his title unless plaintiff claims relief within time prescribed for the particular case.)

('01) 3 Bom L R 667 (672) (DB), *Apaji Bapuji Kargupi* v. *Nilakanta Annaji.* (It is desirable for lower appellate Court to find on all material issues of fact rather than to dispose of case on some point of law.)

('76) 25 Suth W R 393 (394) (DB), *Moni Roy* v. *Mt. Rajbunsee Koer.* (Merging of issue of limitation in issue of possession is not an error in law.)

('70) 14 Suth W R 267 (268) (DB), *Sham Churn Doss* v. *Goono Moye Chowdhrain* (Trial of issue of limitation after issue on merits is an irregularity which if committed in appellate Court is not necessarily disadvantageous even to defendant.)

('69) 12 Suth W R 286 (286), *Mahomed Azim* v. *Sumeerooddee.* (It is discretionary with Court to try plea of limitation with merits though as a general rule such plea should be tried before plaintiff can go into merits.)

('66) 6 Suth W R 218 (219) (DB), *Shibo Durga Chowdhrain* v. *Syud Hossein Ali Chowdhry.* (Court deciding case on limitation ought also to go into merits.)

(1865) 4 Suth W R 61 (61) (DB), *Doorgah Ram Surmah Chukerbutty* v. *Ruttun Monee.* (Whether a plea of limitation should be decided before merits depends on the peculiar circumstances of each case.)

(1865) 4 Suth W R 101 (101) (DB), *Gopal Chunder Chatterjee* v. *Raj Koomaree Debia.* (Court should try issue on limitation first.)

Section 3
Note 17

17. New plea as to limitation. — The question whether a point as to a suit or other proceeding having been instituted after the period of limitation can be raised for the first time at a late stage of the proceedings, for instance, in appeal or second appeal, depends on the law of *procedure*. (See Note 2 above.) The following are some of the rules governing the matter :

1. Where a plea of limitation depends on a question of fact, the plea cannot be raised for the first time in appeal, as a matter of right.[1] But the appellate Court has a discretion to allow such a question to be raised.[2] Where a question cannot be decided without taking fresh evidence, the appellate Court will generally refuse to entertain the plea.[3]

(1864) 1864 Suth W R (Gap) Civ 247 (248) (DB), *Maharajah Rajendra Kishore Singh Bahadur* v. *Roy Goodhur Sahary.* (Decision on plea of limitation is unnecessary where decision on merits is clearly against plaintiff.)

(1864) 1 Suth W R 59 (59) (DB), *Greesh Chunder Roy* v. *Narain Das.* (If first Court tries issue on limitation and decrees plaintiff's suit, appellate Court should try that issue before going into merits.)

Note 17

1. See the Authors' Commentary on Civil Procedure Code, 3rd Edition, Order 8, Rule 2, Notes 1 and 5.

('37) 24 AIR 1937 Nag 184 (185) : I L R (1938) Nag 167 : 171 Ind Cas 783, *Dular Singh* v. *Sitaram.* (Finding by lower Court as to limitation—No ground of appeal as to finding—Question not allowed to be raised for first time in second appeal.)

[*See also* ('40) 27 AIR 1940 Cal 113 (114) : I L R (1939) 2 Cal 358 : 187 Ind Cas 301 (DB), *Smt. Bajroga Khatun* v. *Province of Bengal.* (Case decided with reference to S. 184, Bengal Tenancy Act.)]

2. ('01) 3 Bom L R 682 (683) (DB), *Balwantrao Narasinha* v. *Ramkishna Baburao.* (Plea allowed as no fresh evidence was necessary for its determination.)

('27) 14 AIR 1927 Cal 30 (31) : 97 Ind Cas 635 (DB), *Abdul Gafur* v. *Abdul Jabbar.* (Case remanded for decision on plea under S. 18, Limitation Act.)

(1846-51) 4 Moo Ind App 403 (414) : 7 Suth W R P C 67 : 1 Suther 208 : 1 Sar 371 (PC), *Mt. Imam Bandi* v. *Hargovind Ghose.* (Plea disallowed on the ground that not having been raised in lower Court, appellants had no opportunity of meeting it by evidence.)

('01) 3 Bom L R 420 (421, 422) (DB), *Gopal Raghunath Kulkarni* v. *Krishna.* (Second appeal—Plea not taken in Court of first instance but in lower appellate Court—Case remanded to lower appellate Court for decision on the point.)

('93) 1893 Bom P J 394 (DB), *Desai Girdharlal* v. *Desai Santukrai.* (Lower appellate Court dismissing suit on point of limitation without giving parties opportunity of adducing evidence on the point — Case remanded for taking evidence.)

('20) 7 AIR 1920 All 172 (173) : 56 Ind Cas 513, *Debi Din Bhagwan Din* v. *Sarkar & Co.* (Plea allowed to be raised in revision—Case remanded for retrial as plea depended on evidence.)

3. ('39) 26 AIR 1939 Rang 42 (44) : 180 Ind Cas 300 (DB), *Ramanna Reddy* v. *Abdul Rashid.*

('37) 24 AIR 1937 Lah 312 (312):174 Ind Cas 837, *Rama Nand* v. *Nand Kishore.*

('29) 16 AIR 1929 P C 158 (160, 161) : 56 Ind App 192:51 All 367:117 Ind Cas 22 (P C), *Skinner* v. *Naunihal Singh.* (High Court allowing plea to be argued for first time in appeal, although no evidence had been given in lower Court in support of it—Decision not approved by Privy Council.)

('36) 23 AIR 1936 Cal 382 (385, 386):166 Ind Cas 900(DB), *Bejoy Kumar Bhattacharjee* v. *Firm Satish Chandra Nandi.*

('19) 6 AIR 1919 Cal 1025 (1026) : 46 Ind Cas 787 (D B), *Kedar Nath Mondal* v. *Mohesh Chandra Khan.*

('21) 8 AIR 1921 Cal 661 (671, 672) : 66 Ind Cas 287 (D B), *Secretary of State* v. *Ananda Mohan Roy.*

('24) 11 AIR 1924 Cal 463 (463) : 69 Ind Cas 194, *Sadakali Khan* v. *Janakinath Singha Roy.*

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This will specially be so in the case of a second appellate Court[4] or the

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('29) 16 AIR 1929 Lah 432 (432): 115 Ind Cas 71, *Lajpat Rai* v. *Sohna.*

('26) 13 AIR 1926 Lah 511 (512) : 94 Ind Cas 457, *Teju* v. *Ralla.*

(1900) 27 Cal 205 (206, 207) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Muhammad Rojabi.* (Quære.)

('10) 5 Ind Cas 205 (207) : 37 Cal 57 (DB), *Raja Ranjit Sinha Bahadur* v. *Kalidasi Debi.*

('12) 13 Ind Cas 792 (793, 794) : 1911 Pun Re No. 84 (DB), *Shah Muhammad* v. *Piramal.*

('14) 1 AIR 1914 Sind 27 (28) : 8 Sind L R 272 : 27 Ind Cas 933 (DB), *Bherumal Teckchand* v. *Duhlanomal.*

('93-1900) 1893-1900 Low Bur Rul 539 (539), *Maung Shwe* v. *Maung Shwe Gon.*

[*See also* ('68) 10 Suth W R 59 (60) : 1 Beng L R A C 17 (DB), *Kedarnath Mookerjee* v. *Mathuranath Dutt.*

('67) 1867 Pun Re No. 92, *Gopal Dass* v. *Ruthee Ram.*

(1864) 1864 Suth W R (Gap) Act X Rul 6 (7), *The Collector of Rajshahye* v. *Hursoondery Debea.*

(1864) 1864 Suth W R (Gap) Act X Rul 9 (9), *Brindabun Chunder Sircar Chowdry* v. *Mr. G. Clarke.*

(1864) 1 Suth W R Misc 1 (1), *Digamburee Debee* v. *Mundgopal Banerjee.*]

4. ('37) 24 AIR 1937 All 696 (699) : 171 Ind Cas 910, *Kishun Prasad* v. *Mt. Shubratan.* (Plea not raised in pleadings — No issue framed — Plea also not raised in grounds of first appeal — Plea not allowed.)

('14) 1 AIR 1914 Mad 495 (501) : 15 Ind Cas 576 (582) : 37 Mad 514 (DB), *Ayderman Kutty* v. *Syed Ali.*

('09) 4 Ind Cas 1167 (1167) (DB) (Mad), *Appavu* v. *Muthusamy Pillai.*

('37) 24 AIR 1937 Lah 312 (312) : 174 Ind Cas 837, *Rama Nand* v. *Nand Kishore.*

('28) 15 AIR 1928 Nag 329 (331) : 114 Ind Cas 454, *Mahepat* v. *Mukund Rao.*

('25) 12 AIR 1925 Nag 178 (179) : 78 Ind Cas 960, *Bhuwan Lal* v. *Manhori.*

('03) 30 Cal 687 (689) (DB), *Ambica Dat* v. *Vyas Nityanand Singh.*

('20) 7 AIR 1920 Pat 735 (737) : 52 I. C. 125 (DB), *Bhadai Sahu* v. *Manowar Ali.*

('29) 16 A I R 1929 Mad 38 (40) : 111 Ind Cas 152 (DB), *Alagarswamy Thevan* v. *Ramabadra Naidu Garu.*

('27) 14 AIR 1927 Mad 455 (455) : 99 Ind Cas 691, *Gundappa* v. *Narasappa.*

('16) 3 AIR 1916 Mad 535 (535, 536) : 28 I. C. 378 (DB), *Peruma Goundan* v. *Rama Goundan.* (Plea can be allowed only if it rests on pleadings and not on facts.)

('29) 16 AIR 1929 Lah 154 (155) : 112 Ind Cas 375, *Bhagwan Das* v. *Fazal Khan.*

('24) 11 AIR 1924 Lah 468 (469) : 80 I. C. 321 (DB), *Wazir Chand* v. *Nathu Ram.*

('20) 7 AIR 1920 Cal 846 (848) : 60 Ind Cas 280 (DB), *Bhushan Chandra Pal* v. *Narendra Nath.* (Following 34 Cal 941.)

('22) 9 AIR 1922 Pat 398 (399) : 1 Pat 23 : 69 Ind Cas 185 (DB), *Khub Lal Upadhya* v. *Jugdish Prasad Singh.*

('84) 8 Bom 535 (536, 537) (DB), *Dattu* v. *Kasai.*

('34) 21 AIR 1934 Cal 467 (469) : 152 Ind Cas 172 (DB), *Bhabadeb Chatterjee* v. *Hemanta Kumari Debi.*

('30) 17 AIR 1930 Cal 385 (387) : 57 Cal 114 : 125 Ind Cas 607 (DB), *Ahamadar Rahaman Chaudhari* v. *Jaminiranjan Barua.*

('21) 8 AIR 1921 Cal 816 (817, 818) : 60 Ind Cas 753 (DB), *Bipin Behari Saha* v. *Charu Chandra Ghose.*

('17) 4 AIR 1917 Cal 817 (817, 818) : 37 Ind Cas 942 (DB), *Priyanath Mitter* v. *Anath Nath Dev.*

('26) 13 AIR 1926 Bom 40 (42) : 49 Bom 847 : 91 Ind Cas 349 (DB), *Rachappa Chanbasappa* v. *Ningappa Kasappa.*

('23) AIR 1923 Bom 254 (255): 72 I. C. 326 (DB), *Digambar Govind* v. *Lahyadeo Bhau Deshpande.*

('29) 115 Ind Cas 680 (681) (DB) (Pat), *Md. Sayed Khan* v. *Abdul Gafoor.*

('17) 4 AIR 1917 All 359 (362) : 37 Ind Cas 343 (DB), *Babu Lal* v. *Jalakia.*

('84) 1884 All W N 327 (328) (DB), *Atma Ram* v. *Sardar Kuar.*

('68) 10 Suth W R 425 (426) (DB), *Ram Dhun Doss* v. *Ram Rattan Dutt.*

Section 3
Note 17

Privy Council.[5] So also, a new point of limitation which involves an investigation into fresh facts will not be allowed to be raised for the first time in revision.[6]

2. Where the plea of limitation involves only a question of law which can be decided on the facts proved or admitted before the Court, it can be raised at any stage of the proceedings.[7] Thus, in such cases,

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('68) 10 Suth W R 389 (389) (DB), *Kisto Mohun Kurmokar* v. *Noyan Tara Dossee.*

('68) 9 Suth W R 493 (494) (DB), *Bunode Putnaik* v. *Doyanidhee Bullior Singh.*

('09) 3 Ind Cas 711 (712) : 5 Low Bur Rul 82, *Po Mya* v. *Ma Le.*

('05) 9 Cal W N 56 (58), *Nadhu Mandal* v. *Kartic Mandal.*

('22) 65 Ind Cas 601 (602) (DB) (Cal), *Hari Charan* v. *Jitendra Nath.*

('87) 11 Bom 114 (119) (DB), *Shivappa* v. *Dod Nagaya.*

(1864) 1864 Suth W R (Gap) Civ 212 (212) (DB), *Bechoo Misser* v. *Ramadheen Misser.*

('75) 24 Suth W R 298 (298) (DB), *Shaikh Peer Nuzur* v. *Lall Muhammad.*

('72) 18 Suth W R 252 (252) (DB), *Rajah Mokoond Narayan Deo* v. *Pershad Mudduck.*

('69) 12 Suth W R 215 (217) (DB), *Sheo Golam Singh* v. *Roy Dinkur Dayal.*

(1862) 1 Mad H C R 358 (359) (DB), *Narasu Reddi* v. *Krishna Padayachi.*

('72) 8 Beng L R 78 (79, 80, 83): 15 Suth W R 315 (DB), *Borokhasia* v. *Jata Sirdar.*

[*See* ('22) 9 AIR 1922 Mad 57 (59): 45 Mad 415 : 66 Ind Cas 858 (DB), *Krishnan Pattar* v. *Lakshimi.*]

[5] ('21) 8 AIR 1921 P C 27 (27) : 48 Ind App 24 : 59 Ind Cas 782 (PC), *Maharaj Bahadur Singh* v. *A. H. Forbes.*

('22) 9 AIR 1922 P C 336 (338, 339) : 67 Ind Cas 914 : 49 Ind App 312 : 1 Pat 733 (PC), *Radha Krishna* v. *Bisheshar Sahay.*

('16) 3 AIR 1916 P C 5 (7) : 41 Bom 300 : 39 Ind Cas 627 : 44 Ind App 36 (PC), *Srinivasdas Barri* v. *Meherbai.*

('14) 1 AIR 1914 P C 129 (132) : 42 Cal 72 : 41 Ind App 251 : 24 Ind Cas 304 (PC), *Raghunath Das* v. *Sunder Das Khetri.*

('16) 3 AIR 1916 P C 182 (185) : 44 Cal 759 : 44 Ind App 65 : 39 Ind Cas 456 (PC), *Tricomdas Kooverjea Bhoja* v. *Gopi Nath Jiu Thakur.*

('28) 15 AIR 1928 P C 47 (48) : 108 Ind Cas 14 (PC), *Khushaldas Gokaldas* v. *Chimanlal Kalidas.*

[6] ('25) 12 AIR 1925 Mad 986 (988) : 85 I. C. 982, *Chinnammal* v. *Pappathiammal.*

('15) 2 AIR 1915 Mad 688 (689) : 27 I. C. 116, *Natesa Moopan* v. *Ramachandra.*

('27) 14 AIR 1927 Lah 555 (555) : 103 Ind Cas 68, *Abdul Kadir* v. *Nur Din.*

[7] ('16) 3 AIR 1916 Pat 331 (332, 333) : 35 Ind Cas 337, *Mt. Gunjra Koer* v. *Mt. Lakhar Koer.* (Facts upon which objection was based, patent on face of the record.)

('06) 33 Cal 257 (259) : 1 Cal L Jour 408 : 9 Cal W N 636 (DB), *Harihar Ojha* v. *Dasarathi Misra.*

('05) 32 Cal 129 (133, 134) : 31 Ind App 203: 6 Bom L R 765 : 1 All L Jour 585 : 8 Cal W N 809 : 8 Sar 698 (PC), *Jagadindra Nath Roy* v. *Hemanatha Kumari Debi.*

('33) 20 AIR 1933 Nag 130 (133) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai* v. *Kedar Nath.*

('72) 1872 Pun Re No. 32, *Maya Singh* v. *Gunesh Das.*

('75) 1875 Pun Re No. 2, *Shama* v. *Azim.* (Appeal from decree based on award—Objection of limitation not apparent on face of award — Facts and circumstances not before Court — Objection disallowed.)

('70) 13 Suth W R 52 (55):5 Beng L R 585 (DB), *Mt. Raj Koonwar* v. *Mt. Inderjit Kunwar.* (Facts for decision of plea not patent on record—Plea disallowed.)

('16) 3 AIR 1916 Pat 396 (397) : 34 Ind Cas 897, *Bankey Behari Lal* v. *Bhagwandas Marwari.*

('25) 90 Ind Cas 827 (828) (Cal) (DB), *Kumud Charan Roy* v. *Sambhu Chandra Ghose.* (*Held* Court was bound to take cognizance of plea of limitation under S. 3, although raised for first time in second appeal.)

[*See* ('67) 4 Bom H C R A C 197 (198) (DB), *Davalata Bhujanga* v. *Beru Yadoji.*

('16) 3 AIR 1916 Pat 269 (271) : 36 Ind Cas 960 (DB), *Sheobux Singh* v. *Dayal Singh.* (Question of limitation can be raised at any stage.)]

the plea can be raised in appeal,[8] second appeal[9] or even before the

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[8] ('39) 26 AIR 1939 Bom 425 (425) : I L R (1939) Bom 564 : 186 Ind Cas 164 (DB), *Narbheramji* v. *Vivekramji.*

('33) 20 AIR 1933 Pat 224 (227) : 12 Pat 261 : 149 Ind Cas 561 (DB), *Jurawan Singh* v. *Ramsarekh Singh.* (Plea considered only so far as it raised question of law.)

(1865) 4 Suth W R Misc 21 (21) : 1 Ind Jur (N S) 31 (DB), *Anundee Koonwar* v. *Takoor Pandey.*

('26) 13 AIR 1926 Pat 192 (193, 194) : 5 Pat 441 : 92 Ind Cas 177 (DB), *Mt. Batisa Koer* v. *Raja Ram Pandey.*

('34) 21 AIR 1934 Rang 329 (330) : 154 Ind Cas 153 : 13 Rang 43, *M. S. Chettyar Firm* v. *S. E. Bholat.*

('13) 17 Ind Cas 638 (639) : 8 Nag L R 174, *Ganesh Das* v. *Mt. Nimbi.* (Plea, when arising upon facts before Court must be heard and determined, whether or not it is directly raised in pleadings or grounds of appeal.)

('89) 14 Bom 222 (224) (DB), *Hargovandas Lakshmidas* v. *Bajibhai Jijibhai.*

('23) 10 AIR 1923 Cal 283 (284) : 67 Ind Cas 386, *Hem Chandra Roy* v. *Biraja Sundari Choudhrani.*

('26) 13 AIR 1926 Lah 451 (452): 94 I. C. 251 (DB), *Dulo* v. *Muhammad Nathu.*

('24) 11 AIR 1924 All 473 (473): 82 I. C. 736 (DB), *Abdul Hasan* v. *Fida Husain.*

('21) 8 AIR 1921 Bom 381 (383) : 45 Bom 920 : 61 Ind Cas 347 (DB), *Dhanji Jairam* v. *Secretary of State.*

('19) 6 AIR 1919 Cal 634 (635) : 45 Ind Cas 783 : 46 Cal 111 (DB), *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee.*

('08) 1908 Pun Re No. 27 : 1908 Pun W R No. 43 : 1908 Pun L R No 142, *Bhag Singh* v. *Dharta Singh.*

('33) 20 AIR 1933 Lah 1044 (1044): 147 I. C. 507, *Ram Chand* v. *Dewan Chand.*

('08) 1908 Pun L R No 87 p. 241 (241) : 1908 Pun Re No. 54 : 1908 Pun W R No. 40, *Bhagwan Singh* v. *Mohan Lal.*

('66) 3 Mad H C R 258 (259) (DB), *Saraswati* v. *Pachanna Setti.*

('69) 11 Suth W R 288 (289) (DB), *Taroo Mytee* v. *Obhoy Koolya.*

('74) 1874 Bom P J 132 (DB), *Balu Bapurav* v. *Narayan.*

('25) 12 AIR 1925 Lah 566 (567) : 87 Ind Cas 635, *Mulchand* v. *Mt. Champa.*

('74) 22 Suth W R 263 (264) (DB), *Chummun Lall* v. *Soorujmun Jha.*

('76) 25 Suth W R 335 (342) (DB), *Sreemutty Puddo Monee* v. *Dwarkanath.*

('72) 17 Suth W R 429 (429), *Beem Goyalle* v. *Khoobun Sahoo.* (As when landlord sues for six years' rent or a tradesman sues for price of goods sold ten years before suit.)

('66) 1866 Pun Re No 98, *Deva Singh* v. *Dhurm Singh.*

(1900) 1900 Pun L R No 13 p. 45 (48) (DB), *Har Chandi* v. *Mehbub Khan.*

[9] ('28) 15 AIR 1928 Cal 870 (871): 115 Ind Cas 606 (DB), *Baikunth Nath Das* v. *Shekh Azidulla.*

('25) 12 AIR 1925 Cal 819 (820): 85 Ind Cas 629 (DB), *Sarada Prasad* v. *Mohan.*

('81) 4 All 102 (105): 1881 All W N 148 (DB), *Brij Mohan Singh* v. *The Collector of Allahabad.*

('90) 12 All 461 (464): 1890 All W N 149 (FB), *Bechi* v. *Ahsan Ullah.*

('20) 7 AIR 1920 Cal 963 (964): 63 Ind Cas 785 (DB), *Panchanan Misra* v. *Aporna Kul Mukherjee.*

('28) 15 AIR 1928 All 689 (695): 114 Ind Cas 734 (DB), *Rangacharya* v. *Revti.*

('22) 9 AIR 1922 Lah 240 (241): 65 Ind Cas 580 (DB), *Nighaia Ram* v. *Bhagu.*

('36) 23 AIR 1936 Cal 497 (503) : I L R (1937) 1 Cal 1 : 164 Ind Cas 226 (FB), *Bejoy Kumar Addya* v. *Nagendra Nath Palit.*

('32) 19 AIR 1932 Cal 195 (196): 136 Ind Cas 601 (DB), *Ram Charan* v. *Madan.*

('30) 17 AIR 1930 Cal 703 (704): 129 I C 108 (DB), *Afiruddi* v. *Joy Chandra.*

('27) 14 AIR 1927 All 177 (179): 99 Ind Cas 280, *Munawar Ali* v. *Jagmilan.*

('15) 2 AIR 1915 Mad 150 (156) : 26 Ind Cas 369 (DB), *Grace Rosmaund Rhodes* v. *Padmanabha Chettiar.*

('02) 6 Cal W N 903 (904) (DB), *Swarnamoyee Debi* v. *Hari Das Roy.*

('14) 1 AIR 1914 Lah 210 (210, 211): 25 I. C. 354 (DB), *Gulab Mal* v. *Shujawal..*

('19) 6 AIR 1919 Cal 671 (671): 46 Cal 455: 47 Ind Cas 25 (DB), *Narasinga Bana Goswami* v. *Prolhadman Tevari.*

('68) 10 Suth W R 71 (71, 72): 1 Beng L R A C 25 (DB), *Mozaffur Ally* v. *Girish Chandra Das.*

('16) 3 AIR 1916 Mad 774 (775) : 29 I. C. 36 (DB), *Ramasamy Pallar* v. *Tirucha Mannadiar.*

('18) 5 AIR 1918 Pat 504 (504): 43 Ind Cas 955 (DB), *Lachman* v. *Dil Jan.*

Privy Council.[10] But, even in such cases, an appellant would not be entitled *as of right* to urge at the hearing of an appeal any ground not taken by him in his memorandum of appeal (See Civil Procedure Code, O. 41, R. 2). It would, however, be open to the appellate Court, in such cases, to allow the appellant to argue the point or to raise the point *suo motu*, and usually, the appellate Court would do so.[11]

3. Where the plea of limitation raises a question of fact and has been abandoned by a party, he cannot subsequently raise the plea as a matter of *right*.[12] Though the Court has a discretion to allow such a point to be raised,[13] it will generally refuse to do so where it involves the taking of fresh evidence.[14] If, however, the plea raises

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('97-1901) 1897-1901 Upp Bur Rul 446 (447), *Ma Pon* v. *Maung San Baw*.
('73) 20 Suth W R 1 (1) : 11 Beng L R App 1, *Bishonath Surma* v. *Sree Mutty Shoshi Mookhee*. (Point allowed to be raised in special appeal, from the very nature of suit—Suit by reversioner for declaration of his rights affected by transfer by Hindu widow.)
('30) 17 AIR 1930 Pat 256 (260): 125 Ind Cas 565, 9 Pat 788 (FB), *Gajadhar Rai* v. *Ramcharan Gope*.
('98) 21 All 22 (23): 1898 All W N 151, *Muhammad Husen* v. *Muzaffar*.
('09) 2 Ind Cas 559 (561): 37 Cal 67 (DB), *Ram Kumar Saha* v. *Ram Gaur*.
('14) 1 AIR 1914 All 80 (83): 36 All 370: 24 Ind Cas 255 (DB), *Balkaran Upadya* v. *Gaya Din Kalwar*.
('08) 30 All 402 (404): 1908 All W N 185: 5 All L Jour 480 (DB), *Mulkunwar* v. *Chattar Singh*.
('20) 7 AIR 1920 Cal 842 (843) : 59 Ind Cas 772 (DB), *Motu Dasi* v. *Behari Lal Chongdor*. (As, however, the question was not raised in the lower Courts, the parties were ordered to bear their own costs throughout.)
[*See* ('37) 24 AIR 1937 Nag 314 (316) : I L R (1937) Nag 28 : 174 Ind Cas 179, *Agarwal Jorawarmal* v. *Kasam*. (But if plea of limitation not merely raises question of law but also involves facts, plea cannot be raised in second appeal for first time.]

10. (1850) 4 Moo Ind App 466 (509, 510):1 Sar 385 (PC), *Maharajadheeraj Raja Mahatab Chund* v. *Government of Bengal*.
('11) 13 Ind Cas 257 (259) : 34 All 57 (PC), *Jit Singh* v. *Maharaj Singh*.

11. ('07) 34 Cal 941 (945, 946, 949) : 11 Cal W N 959 : 6 Cal L Jour 237 (SB), *Balaram* v. *Mangta Dass*.

12. ('40) 27 AIR 1940 Lah 475 (485) : 191 Ind Cas 676, *Sharifa Begam* v. *Court of Wards*. (Plea raised in trial Court and given up before issues were raised, cannot be re-agitated in appeal — Nor can further evidence be allowed.)
('96) 19 Mad 416 (419) (DB), *Rengayya Appa Rau* v. *Narasimha Appa Rau*. (If a party gives up a plea of limitation in the lower Court, he cannot thereafter insist on raising it in second appeal especially if it will involve questions of fact.)
('30) 17 AIR 1930 PC 18 (21) : 121 Ind Cas 205 (PC), *Virayya* v. *Adenna*. (Plea, although mentioned in written statement and grounds of appeal, no issue before trial Judge, nor point taken at trial — Plea disallowed.)
('13) 18 Ind Cas 445 (446, 447) (DB) (Lah), *Atar Singh* v. *Allah Din*. (Plea not pressed in first Court nor revived in first appeal, overruled.)
('68) 9 Suth W R 452 (453) (DB), *Kashee Chunder Turkobhoosun* v. *Kally Prosunno Chowdhry*. (Plea overruled in Court of first instance, and not brought before the lower appellate Court, cannot be entertained by the High Court in special appeal.)

13. ('25) 12 AIR 1925 Pat 549 (550, 551) : 89 Ind Cas 340, *Pallakdhari Thakur* v. *Bankey Thakur*. (Point allowed to be raised where fresh evidence not necessary.)
[*See* ('14) 1 AIR 1914 Bom 47 (51) : 38 Bom 227 : 24 Ind Cas 716 (DB), *Pirsab* v. *Gurrappa*. (Admission to the effect that claim is barred—Point of limitation on ground of adverse possession can be raised in second appeal.)]

14. ('02) 25 Mad 55 (60) : 11 Mad L J 318 (D B), *Seshachala Naicker* v. *Varadachariar*.
('96) 19 Mad 416 (419) (D B), *Rengayya Appa Rau* v. *Narasimha Appa Rau*.
('30) 17 AIR 1930 All 467 (468) : 123 Ind Cas 820 : 52 All 480 (D B), *Raj Narayanrao* v. *Ramsarup*.

only a question of law, it can be raised notwithstanding such abandonment.[15]

See also the undermentioned cases.[16]

18. Duty of appellate Court under this section.— Where an appeal is presented out of time, it is the duty of the appellate Court, under this section, to dismiss the appeal although the respondent has not raised the plea of limitation,[1] unless the appellate Court decides to excuse the delay under section 5. An appellate Court can, in proper cases, treat an appeal filed beyond limitation as cross-objections in another appeal.[2]

This section is not confined in its application to the Court in which a proceeding is *instituted*. The duty under the section applies also to any higher Court before which the proceeding may go up in its further stages from the Court of institution. Hence, where an appellate Court finds that the suit in the lower Court was instituted after the prescribed period of limitation, it is the duty of the appellate Court (equally with that of the lower Court) to dismiss such suit although the defendant had not set up the plea of limitation.[3] But, as seen in Note 2 above, this section does not impose on any Court the duty of raising and deciding the question whether a proceeding has been instituted after the period of limitation and that it depends on the law of procedure whether in any case the Court is bound to decide such question. In the case of the appellate Court, it is provided by Order 41 Rule 2 that an appellant shall not be entitled to urge at the hearing of an appeal any ground in support of his appeal which he has not mentioned in his memorandum of appeal. The duty of the appellate Court to go into the question of limitation is subject to the provisions of this rule and hence, where the point of limitation has not been taken in the memorandum of appeal, the appellate Court is not bound to go into the question.[4] But, at the same time, the rule reserves power to the appellate Court to allow such point to be argued at the hearing of the appeal although not raised in the memorandum of appeal. The Court has also power under the rule to go into the question *suo motu*. As a general rule, if no new question of fact is involved, the appellate Court will exercise its discretion in favour of going into the question although not raised in the memorandum of appeal.[5]

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[15] ('18) 5 AIR 1918 Lah 374 (375): 44 Ind Cas 890, *Hukam Singh* v. *Shahab Din*.
('33) 20 AIR 1933 Lah 404 (404) : 147 Ind Cas 57, *Des Raj Hukum Chand* v. *Lachmi Ram Prabh Dayal*.
('17) 4 AIR 1917 Lah 60 (63) : 38 Ind Cas 120 (D B), *Gullu* v. *Khuda Bakhsh Khan*.
('34) 21 AIR 1934 All 386 (387) : 149 I. C. 651 (D B), *Radha Mohan* v. *Ami Chand*.
('32) 19 AIR 1932 All 108 (109) : 53 All 738 : 136 Ind Cas 71 (D B), *Ram Charitter Missir* v. *Suraj Teli*.
('07) 7 Cal L Jour 152 (163) (D B), *Abdullah Sircar* v. *Asraf Ali Mandal*.
('81) 3 All 846 (848) : 1881 All W N 95 (D B), *Bhawani Prasad Singh* v. *Bisheshar Prasad Misr*.
('98) 8 Mad L Jour 217 (218) (D B), *Nilkanta Rotho* v. *Gangapani Panda*.
('27) 14 AIR 1927 Mad 273 (274) : 100 Ind Cas 40 (41), *Patrachariar* v. *Alamelumangai Ammal*.
('13) 20 Ind Cas 360 (361) : 1 Upp Bur Rul 164, *Nga Tok* v. *Nga E Gyan*.
('25) 12 AIR 1925 Rang 313 (313) : 94 Ind Cas 611, *Maung Mya* v. *Ma Thin Tin*.

[16] ('34) 21 AIR 1934 All 11 (12): 154 I. C. 415 (DB), *Mt. Lugdi* v. *Har Prasad*. (Point not raised in pleadings but extracted in cross-examination cannot form basis of decision.)
('67) 8 Suth W R 451 (451, 452) (DB), *Beharee Lall* v. *Kalee Doss Chunder*. (New point of limitation raised after remand — Point not arising on materials before Court—Point not allowed.)
('66) 6 Suth W R 178 (178, 179) (DB), *Moonshee Buzl Ruheem* v. *Sreenath Bose*. (Do.)
('24) 11 AIR 1924 Cal 633 (634): 51 Cal 690: 78 Ind Cas 958 (DB), *Jogunnessa Bibi* v. *Satish Chandra Bhattacharya*. (Objection to interlocutory order on ground of limitation not taken at any stage of proceeding — Objection disallowed in appeal from final order.)
('30) 17 AIR 1930 Cal 547 (551, 552): 126 Ind Cas 754 (DB), *Kanto Mohan Mullick* v. *John Carapiet Galstaun*. (Remand — Point of limitation not raised before appellate Court—On remand it cannot be so raised if reference is limited.)

Note 18

[1] ('35) 22 AIR 1935 All 92 (93): 152 Ind Cas 939 (DB), *Sudama Rai* v. *Bisheshar*.
('89) 12 All 79 (85, 90, 91): 1890 All W N 25 (DB), *Parbati* v. *Bhola*.

[2] ('22) 9 AIR 1922 Lah 428 (428, 424) : 67 Ind Cas 478, *Bawa Singh* v. *Thakur Singh*.
('34) 21 AIR 1934 Lah 273 (273) : 150 Ind Cas 273 : 15 Lah 641, *Mihan Singh* v. *Tilak Ram*. (A I R 1924 All 667 distinguished.)
('25) 12 AIR 1925 Lah 57 (57): 79 Ind Cas 132 (DB), *Bhagat Ram* v. *Raghbar Dial*.

[3] ('39) 26 AIR 1939 Pat 421 (425) : 183 Ind Cas 878 (DB), *Byomesh Mukharji* v. *Madhabji Mepa Maru*.

Where a decree has been passed against several defendants and one of them appeals against the decree, it is open to the appellate Court under Order 41 Rules 4 and 33 to go into the question whether the suit as against all the defendants was instituted after the period of limitation, and if it finds that it was so instituted, to dismiss the suit as against all the defendants.[6] Similarly, although an appeal

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('36) 23 AIR 1936 Nag 285 (288) : ILR (1937) Nag 61:167 Ind Cas 1003, *Jiwandas* v. *Babulal.*

('03) 30 Cal 761 (768): 8 Cal W N 251 (DB), *Troylokyanath Bose* v. *Jyoti Prokash.*

[4] ('38) 25 AIR 1938 Pat 323 (324) : 174 I. C. 452, *Etwari Mahto* v. *Ganga Mahto.*

('18) 5 AIR 1918 Mad 1173 (1173) : 42 Ind Cas 536, *British India Steam Navigation Co. Ltd.* v. *Hussain Kasim.* (Failure of appellate Court to adjudicate on plea of limitation not pressed before it, is not material irregularity.)

('03-04) 2 Low Bur Rul 237 (237, 238), *Kyin Baw* v. *Maung Lon.* (Statement in ground of appeal that "plaintiff had no cause of action" does not amount to raising of plea of limitation.)

('93) 15 All 123 (127, 128) : 1893 All W N 47 (DB), *Ahmad Ali* v. *Waris Hussain.*

('91) 13 All 580 (580, 581) : 1891 All W N 166 (DB), *Ram Kishen Upadhia* v. *Dipaupadhia.*

('84) 8 Bom 535 (537) (DB), *Dattu* v. *Kasai.*

('29) 16 AIR 1929 All 485 (488, 489) : 121 Ind Cas 552 (DB), *Baldeo Prasad* v. *Sukhdeo Prasad.*

[*See also* ('12) 16 Ind Cas 418 (419) (DB) (Cal), *Lahar Singh* v. *Johun Munda.* (Appellate Court not bound to re-investigate unless pressed.)]

[But see ('07) 34 Cal 941 (945, 946, 949) : 11 Cal W N 959 : 6 Cal L Jour 237 (SB), *Bala Ram* v. *Mangata Das.* (Plea allowed to be raised as it arose on the face of the pleadings and on facts found.)

('12) 17 Ind Cas 638 (639) : 8 Nag L R 174, *Ganeshdas* v. *Mt. Nimbi.*

(1864) 2 Bom H C R 162 (166, 167) (DB), *Saluji Kesraji* v. *Rajsangji Jalmasanji.*]

[5] See Note 17, above.

[*See* ('25) 12 AIR 1925 Rang 223 (223) : 3 Rang 60 : 89 Ind Cas 56, *Maung Yan Kwin* v. *Maung Po Ka.* (Where suit is not on face of it barred by limitation, appellate Court does not exercise a wise discretion in taking up question of limitation on its own initiative.)]

[6] ('23) 10 AIR 1923 Mad 392 (402) : 74 Ind Cas 416 (DB), *Gopala Iyengar* v. *Mummachi Reddiar.*

('16) 3 AIR 1916 Mad 887 (887) : 29 Ind Cas 579 (DB), *Subbarayalu Naidu* v. *Pappammal.*

may be only from a portion of the decree, the appellate Court has power under Order 41 Rule 33 to consider whether the whole suit was barred by limitation and to dismiss such suit if it was so barred.[7] The undermentioned decisions[8] to the contrary, which were given prior to the enactment of the above Rule in the present Civil Procedure Code, are no longer good law.

As to whether a question of limitation decided by an order of remand can be re-opened in the appeal from the decree passed after remand, see the Authors' Commentary on the Civil Procedure Code, 3rd Edition, section 105 Note 8.

See also Note 17.

19. Res judicata and plea of limitation. — The doctrine of *res judicata* applies as well to the decision of a question of limitation as to that of any other question and hence, the decision of a question of limitation may be concluded in a particular way by reason of the operation of the above doctrine.[1] Thus, where the question whether an application for execution is within time depends on whether a prior application was within time and it was decided in that application that it was within time, the decision operates as *res judicata* and cannot be re-opened in the subsequent application.[2] Similarly, a final decision between the parties to a proceeding (as for instance an application for execution) that it is not barred by limitation cannot be gone back upon in the subsequent stages of the proceedings.[3] It depends on the facts and circumstances of each case whether the question of limitation is *res judicata*.[4] See also the Authors' Commentary on the Civil Procedure Code, 3rd Edition, S. 11, Note 23.

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[7] ('41) 28 AIR 1941 Oudh 1 (3) : 190 I. C. 721 (DB), *Daulat Ram* v. *Raghubir Sahai.* (Decree awarding damages — Appeal against only part of decretal amount — Claim to damages found time-barred and appeal allowed — Court can dismiss entire claim and set aside decree as a whole—Court should however require appellant to pay court-fee on entire decretal amount in such case.)

('12) 17 I. C. 638 (639): 8 Nag L R 174, *Ganeshdas* v. *Mt. Nimbi.* (Appellate Court is compelled by S. 3 to dismiss suit whichever party may have made the appeal.)

[*See also* ('18) 5 AIR 1918 Cal 13 (14, 15) : 48 Ind Cas 78 (SB), *Shib Chandra Kar* v. *A. C. Dulcken.* (Order 41, R. 33 should not be invoked in favour of litigant so as to enable him to evade provisions of other statutes such as Limitation Act.)

('37) 166 Ind Cas 1007 (1007) (Cal), *Munish Chandra Datta* v. *Ajit Sankar De.* (In appeal by plaintiff against decree dismissing his suit, defendant is at liberty to support the decree of dismissal on grounds of limitation and title which the trial Court had found against him and in favour of the plaintiff, although no cross-objections have been filed by him.)]

[8] ('80) 6 Cal L R 267 (269), *Alimunnissa Khatoon* v. *Hosseinali.*

('83) 9 Cal 635 (636, 637) : 13 Cal L R 89 (DB), *Raghunath Singh Manku* v. *Pareshram Mahata.*

('92) 1892 Bom P J 87 (DB), *Shirckali* v. *Sanna Ganapaya.*

[*See also* ('05) 28 Mad 67 (68, 69) : 15 Mad L Jour 402 (DB), *Kandasamy Chetty* v. *Annamalai Chetty.* (Obligation cast upon Court by S. 4 of Act of 1877, to dismiss suit, although limitation has not been set up as defence, is only in cases where Court is in a position to dismiss whole claim or suit.)]

Note 19

[1] ('82) 8 Cal 51 (60) : 8 Ind App 123 : 4 Sar 248 (P C), *Mungul Pershad* v. *Grija Kant.*

('02) 24 All 282 (284, 285): 1902 All W N 63 (DB), *Sheoraj Singh* v. *Kameshar.*

('13) 19 Ind Cas 399 (400) (Lah), *Jhanda* v. *Budha.* (Date of mortgage material for seeing whether suit barred by limitation—Decision in former suit as to date of mortgage is binding in later suit also as *res judicata.*)

('21) 8 AIR 1921 P C 23 (24) : 48 Ind App 45 : 59 Ind Cas 880 (PC), *Raja of Ramnad* v. *Velusami Tevar.*

('82) 6 Bom 54 (58) (DB), *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog.*

[2] ('82) 8 Cal 51 (60) : 8 Ind App 123 : 4 Sar 248 (PC), *Mungul Pershad* v. *Grija Kant.*

('35) 22 AIR 1935 Cal 664 (665) : 159 Ind Cas 637 (DB), *Bir Bikram Kishore* v. *Khaliler Rahaman.*

('34) 21 AIR 1934 Pesh 64 (66): 151 Ind Cas 235 (DB), *Muhammad Nawaz Khan* v. *Shira Ram Singh*.

('36) 23 AIR 1936 Pesh 9 (10) : 160 Ind Cas 448, *Nand Ram Shah* v. *Kabul Shah*.

('01) 24 Mad 669 (671) (DB), *Lakshmanan Chetty* v. *Kuttayan Chetty*.

('24) 11 AIR 1924 Pat 122 (125) : 2 Pat 759 : 74 Ind Cas 130 (DB), *Jago Mahton* v. *Khirodhar Ram*.

('32) 19 AIR 1932 Sind 116 (119, 120) : 26 Sind L R 91 : 140 Ind Cas 702 (DB), *Khemchand* v. *Fakhruddin*.

('22) 67 Ind Cas 56 (57) (Lah), *Kedar Nath* v. *Radha Kishen*.

('28) 113 Ind Cas 92 (93) (Mad) (DB), *Srirama Raghavachariar* v. *Narasama*.

('21) 8 AIR 1921 P C 23 (24) : 48 Ind App 45 : 59 Ind Cas 880 (PC), *Raja of Ramnad* v. *Velusami Tevar*.

('99) 27 Cal 210 (213, 215) (DB), *Harendra Lal Roy* v. *Sham Lal Sen*. (In this case, however, the question was held not barred by *res judicata* as the parties were not the same.)

('17) 4 AIR 1917 Pat 158 (159) : 45 Ind Cas 404 (DB), *Janki Koer* v. *Banwamalle Ramanaujear*. (Objection is not *res judicata* as against judgment-debtor who was ward of Court and not properly served with notice of previous proceedings.)

[3] *See* ('83) 1883 Pun Re No. 143, *Fatteh Muhammad* v. *Lalji Mal*.

('10) 8 Ind Cas 22 (24, 25) (Cal) (DB), *Sripati Charan* v. *Belchambers*.

[4] ('40) 27 AIR 1940 Oudh 226 (227) : 185 Ind Cas 650, *Ramji Lal* v. *Mandai*. (Effective order for further execution involves adjudication that execution application is in time—Awarding costs of execution to decree-holder and noting balance due under decree do not involve any such adjudication.)

('38) 25 AIR 1938 All 89 (90) : 173 Ind Cas 428 (DB), *Collector of Benares* v. *Jai Narain Rai*. (Order in execution on question of limitation cannot operate as *res judicata* unless it is decided specifically or it can be implied that decision was arrived at.)

('37) 24 AIR 1937 Cal 581 (583) : 173 Ind Cas 584, *Sureswar Prasad* v. *Maharaj Bahadur Sinha*. (Execution application dismissed for failure of decree-holder to take further steps—Subsequent application for execution —Judgment-debtor held could raise plea of limitation in respect of previous application.)

('30) 17 AIR 1930 Oudh 65 (67) : 5 Luck 458 : 124 Ind Cas 445, *Drigbijai Singh* v. *Bhagwandas*. (Objection to application for execution once adjudicated as without force, operates as *res judicata*.)

('25) 12 AIR 1925 Nag 82 (89) : 22 Nag L R 67 : 80 Ind Cas 905, *Khairulla* v. *Dhanrupmal*. (Ordering execution to proceed after limitation period, can operate as *res judicata* where the order is not set aside.)

('35) 22 AIR 1935 Oudh 198 (201):10 Luck 606 : 153 Ind Cas 878 (DB), *Ramanuja Bhan Bakhsh Singh* v. *Manraj Kuer*. (Court-fee made good and notice of restoration application sent to opposite party — Restoration ordered after hearing parties—Objection to restoration on ground of limitation cannot be subsequently raised.)

('22) 9 AIR 1922 Bom 118 (119) : 46 Bom 269 : 63 Ind Cas 844 (D B), *Gulappa Rudrappa* v. *Erava Basangouda*. (Application for making decree final accepted as being in time—Decision cannot be reconsidered in later execution proceedings.)

('34) 21 AIR 1934 Oudh 289 (291) : 150 Ind Cas 947, *Narottam* v. *Atul Chandra*. (Application to bring person on record as representative of judgment-debtor — Objection taken but person impleaded — Subsequent objection that execution is barred can be raised.)

('25) 12 AIR 1925 Oudh 462 (464) : 88 Ind Cas 810 (DB), *Bibi Batul* v. *Kedar Nath*. (In this case, the question of limitation regarding a certain relief was kept open to be decided at the proper time.)

('26) 13 AIR 1926 Oudh 291 (292, 293) : 1 Luck 171 : 93 I.C. 833 (DB), *Raghubar Singh* v. *Gokaran*. (Adjudication on question of limitation by interlocutory order is final in same or subsequent proceedings.)

('27) 14 AIR 1927 Oudh 488 (489) : 105 Ind Cas 545 (DB), *Mt. Fatima Begum* v. *Ranjit Khan.*

('83) 6 Mad 237 (238) : 7 Ind Jur 191, *Gangathara Pandithar* v. *Rathabai Ammal.* (After a sale of land in execution of a decree and before its confirmation the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred.)

('37) 24 AIR 1937 Nag 87 (88):ILR (1938) Nag 359:171 Ind Cas 460, *Revansiddapa Appa* v. *Shankar Appa Gurappa.*

('10) 6 Ind Cas 746 (748) : 13 Oudh Cas 90 (DB), *Kaniz Fatima* v. *Muhammad Jafar Ali.* (In an execution application the decree-holder failed to pay process fees for issuing notice and the application was thrown out. The question of limitation was not determined.)

('67) 8 Suth W R 141 (144) (DB), *Bharutchundar Roy* v. *Issurchunder Sircar.* (When once an appeal is admitted as within time, the question that it is beyond time cannot be again gone into.)

('70) 13 Suth W R 351 (352): 4 Beng R L App 103 (DB), *Syed Jaffur Hossein* v. *Sheikh Mahomed Amir.* (Registration of appeal is purely a proceeding of ministerial character and has not the force of a conclusive judicial determination on point of limitation.)

('01) 28 Cal 122 (126) : 5 Cal W N 80 (D B), *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry.*

('36) 23 AIR 1936 All 21 (31, 32):160 Ind Cas 394:58 All 313 (FB), *Genda Lal* v. *Hazari Lal.* (Court can entertain judgment-debtor's plea of limitation at any time while execution application is pending.)

('21) 8 AIR 1921 Cal 606 (608):64 Ind Cas 594 (DB), *Govinda Nath* v. *Basiruddin Mandal.* (Judgment-debtor having notice but not raising objection as to limitation—He cannot attack execution sale.)

('30) 17 AIR 1930 Cal 353 (354, 355) : 127 Ind Cas 54 (DB), *Basanta Kumari* v. *Tulsi Charan Ghose.*

('35) 22 AIR 1935 Cal 230 (231) : 155 Ind Cas 723 (D B), *Rafatulla Farazi* v. *Kundarmal Agarwalla.* (*Ex parte* finding that execution application is within time—Application dismissed both parties being absent—In subsequent application the judgment-debtor can raise objection that first application was not within time.)

('35) 22 AIR 1935 Cal 306 (307):156 Ind Cas 604 (DB), *Boidya Nath Sil* v. *Bijoy Chandra Kundu.*

('20) 7 AIR 1920 Pat 570 (574):53 Ind Cas 85 (DB), *Kesho Prasad Singh Bahadur* v. *Harbans Lal.* (So long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred.)

('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy* v. *Bhavani Sankaran.* (In execution proceedings on application for transfer of decree, failure to plead limitation creates constructive *res judicata.*)

('20) 7 AIR 1920 Pat 615 (616) : 54 Ind Cas 933, *Sobran Mahton* v. *Mt. Sibilas Kuer.* (*Ex parte* order without notice does not estop judgment-debtor from raising plea of limitation.)

('27) 14 AIR 1927 All 589 (589, 590) : 102 Ind Cas 1 : 49 All 809 (DB), *Mithu Lal* v. *Deojit.* (In this appeal fresh ground was raised with Court's permission. Plea as to its being barred by limitation can be raised at any time before decision.)

('19) 6 AIR 1919 Mad 197 (197, 198) : 53 Ind Cas 862 (D B), *Mydeen Rowther* v. *Abdul Gaffur Rowther.* (The failure to plead the saving of the limitation bar in an application for execution will not operate as *res judicata* for a subsequent application.)

('28) 15 AIR 1928 Mad 1052 (1053) : 116 Ind Cas 363 (D B), *Lakshmanan Chetty* v. *Palaniappa Chetty.*

('26) 13 AIR 1926 Mad 177 (177, 178) : 91 I. C. 1017, *Bhadrayya* v. *Jaggaraju.*

('30) 17 AIR 1930 Pat 330 (331): 9 Pat 306 : 125 Ind Cas 527 (D B), *Atul Krishna Ghosh* v. *Brindaban Naik.*

('28) 15 AIR 1928 Pat 471 (472) : 7 Pat 465 : 112 Ind Cas 265 (D B), *Richharam* v. *Pasupati Banerji.*

('33) 20 AIR 1933 Pat 210 (217): 143 Ind Cas 542 (D B), *Bansidhar Dhan Dhania* v. *Hazari Ram Marwari.* (For operation of the doctrine of *res judicata,* there must be reciprocity.)

('24) 11 AIR 1924 Mad 695 (696) : 80 Ind Cas 85 : 47 Mad 618 (D B), *Kalyani Pillai* v. *Thiruvenkatasamy Iyengar.* (Executing Court cannot allow plea of bar of limitation where the decree directs execution to proceed—An executing Court cannot go behind the decree.)

('27) 14 AIR 1927 Mad 149 (151) : 98 Ind Cas 702, *Subbarayudu* v. *Bapayya.*

20. Consent decree for time-barred claim. — Under O. 23, R. 3, Civil Procedure Code, where the Court is satisfied that the parties have entered into a lawful compromise, the Court is bound to record such compromise and pass judgment and decree in accordance with it. In such cases, the Court is not entitled to raise the question whether the claim is barred by limitation. The only question before the Court, when a compromise is reported, is whether the alleged compromise has really been entered into, and whether it is a lawful compromise. The fact that it is based on an agreement to satisfy a time-barred claim will not make it unlawful within the meaning of S. 23, Contract Act.[1]

21. Admission on point of limitation — Effect. — In considering the question whether a suit or other proceeding is barred by limitation, the Court will be entitled to take into account the *admissions* of the parties. But such admissions will be binding on the parties making them only where they are admissions of *fact*. Admissions on questions of *law* will not bind the parties on whose behalf they are made. Thus, an admission of a counsel on a point of law as to limitation will not bind his client.[1]

22. Abandonment of plea of limitation. — See Note 17.

23. Waiver of plea of limitation.—The Court is bound under this section to dismiss a suit or other proceeding which has been instituted after the period of limitation although limitation has not been set up as a defence. Hence, it is not competent to a party to

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('29) 16 AIR 1929 Lah 334 (334, 335) : 119 Ind Cas 321, *Farangu* v. *Harikishan*. (In previous execution application notice was not properly served on the judgment-debtor. The question of limitation would not be *res judicata* in subsequent application.)

('28) 15 AIR 1928 Lah 653 (654) : 111 Ind Cas 808 (D B), *Ralia Ram* v. *Hiralal*.

('33) 20 AIR 1933 Cal 855 (856, 857) : 149 Ind Cas 1017 (D B), *Lalit Mohan Roy* v. *Sarat Chandra Saha*.

[*See* ('22) 9 AIR 1922 All 100 (100) : 66 Ind Cas 751 (D B), *Mahamadi Begam* v. *Umda Begam*. (Judgment-debtor knowing that question of limitation was at issue but failing to oppose it — Decision on that issue cannot be subsequently questioned — This, however, did not rest on a question of *res judicata* but as being decision in the very litigation.)]

Note 20

[1] ('20) 7 AIR 1920 P C 139 (140) : 47 Ind App 200 : 56 Ind Cas 539 (P C), *Ramchandra Deo Garu* v. *Chaitana Sahu*.

('26) 13 AIR 1926 Oudh 311 (313) : 92 Ind Cas 732 (D B), *Chandoo* v. *Murlidhar*. (It is incorrect to say that where a compromise or confession of judgment prevents any consideration of legal bar, it is invalid on the ground that if the legal question had been gone into, a legal bar would have been obvious.)

Note 21

[1] ('38) 25 AIR 1938 Lah 368 (368) : 178 Ind Cas 288, *Panna Lal* v. *Jain Bank of India Ltd., Lahore*.

('27) 14 AIR 1927 Lah 284 (285) : 100 Ind Cas 833, *Fateh Ali* v. *Ahmad Din*.

[*See* ('67) 8 Suth W R 63 (63) (DB), *Chunder Kant Mitter* v. *Ramnarain Dey Sircar*. (Any admission by parties other than the executors to the will, would not bind the estate of the deceased.)

('06) 10 Cal W N 959 (961) (DB), *Baijnath Ramgoenka* v. *Hem Chunder Bose*. (Admission of receiver that estate owes debt to a creditor — Effect of.)]

See also Authors' Commentary on the Civil Procedure Code, 3rd Edn., O. 3 R. 4, Note 5.

waive a plea of limitation so as to absolve the Court from this duty.[1] Even if such plea is waived, the party or the Court itself can take it up again.[2] Similarly, waiver of the plea of limitation by one of the judgment-debtors cannot bind the others. It is, therefore, open to them to insist on a decision on the plea of limitation.[3]

24. Contract or custom cannot override the statute. — Under S. 28, Contract Act, an agreement which limits the time within which a party thereto may enforce his rights by the usual legal proceedings in the ordinary tribunals is void. Hence, an agreement which *curtails* the period of limitation provided by this Act for any suit is void and such a suit cannot be dismissed although instituted after the period agreed upon, provided that it is instituted within the period prescribed by the law of limitation. But, where the agreement is to the effect that if no suit is brought within a certain time the right itself should cease to *exist*, it does not amount to an agreement to limit the time within which a right may be *enforced* and hence does not come within the mischief of the above section.[1] Thus, a clause in a policy of fire insurance that if no suit is instituted within a particular period after the rejection of the claim by the insurance company all rights under the policy shall be forfeited, is valid.[2] Whether the effect of an agreement is to make the right itself cease to exist after a particular time, or whether it is simply to cut down the period of limitation within which a suit to enforce the right may be brought, depends on the interpretation to be placed on the terms of each contract.

Note 23

[1] ('40) 27 AIR 1940 Lah 75 (78) : 190 Ind Cas 379, *Kundo Mal* v. *Daulat Ram-Vaidya Prakash Firm.*
('24) 11 AIR 1924 Oudh 127 (128):26 Oudh Cas 324:73 Ind Cas 127 (DB), *Samuel Burge* v. *Improvement Trust, Lucknow.* (Case under the Land Acquisition Act, section 18.)
('15) 2 AIR 1915 Mad 979 (980, 981) : 38 Mad 374 : 21 Ind Cas 24 (DB), *Sitarama Chetty* v. *Krishnaswami Chetty.*
[*See also* ('38) 25 AIR 1938 Lah 368 (368) : 178 Ind Cas 288, *Panna Lal* v. *Jain Bank of India Ltd., Lahore.*]
[But see ('72) 18 Suth W R 497 (498) (DB), *Roy Luchmeeput Singh Bahadur* v. *Moonshee Jowahar Ali.* (Proceedings in execution application —The corresponding S. 1 of the Act of 1859 did not apply to execution applications — Submitted cannot be good law now.)]
See also section 29 Note 3.

[2] ('40) 27 AIR 1940 Lah 75 (78) : 190 Ind Cas 379, *Kundo Mal* v. *Daulat Ram-Vaidya Parkash Firm.*

[3] ('40) 27 AIR 1940 Lah 75 (77) : 190 Ind Cas 379, *Kundo Mal* v. *Daulat Ram-Vaidya Parkash Firm.*

Note 24

[1] ('34) 21 AIR 1934 Rang 15 (17) : 11 Rang 475 : 149 Ind Cas 15, *A. N. Ghose* v. *Reliance Insurance Co.*
('09) 2 Ind Cas 578 (584, 586) : 36 Cal 516 (DB), *South British Fire and Marine Insurance Co., New Zealand* v. *Braja Nath Sah.*

[2] ('27) 14 AIR 1927 Rang 196 (196) : 5 Rang 208 : 105 Ind Cas 201 (DB), *Universal Fire and General Insurance Co., Ltd.* v. *Japan Cotton Trading Co., Ltd.*
('26) 13 AIR 1926 Rang 3 (4) : 3 Rang 383 : 91 Ind Cas 622 (DB), *G. Rainey* v. *Burmah Fire and Marine Insurance Co. Ltd.*
('14) 1 AIR 1914 Bom 225 (228) : 38 Bom 344 : 21 I. C. 694 (DB), *Baroda Spinning and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd.*
('24) 11 AIR 1924 Cal 186 (187) : 80 Ind Cas 637 (DB), *Girdharilal Hanuman Bux* v. *Eagle Star and British Dominions Insurance Co., Ltd.*

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Thus, in the undermentioned cases[3] the material words in a contract of insurance were: "No suit shall be brought against the company in connexion with the said policy later than one year after the time when the cause of action accrues." It was held that although interpreted literally, the above clause might come within the provisions of S. 28, Contract Act, the terms used in an insurance contract must be interpreted with reference to the object and exigencies of insurance and that so interpreted, the above words meant that after the specified period of one year, the right under the contract itself should *come to an end* and that, therefore, the clause in question was valid.

An agreement to *extend* the period of limitation is not governed by S. 28, Contract Act. But, such an agreement would come within the provisions of S. 23, Contract Act, as tending to defeat the provisions of the Limitation Act and would, therefore, be void.[4] Similarly, an agreement not to plead limitation would be void under S. 23, Contract Act, and cannot be relied upon in answer to a plea of limitation.[5]

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[3] ('12) 16 Ind Cas 1001 (1001) (Bom) (DB), *Hirabhai Narotomdas* v. *Manufacturers Life Insurance Co.*
[*See also* ('09) 36 Cal 516 (535): 2 I. C. 573 (SB), *South British Fire and Marine Insurance Co., New-Zealand* v. *Brojo Nath Shaha.* (In this case the contract of insurance provided that no suit against the company for the recovery of any claim under the policy shall be sustainable in any Court of law unless such suit shall be commenced within six months after the loss or damage — It was held that a suit brought after six months should be dismissed—The validity of such a condition was taken for granted.)]

[4] ('69) 4 Beng L R 101 (105) : 13 Suth W R 44 (48) (FB), *Krishna Kamal Singh* v. *Hiru Sirdar.* (The executing Court cannot add or in any way alter the terms of the original decree in consequence of any consent of the parties.)
('73) 20 Suth W R 395 (397) (DB), *Lalla Ram Sahoy v. Dodraj Mahto.*
('72) 17 Suth W R 396 (398) (DB), *Bibee Meheroonnissa* v. *Ranee Rowshun Jehan.* (Consent of parties cannot extend the period allowed by law for enforcing a decree or keeping it in force.)
('25) 12 AIR 1925 Oudh 502 (503) : 27 Oudh Cas 318 : 85 Ind Cas 280 (DB), *Pherai* v. *Pudai Ram.*
('17) 4 AIR 1917 Pat 132 (134) : 44 Ind Cas 570 : 3 Pat L Jour 132 (DB), *Midnapore Zamindary Co., Ltd.* v. *Deputy Commissioner of Manbhum.*
('32) 19 AIR 1932 All 273 (280, 281) : 54 All 573 : 138 Ind Cas 583 (FB), *Gobardhandas* v. *Dau Dayal.*
('13) 18 Ind Cas 595 (596) (Cal) (DB), *Khetra Mohan* v. *Mohim Chundra.*
('23) 10 AIR 1923 All 1 (3) : 69 Ind Cas 981 : 45 All 27 (FB), *Shib Dayal* v. *Meherban.*
('36) 164 Ind Cas 416 (417) (Cal) (DB), *Sarada Prasad* v. *Rokeya Khatun Bibi.*
('15) 2 AIR 1915 Mad 979 (980, 981) : 38 Mad 374 : 21 Ind Cas 24 (DB), *Sitarama Chetty* v. *Krishnaswami Chetty.*
[*See* ('38) 25 AIR 1938 Rang 328 (330) : 178 Ind Cas 20 (DB), *Chokalingam Chettyar* v. *Narayana Chettyar.* (Per Sharpe, J.—It is impossible for parties by consent or agreement to extend or alter the period of limitation—Parties cannot waive the statute.)]

[5] ('17) 4 AIR 1917 Mad 892 (894) : 35 Ind Cas 575 : 40 Mad 701 (DB), *Ramamurthy* v. *Gopayya.*
(1849) 5 Moo Ind App 43 (70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Co.* v. *Oditchurn Paul.*
('17) 4 AIR 1917 Pat 132 (134) : 44 I. C. 570 : 3 Pat L Jour 132 (DB), *Midnapore Zamindary Co., Ltd.* v. *Deputy Commissioner of Manbhum.*
('20) 7 AIR 1920 Pat 280 (281) : 54 Ind Cas 36, *Chaturbhuj Sahay* v. *Md. Habib.*
('26) 13 AIR 1926 Oudh 311 (313): 92 I. C. 732 (DB), *Chandoo* v. *Murlidhar.*
('15) 2 AIR 1915 Mad 979 (980, 981): 21 Ind Cas 24: 38 Mad 374 (DB), *Sitarama Chetty* v. *Krishnaswami Chetty.*
('13) 18 Ind Cas 595 (596) (Cal), *Khetra Mohan* v. *Mohim Chandra Das.*

Under S. 63, Contract Act, it is open to the promisee under a contract to extend the time for the performance of the promise by the other party. Such an agreement is not one to extend the period of limitation applicable to a suit and its validity is not, therefore, affected by S. 23, Contract Act.[6]

Entries in a *wajib-ul-arz* cannot override the law of limitation.[7]

25. Estoppel against pleading limitation. — As seen in Note 2, this section makes the question whether a suit has been instituted after the period of limitation a material question in every case. Hence, the effect of the section is to confer on every person against whom a suit has been instituted the right of contending that it has been instituted after the prescribed period of limitation and he cannot be *estopped* from raising such a contention,[1] the principle being that there can be no estoppel against the statute. Thus, it is open to a defendant to plead the bar of limitation even though the delay in the institution of the suit has been due to his own conduct in having made the plaintiff waste his time in fruitless inquiries and negotiations.[2]

The fact that the counsel has waived the plea of limitation does not estop his client from raising the plea. The reason is that the counsel's admissions on a point of law are not binding on his client.[3]

26. Proceedings to which section applies. — The section applies to suits, appeals and applications for which a period of limitation is prescribed by the first schedule to the Act. A proceeding which does not fall within any of these categories is not subject to any period of limitation under this Act.[1] But the maintainability of

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[6] ('27) 14 AIR 1927 All 451 (452) : 101 Ind Cas 643 : 49 All 599 (DB), *Jugal Kishore* v. *Chari & Co.*
('17) 4 AIR 1917 Mad 539 (541) : 39 Mad 129 : 32 Ind Cas 869 (FB), *Annamalai Chetty* v. *Velayuda Nadar.* (Suit on promissory note payable on demand—Collateral agreement postponing time for payment.)

[7] ('04) 26 All 337 (341): 1 A. L. J. 48: 1904 All W N 39 (DB), *Jai Ram* v. *Makunda.*

Note 25

[1] ('32) 19 AIR 1932 All 273 (281): 54 All 573 : 138 Ind Cas 583 (FB), *Gobardhan Das* v. *Dau Dayal.*
('81) 3 All 585 (596) : 1881 All W N 42 (FB), *Debi Rai* v. *Gokal Prasad.*
('21) 8 AIR 1921 Bom 252 (254, 255): 45 Bom 955: 61 I. C. 70 (DB), *Multanmal* v. *Budhumal.*
('15) 2 AIR 1915 Mad 244 (246) : 24 I. C. 507 (DB), *Sita Rama* v. *Krishnasamy.*
[*See* ('18) 5 AIR 1918 Mad 94 (95, 96) : 43 Ind Cas 6 (DB), *Abdulla Koya* v. *K. Kanaran.*]
[**See however** ('19) 6 AIR 1919 Cal 261 (262, 263): 53 Ind Cas 111 (DB), *Haridas Basak* v. *Raj Kumar Dey.*]

[2] ('23) 10 AIR 1923 All 22 (23, 24): 68 I. C. 981: 45 All 43 (DB), *Jugal Kishore* v. *G. I. P. Ry. Co.*
(1900) 2 Bom L R 407 (409) (DB), *Sitaram Raghunath* v. *Naro Gorind.*

[3] ('38) 25 AIR 1938 Lah 368 (368): 178 I. C. 288, *Panna Lal* v. *Jain Bank of India, Ltd. Lahore.*

Note 26

[1] ('17) 4 AIR 1917 Low Bur 17 (17, 18) : 38 Ind Cas 563, *K. Hill* v. *M. N. Greenberg.* (Limitation Act does not apply to references to Judge on order by Deputy Registrar of Chief Court of Lower Burma.)
[*See* ('40) 27 AIR 1940 Cal 113 (113) : ILR (1939) 2 Cal 358 : 187 Ind Cas 301 (DB), *Sm. Bajroga Khatun* v. *Province of Bengal.* (Suit to recover possession of land claimed by the plaintiff as a raiyat is governed by S. 184, Bengal Tenancy Act, and not by S. 3 or S. 29, Limitation Act.)]

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such proceeding may, in certain cases, be affected by the fact that a *suit* to obtain the same relief would have been barred by limitation at the date of the institution of such proceeding. The question whether a proceeding is so affected depends on the facts and circumstances of each case. Thus, although an application by the liquidator of a company for an order under section 186, Companies Act, for the recovery of money due from a contributory may neither be a "suit" nor an application to which the first schedule of the Act applies and may be free from any bar of limitation *directly*, yet such application will not be maintainable if at the date of the application the recovery of the sum by *suit* is barred by limitation. The reason is that in view of the place and context in which the words "money due" occur in section 186, Companies Act, they must be confined to money due and recoverable in a suit by the company and they do not include any moneys which at the date of the application under the section could not have been so recovered.[2]

Similarly, an application by the Official Assignee under section 7, Presidency Towns Insolvency Act, for the recovery of money due from a debtor to the insolvent's estate, though not a "suit" is *equivalent* to a suit for purposes of limitation.[3] In other words, such application must fail if a suit for the recovery of the money is barred by limitation at the date on which the application is made. The principle seems to be that, when the law dispenses with the necessity of filing a *suit* and enables moneys to be recovered by *summary proceedings*, although such proceedings may not be directly governed by any period of limitation, the law must be deemed to intend that such proceedings will lie only in respect of moneys the recovery of which by *suit* is not barred by limitation. Where the normal remedy for the recovery of money is by suit and the law provides a summary and concurrent remedy by means of an application, it cannot be the object of the law to make it possible to recover by the summary proceeding money, the recovery of which by a *suit* is barred by limitation.[4]

But, the liability of a contributory to pay the money due on shares in a company in liquidation is a *statutory* liability under section 156, Companies Act, and although a suit for such money may be barred by limitation under article 112, Limitation Act, the liability under section 156, Companies Act, can be enforced against him.[5]

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[2] ('33) 20 AIR 1933 P C 63 (64, 65) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd.* (Claim against company in liquidation not made by presentation of plaint is not suit instituted within S. 3.)

('24) 11 AIR 1924 Lah 53 (54) : 4 Lah 109 : 74 Ind Cas 600 (DB), *Sri Narain* v. *Liquidator, Union Bank of India.*

See also Note 13.

[3] ('36) 23 AIR 1936 Mad 778 (779) : 164 I. C. 660 : 59 Mad 1020 (FB), *Muthusamy Chetty* v. *Official Assignee, Madras.*

See also Note 30.

[4] *See* observations in ('33) 20 AIR 1933 P C 63 (66) : 142 Ind Cas 7 : 54 All 1067 : 60 Ind App 13 (PC), *Hansraj Gupta* v. *Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

('24) 11 AIR 1924 Lah 53 (54) : 4 Lah 109 : 74 Ind Cas 600 (DB), *Sri Narain* v. *Liquidator, Union Bank of India.*

[*See also* (36) 23 AIR 1936 Mad 778 (779) : 164 Ind Cas 660 : 59 Mad 1020 (FB), *Muthusamy Chetty* v. *Official Assignee, Madras.*]

As seen in Note 20 to the Preamble, the Act does not apply to *all* applications under the Civil Procedure Code. For example, it does not apply to applications to the Court to do anything which the Court can do of its own motion and for which no application is necessary.[6] Thus, an application for the amendment of clerical and arithmetical errors in judgments and decrees is not subject to any period of limitation, it being open to the Court to amend such errors *suo motu.*[7] Similarly, the powers of revision of the High Court under

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5. ('96) 20 Bom 654 (657, 658) (DB), *Sorabji Jamsetji* v. *Ishwardas.*
('08) 31 Mad 66 (67) (DB), *Vaidiswara Ayyar* v. *Siva Subramania Mudaliar.*
('16) 3 AIR 1916 All 317 (318) : 35 Ind Cas 159 (160) : 38 All 347 (DB), *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co., Ltd.*
See also Note 13.

6. ('24) 11 AIR 1924 Lah 331 (333) : 69 Ind Cas 403 (DB), *Pirthi Nath* v. *Basheshar Nath.* (Power of Insolvency Court under S. 37 of the Provincial Insolvency Act, III of 1907, to set aside alienation.)
('95) 22 Cal 425 (433, 434) (DB), *Dwarka Nath Misser* v. *Barinda Nath Misser.* (Application for partition under preliminary decree for partition.)
('06) 30 Bom 415 (420, 421) : 8 Bom L R 218 (DB), *Balaji* v. *Kushaba.* (Duty of the Mamlatdar to order village officers to give effect to his order—Duty absolute and unqualified—Limitation Act not applicable.)
('83) 7 Bom 316 (321, 322) : 7 Ind Jur 609 (DB), *Iswardas Jagjivandas* v. *Dosibai.* (Application for passing judgment in terms of award which had been filed not governed by Art. 178 of Act of 1877 (now Article 181).)
('86) 8 All 519 (533, 534) : 1886 All W N 182 (DB), *Dhan Singh* v. *Basant Singh.* (The mere fact that one of the parties has made an application asking the Court to amend its decree, will not render the action of the Court subject to the rule of limitation.)
('24) 11 AIR 1924 Lah 553 (554) : 75 Ind Cas 995, *Daryai Singh* v. *Kunjlal.* (Court can take action under S. 53 of the Provincial Insolvency Act at any time during pendency of proceedings when a transfer open to objection under the said section is brought to its notice by an application made to it by a creditor of the insolvent.)
('81) 4 Mad 172 (173) (DB), *Kylasa Goundan* v. *Ramasamy Ayyan.* (The provisions of the Limitation Act do not extend to an application by a purchaser of land at a Court sale under a decree to obtain a certificate.)
('82) 6 Bom 586 (587) : 7 Ind Jur 35, *Vithal Janardan* v. *Vithojirav Putlajirav.*

7. ('86) 8 All 519 (533, 534) : 1886 All W N 182 (D B), *Dhan Singh* v. *Basant Singh.* (Per Mahmood, J.)
('87) 9 All 364 (365) : 1887 All W N 79, *Darbo* v. *Kesho Rai.*
('87) 11 Bom 284 (285) (D B), *Shivapa* v. *Sivpanch Lingapa.*
('85) 7 All 276 (280) : 1885 All W N 13 (D B), *Raghunath Das* v. *Raj Kumar.* (Per Mahmood, J.)
('29) 16 AIR 1929 All 337 (337) : 51 All 672 : 119 Ind Cas 287, *Hukum Singh* v. *Suraj Pal Singh.*
('27) 14 AIR 1927 Rang 57 (57) : 4 Rang 347 : 98 I. C. 799 (DB), *Mt. Sara Bi* v. *Hamid Kassim.*
('26) 13 AIR 1926 Oudh 223 (224) : 91 I. C. 29, *Jagmohan Singh* v. *Sitapatram.* (Amendment of the decree can be made so as to represent the intention of the Judge when he made the decree.)
('24) 11 AIR 1924 Oudh 408 (409) : 80 Ind Cas 833, *Sheo Dharshan Singh* v. *Mata Din Singh.* (Error may be amended though twenty years old.)
('14) 1 AIR 1914 All 61 (62) : 23 Ind Cas 344, *Sheo Balak Pathak* v. *Sukhdei.*
('97) 1897 Pun Re No. 12, *Devidas* v. *Gurdatta.*
('29) 16 AIR 1929 Oudh 385 (387) : 118 I. C. 753 : 4 Luck 562 (F B), *Mahomed Raza* v. *Ram Saroop.*
('29) 16 AIR 1929 Nag 34 (36) : 115 Ind Cas 161 (D B), *Mt. Dhannabai Johri* v. *Keshrichand Johri.*
See also Article 181 Note 19.

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Note 26

section 115, Civil Procedure Code, can be exercised by it without any application by the parties and hence, there is no period of limitation for such application.[8] But, where the matter rests with the discretion of the Court, the fact that there has been undue delay in approaching the Court will be a factor for consideration by the Court.[9] Thus, although there is no period of limitation governing an application for revision, the High Court will refuse to interfere where such application has been made after an undue delay.[10]

It has been held that proceedings under the Workmen's Compensation Act are not governed by the Limitation Act.[11] But an application to execute an award under the Bombay Co-operative Societies Act falls within this section as such award is executable as a decree.[12]

The section applies to every suit and applies without distinction to suits concerning both sacred and secular property.[13] There is also no provision in the Act which exempts suits relating to wakf properties

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8. ('22) 9 AIR 1922 Pat 525 (526) : 1 Pat 232 : 65 Ind Cas 122 (DB), *Ram Prasad Rai* v. *Mahesh Kant.*

('30) 17 AIR 1930 Oudh 401 (401) : 126 Ind Cas 395 : 31 Cri L Jour 1012, *Naim Ata* v. *Emperor.*

('33) 20 AIR 1933 Pesh 51 (52): 144 Ind Cas 482, *Ghulam Rasul* v. *Samundar.*

9. ('23) 10 AIR 1923 Nag 109 (110):67 Ind Cas 310, *Udajiram* v. *Rajeshwar.*

('28) 15 AIR 1928 Nag 149 (149) : 109 Ind Cas 727, *Udajiram* v. *Rajeshwar Trimbuk Rao.* (Laches may disentitle a party to relief under S. 152, C. P. C.)

('24) 11 AIR 1924 Rang 45 (45):79 Ind Cas 441, *Maung Hman* v. *Ma Shin.*

10. (33) 20 AIR 1933 Lah 175 (175, 176) : 142 Ind Cas 687, *Kailash & Bros.* v. *Durga Prasad.*

('22) 9 AIR 1922 Mad 63 (64) : 65 Ind Cas 732, *Yagnasami Iyer* v. *K. Chidambaranatha Mudaliar.* (Revision application was delayed for more than 90 days — Court has discretion to excuse delay.)

('21) 8 AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282 : 64 Ind Cas 303, *Mahabali Pershad* v. *Balbhaddar Singh.*

('23) 10 AIR 1923 Oudh 272 (272):77 Ind Cas 115, *Binda Prasad* v. *Banarsi Das.*

('25) 12 AIR 1925 Oudh 608 (608):86 Ind Cas 329, *Mahadeo Prasad* v. *Mt. Ganeshi.*

('33) 20 AIR 1933 Pat 582 (582) : 147 Ind Cas 200, *Kesho Prasad* v. *Mohendra Prasad.* (C. P. C., S. 115 — Practice is to entertain civil revision only if filed within three months of order.)

('26) 13 AIR 1926 Nag 65 (65) : 89 Ind Cas 933, *Udairam* v. *Thakur Prasad.* (C. P. C., S. 115—Time for filing revision is 45 days in C. P. and Berar.)

('29) 16 AIR 1929 Oudh 383 (383), *Jagannath* v. *Bikarmajit Singh.*

('30) 17 AIR 1930 Oudh 496 (496) : 128 Ind Cas 739 (D B), *Hamidulnissa* v. *Mohammad Anwar.*

('30) 17 AIR 1930 Oudh 401(402):126 I.C. 395:31 Cr.L.J. 1012, *Naim* v. *Emperor.*

('26) 13 AIR 1926 All 577 (578) : 96 Ind Cas 877:27 Cri L Jour 1021, *Emperor* v. *Ramnarain.*

('26) 13 AIR 1926 All 767 (768) : 27 Cri L Jour 1132 : 97 Ind Cas 652:49 All 228, *Ram Deo Singh* v. *Emperor.* (Revision to High Court against order under S. 107, Cr. P. C., should be made within 30 days.)

('28) 15 AIR 1928 Mad 528 (530):51 Mad 672:110 Ind Cas 63 (DB), *Muthu Chettiar* v. *Narayanan.* (In an exceptional case mere lapse of time is no ground for rejecting revision petition.)

('81) 4 All 154 (155):1881 All W N 165 (DB), *Durga Prasad* v. *Sheo Charan Lal.*

11. ('38) 25 AIR 1938 Cal 348 (351) : ILR (1938) 2 Cal 52 : 178 Ind Cas 810 (DB), *Salamat* v. *E. I. Railway.*

12. ('38) 25 AIR 1938 Bom 424 (425):177 Ind Cas 897 (DB), *Maratha Co-operative Credit Bank, Dharwar* v. *Keshav Trimbak.*

13. ('38) 25 AIR 1938 Lah 369 (376, 377):175 Ind Cas 945 (FB), *Masjid, Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.*

from its operation. Hence, a suit relating to a mosque is subject to the rules of limitation prescribed in the Act.[14]

Suits by juristic persons like other suits are subject to the law of limitation and enjoy no special privilege in this respect.[15]

27. Applicability of Act to arbitration proceedings. — Under S. 37 of the Arbitration Act, X of 1940, all the provisions of the Limitation Act are applicable to arbitrations as they apply to proceedings in Court. Before the passing of the above Act, the position was as follows : The Limitation Act only applied to suits, appeals and certain applications to *Courts*. As arbitration proceedings did not come within any of these categories, the Act did not directly apply to them.[1] But in making their award it was the duty of the arbitrators to have regard to the provisions of the law of limitation and not to allow claims which were barred under such law.[2] Where the arbitrators failed in this respect and the error was apparent on the face of the award, the award could be remitted to the arbitrators for re-consideration.[3]

Where A and B enter into an agreement to refer future disputes that may arise out of a contract to arbitration, it has been held that after the expiry of limitation for a suit for the enforcement of the claims arising out of the contract, there would be no subsisting differences which could be referred to arbitration and that a reference to arbitration under such circumstances is invalid.[4]

After a suit is referred to arbitration by order of the Court, the Court has no power to dismiss the suit as barred by limitation.[5]

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[14] ('38) 25 AIR 1938 Lah 369 (380):175 Ind Cas 945 (FB), *Masjid, Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar.*

[15] ('38) 25 AIR 1938 Lah 369 (385):175 Ind Cas 945 (FB), *Masjid, Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar.*

Note 27

[1] ('29) 16 AIR 1929 P C 103 (105, 107) : 115 Ind Cas 713 : 56 Ind App 128 : 56 Cal 1048 (P C), *Ramdutt Ramkissen Dass v. E. D. Sassoon & Co.*

[2] ('29) 16 AIR 1929 P C 103 (105, 107, 108): 115 Ind Cas 713 : 56 Ind App 128 : 56 Cal 1048 (P C), *Ramdutt Ramkissen v. E. D. Sassoon & Co.*
('83) 1883 Bom P J 339, *Babaji v. Kano.*
[*See* ('37) 24 AIR 1937 Rang 363 (364): 1937 Rang L R 399 : 173 Ind Cas 377, *Maung Kyaw Tha v. Co-operative Town Bank, Henzada.* (It is not the intention of the Legislature that the arbitrator should arrogate to himself the right to ignore the law of limitation.)
('92-96) 2 Upp Bur Rul 9 (10), *Ma Min Ku v. Maung Tha Nyun.*]

[3] ('31) 18 AIR 1931 Mad 619 (624) : 133 Ind Cas 522 (DB), *Alagapa Chettiar v. Chidambaram Chettiar.*
('97) 24 Cal 469 (473) (DB), *Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer.* (In this case, it was held that the award was not vitiated by any error apparent on the face of it.)
('97) 1897 All W N 162 (163), *Ramjatan Rai v. Sheobalak Rai.*
('26) 13 AIR 1926 Sind 209 (211) : 19 Sind L R 24 : 95 Ind Cas 750, *Official Receiver v. Kersondas Mavji.*

[4] ('29) 16 AIR 1929 Sind 55 (58) : 107 Ind Cas 435 (DB), *Uttamchand Brijlal v. Balmokand.*
[But see ('27) 14 AIR 1927 Sind 177 (181) : 100 Ind Cas 890, *Balmokand v. Uttamchand Brijlal.* (Claim time-barred at the time of reference can validly form subject-matter of reference—AIR 1926 Sind 209 dissented from.]

[5] ('97) 1897 All W N 162 (163), *Ramjatan Rai v. Sheobalak Rai.*

28. Inherent power and limitation. — As seen in Note 3, the Court has no inherent power to relieve against the bar of limitation. As the Court can exercise its inherent power of its own motion, an application to the Court to exercise its inherent power is not governed by any period of limitation.[1] As to whether the Court has inherent power to act in any particular case depends upon the question whether any definite remedy is provided for governing such a case. The general principle is that where the law provides a definite remedy in regard to any matter, the Court has no inherent power in respect of such matter. Hence, a person who has failed to avail himself of a definite remedy provided by law within the prescribed period of limitation, cannot invoke the inherent power of the Court.[2] Further, as it is discretionary with the Court to exercise its inherent power, it can refuse to do so if there has been undue delay in invoking such power.[3]

29. Set-off and counter-claim—Limitation. — A claim of set-off by the defendant to a suit is not a proceeding to which this Act applies and hence is not *directly* subject to any period of limitation. But whether a set-off can be claimed may depend in certain cases on the question whether a *suit* for the amount sought to be set off would have been barred by limitation. Thus, a *legal* set-off cannot be claimed, unless a *suit* for the amount sought to be set off would have been within time at the date on which the suit wherein the set-off is claimed was filed.[1] But there is a conflict of decisions whether an *equitable* set-off can be claimed where a suit for the amount claimed

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('66) 1 Agra Rev 53 (54) (DB), *Ameen Chund* v. *Mendhoo Khan.*
('75) 1875 Pun Re No. 2, *Shama* v. *Azim.*
[*See* ('81) 1881 All W N 17 (18) (DB), *Jagmandar Das* v. *Piare Lal.*
('71) 3 N W P H C R 177 (178) (DB), *Monowar Khan* v. *Abdoollah Khan.* (Where the reference to arbitration has fallen through, the Court regains power to go into the question of limitation.)]

Note 28

1. ('27) 14 AIR 1927 All 439 (441) : 101 Ind Cas 676 : 49 All 592 (DB), *Chandra Shekhar* v. *Amir Begam.*

2. ('35) 22 AIR 1935 Cal 336 (337) : 156 Ind Cas 126 : 62 Cal 61 (DB), *Saratchandra Sen* v. *Mritunjay Ray.*
('31) 18 AIR 1931 Cal 319 (320): 129 Ind Cas 778, *Madha Ram* v. *Mt. Tupoo Rubhani.*
('25) 12 AIR 1925 Lah 321 (321) : 86 Ind Cas 256, *Firm Duni Chand* v. *Pritam Das.*
('33) 20 AIR 1933 Mad 258 (258, 259) : 143 Ind Cas 240 (DB), *Sundaresa Iyer* v. *Subba Rao.*
('24) 11 AIR 1924 Rang 274 (275) : 82 I. C. 418 (DB), *S. G. M. Samson* v. *Silvaran.*
('32) 19 AIR 1932 Oudh 220 (222) : 138 Ind Cas 149 (DB), *Jagmohan* v. *Mahadeo.*
('28) 15 AIR 1928 Nag 91 (92) : 23 Nag L R 183 : 107 I. C. 193, *Saba* v. *Dayaram.*
('27) 14 AIR 1927 Nag 197 (198) : 101 Ind Cas 320, *Sabuddin* v. *Pundlik.*

3. ('25) 12 AIR 1925 All 236 (237) : 84 Ind Cas 746 : 47 All 304 (DB), *Imtiaz-ul-nissa* v. *Chuttan Lal.*

Note 29

1. ('41) 28 AIR 1941 All 278 (279) : 1941 O W N 548 (549), *Thakur Prasad* v. *Official Liquidator, Benares Bank.* (Under O. 8, R. 6, C. P. C., the money sought to be set off should be legally recoverable by the defendant from the plaintiff.)
('30) 122 Ind Cas 490 (490) (Lah) (DB), *Firm Bishambar Das-Mul Raj* v. *Firm Salig Ram-Bindra Ban.*
('21) 8 AIR 1921 Cal 67 (68) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal* v. *Tarubala Dassi.*
[*See also* ('21) 8 AIR 1921 Mad 688 (688) : 62 Ind Cas 852 (DB), *Subraya Bhandary* v. *Janardana Bhandary.*]

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would have been barred by limitation.[2] In proceedings for the winding up of a company, the Official Liquidator in exercising his rights under the mutual credit clause (see S. 46 of the Provincial Insolvency Act of 1920 and S. 229 of the Companies Act of 1913) can set off against a debt due from the company a debt which the debtor owes to the company although the latter debt may be time-barred.[3]

Counter-claim : Where the defendant in a suit makes a counter-claim against the plaintiff, such counter-claim virtually amounts to a suit and hence can be made only where at the date when it is *made* an independent suit for the amount claimed would have been in time.[4] Thus, in the case of a set-off, the date with reference to which the test of limitation is applied (in cases in which such test is applicable) is the date of the institution of the suit wherein the set-off is claimed; whereas in the case of a counter-claim, the date with reference to which limitation is determined is the date on which the written statement making the counter-claim is filed.[5]

30. Insolvency proceedings and limitation.—A debt which is not barred by limitation on the date of *adjudication* is provable in insolvency, although it may be barred on the date of the proof.[1]

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2. ('26) 13 AIR 1926 Pat 77 (79) : 90 Ind Cas 785 (DB), *Nathan Prasad* v. *Kali Prasad.* (A time-barred debt may be claimed by way of equitable set-off.)
('25) 12 AIR 1925 Cal 1146 (1146, 1147) : 88 Ind Cas 696 (DB), *Abdul Majid* v. *Kulsam Bibi.* (Do.)
('15) 2 AIR 1915 Cal 649 (650) : 21 Ind Cas 716, *Ramdhari Singh* v. *Permanunda Singh.* (Do.)
('07) 12 Cal W N 60 (62) (DB), *Gajadhar Mahto* v. *Raghubar Gope.* (Do.)
('82) 6 Bom 628 (639), *Merwanji Hormusji* v. *Rustomji Burjorji.* (Do.)
[Contra ('19) 6 AIR 1919 Cal 916 (917) : 47 Ind Cas 938 (DB), *Kanailal Kundu* v. *Nitya Saran Mukerjee.* (Claim barred at the date of filing written statement cannot be allowed to be set off.)
('17) 4 AIR 1917 Mad 258 (258, 259) : 32 Ind Cas 80 : 39 Mad 939 (DB), *Vyravan Chetty* v. *Nataraja Desikar.* (But where there is a fiduciary relationship between the parties, and there is accountability, even barred claims may be taken into account in passing the final accounts.)]

3. ('41) 28 AIR 1941 All 278 (279) : 1941 O W N 548 (549), *Thakur Prasad* v. *Official Liquidator, Benares Bank Ltd.*

4. ('25) 12 AIR 1925 Nag 445 (446, 447) : 89 Ind Cas 371, *Beni* v. *Bisan Dayal.*
('20) 7 AIR 1920 Mad 819 (821) : 42 Mad 873 : 53 I. C. 234 (DB), *Narsimha Rao* v. *Srinivasa Jagannath Rao.*
[*See* ('37) 24 AIR 1937 Nag 210 (210, 211) : 171 I. C. 502, *Sundermal Jaikisan* v. *Ganesh Narayan.* (Counter claim—Allegation of loan put forward by defendant not as a ground of defence but as a ground of attack—Limitation—Written statement more than three years after date of payment—Counter-claim held barred.)]

5. ('34) 21 AIR 1934 All 427 (428, 429, 430) : 150 Ind Cas 105 : 56 All 821 (DB), *Bharata* v. *Chet Ram.*
('21) 8 AIR 1921 Cal 67 (68) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal* v. *Tarubala Dassi.*
('23) 10 AIR 1923 Bom 113 (118) : 77 Ind Cas 943, *Najan Ahmed Haji Ali* v. *Salemahomed Peermahomed.*
[*See* ('98) 1898 Pun Re No. 53, *Sohna* v. *Nand Ram.*
('85) 7 All 284 (287) : 1885 All W N 40 (DB), *Pragi Lal* v. *Maxwell.*]
[But see ('19) 6 AIR 1919 Cal 916 (917) : 47 Ind Cas 938 (DB), *Kanai Lal Kundu* v. *Nitya Saran Mukerjee.* (Claim which has become barred by limitation at the time of filing the written statement in a suit is not a debt legally recoverable by the defendant from plaintiff and cannot therefore be allowed to be set off.)]

Note 30

1. ('24) 11 AIR 1924 Oudh 351 (352) : 75 Ind Cas 790 (DB), *Ijas Hussain* v. *Lachman Das.*

An application by a creditor under the Provincial Insolvency Act to be brought on the schedule of creditors is not governed by any period of limitation. But such application may be refused on the ground of undue delay on the part of the creditor.[2]

An application by the Official Assignee under S. 7 of the Presidency Towns Insolvency Act for the recovery of moneys due to the estate of the insolvent is equivalent to a suit, and cannot be allowed if at the date of the application a suit for the recovery of the moneys would have been barred by limitation.[3]

As to whether the period during which insolvency proceedings are pending against a person can be deducted in calculating the period of limitation for suits and other proceedings by or against such person, see Notes under S. 15.

31. Plea of exemption from limitation.—Order 7, Rule 6 of the Civil Procedure Code provides that where a suit is instituted after the prescribed period of limitation, the plaint should show the ground upon which exemption from the bar of limitation is claimed. Hence, where the allegations in the plaint show that the suit has been instituted after the period prescribed by the first schedule and the plaintiff relies' on the provisions of any of the sections from 4 to 25 of this Act as saving his suit from the bar of limitation, the plaint itself must show the ground on which such exemption is claimed.[1] Where the plaint does

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('25) 12 AIR 1925 Pat 438 (440) : 4 Pat 128 : 85 Ind Cas 543 (DB), *Babu Lal Sahu* v. *Krishna Prashad*.

('26) 13 AIR 1926 Oudh 621 (621) : 98 Ind Cas 74 : 2 Luck 261 (DB), *Damodar Das* v. *Hamidul Rahman*.

[*See also* ('32) 19 AIR 1932 Mad 287 (288) : 55 Mad 630 : 136 Ind Cas 822 (FB), *Fatma Bi* v. *Nagoor Khan*. (Limitation expiring during holidays—Debtor adjudged insolvent on re-opening day—Debtor is "subject" to the debt within S. 46 (3), Presidency Towns Insolvency Act, at the time of his adjudication and the debt is provable in the insolvency.)]

[2] ('27) 14 AIR 1927 Rang 263 (264, 265) : 5 Rang 384 : 104 Ind Cas 816 (DB), *Jhan Bhadur Singh* v. *Bailiff of the District Court of Toungoo*.

[3] ('36) 23 AIR 1936 Mad 778 (779) : 164 Ind Cas 660 : 59 Mad 1020 (FB), *Muthuswami Chetty* v. *Official Assignee, Madras*.
See also Note 26.

Note 31

[1] ('37) 24 AIR 1937 Mad 826 (828):176 I.C. 939, *Madappaya* v. *P. Mahabala Rao*.

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *Mehta & Co., Asansol*. (Written statement filed in suit itself cannot be called in aid for the purpose of S. 20 of the Act—A suit must be tried on the cause of action as laid in the plaint.)

('10) 7 Ind Cas 455 (457) : 34 Bom 540 (DB), *Ghulam Hussain Tayabali* v. *Muhammadali Ibrahmji*.

('95) 22 Cal 952 (note), *Administrator-General of Bengal* v. *Chunder Cant*.

('33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri* v. *Kalu*.

('29) 16 AIR 1929 Lah 266 (266, 267) : 118 Ind Cas 529, *Pahumal* v. *Chunni Lal*.

('22) 9 AIR 1922 Lah 39 (40) : 3 Lah 233 : 69 Ind Cas 419 (DB), *Uttam Chand* v. *Mt. Thakar Devi*. (But a plaintiff having mentioned one ground of exemption in the plaint is not debarred by the provisions of O. 7, R. 6, C. P. C., from taking another ground to get over the bar of limitation.)

('09) 4 Ind Cas 902 (906) : 1910 Pun Re No. 43 (DB), *Abdul Ali* v. *Von Goldstein*. (*Held* that in this case, the plaint did make the intention of the plaintiff clear, *viz.*, the intention to rely on the alleged acknowledgments which saved the bar of limitation.)

('09) 4 Ind Cas 923 (924) (Lah) (DB), *Mt. Gauhar Bibi* v. *Ghulam Muhammad*.

('33) 20 AIR 1933 Mad 675 (677) : 145 Ind Cas 933, *Ramaswami* v. *Palaniappa*.

not comply with this requisite, it must be rejected under O. 7, R. 11 of the Code,[2] and the plaintiff cannot be allowed to rely on any ground, not shown in his plaint as saving his suit from the bar of limitation.[3] But the Court can allow the plaint to be amended by including such ground of exemption.[4] As to when such amendment can be allowed, the matter is within the discretion of the Court.[5] Generally speaking, a plaintiff will not be allowed to plead a ground of exemption at a late stage of the proceedings where such ground raises new questions of fact and cannot be disposed of, on the facts before the Court.[6] But, where the questions raised are capable of determination on the facts before the Court, the point can be allowed to be raised at any stage.[7]

('19) 6 AIR 1919 Mad 332 (333) : 52 Ind Cas 243, *Marudai Muthirian* v. *Chinnakannu Muthirian.*

('24) 11 AIR 1924 Nag 80 (80) : 69 Ind Cas 554, *Vithoba Yadeo* v. *Suryabhan.*

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709, *Jago* v. *Mahadeo.*

('24) 11 AIR 1924 Pat 806 (806) : 78 Ind Cas 919 (DB), *Chatterdhari Mahto* v. *Nasib Singh.*

('14) 1 AIR 1914 Sind 70 (73) : 8 Sind L R 69 : 27 Ind Cas 344 (DB), *Gulrajmal* v. *Pamanmal.*

('14) 1 AIR 1914 Lah 337 (338) : 1914 Pun Re No. 83 : 26 Ind Cas 441, *Gobindamal* v. *Santa.*

('10) 8 I. C. 999 (1011): 1910 Pun Re No. 97 (DB), *Nihal Devi* v. *Kishore Chand.*

2. ('23) 10 AIR 1923 Nag 30 (31), *Sawalram* v. *Ganesh Lal.*

('24) 11 AIR 1924 Nag 80 (80) : 69 Ind Cas 554, *Vithoba Yadeo* v. *Suryabhan.*

3. ('22) 9 AIR 1922 Lah 39 (40): 3 Lah 233 : 69 Ind Cas 419 (DB), *Uttam Chand* v. *Mt. Thakar Devi.*

('07) 17 Mad L Jour 281 (282) (D B), *Jagannadha Rao* v. *Seshayya.*

('04) 31 Cal 195 (201): 8 Cal W N 168 (DB), *Jogeshwar Roy* v. *Rajnarain Mitter.*

[*See* ('17) 4 AIR 1917 Mad 845 (845) : 36 Ind Cas 593, *Nagendran Chetty* v. *Kuppusamy Ayen.* (Objection that the plaintiff did not set out the ground of exemption from limitation will not be allowed to be taken in revision in the High Court.]

[*See also* ('03) 30 Cal 699 (708) : 7 Cal W N 651, *Benode Behari Mookerjee* v. *Raj Narain Mitter.* (Quære.)]

See also cases in foot-note (1) above.

4. ('09) 3 Ind Cas 159 (160) : 34 Bom 250 (DB), *Gunnaji* v. *Makanji.*

('86) 1886 Bom P J 169 (DB), *Gangabai* v. *Venkaji.*

('18) 5 AIR 1918 Lah 220 (220) : 46 Ind Cas 495 : 1918 Pun Re No. 102, *Ramsukh Das* v. *Ghulam Muhammad.*

('27) 14 AIR 1927 Mad 504 (505), *Vasudeva Nayudu* v. *Venkalakshmi Ammal.*

('18) 5 AIR 1918 Mad 1200 (1200) : 38 Ind Cas 720 (DB), *Muthiah Chettiar* v. *Chithambaram Chetty.*

('10) 7 Ind Cas 797 (797) (Mad), *Nathamuri Narayana Iyengar* v. *Balasubramaniya Iyer.*

('20) 7 AIR 1920 Nag 200 (202) : 16 Nag L R 198 : 56 Ind Cas 926, *Tekchand* v. *Mt. Patto.* (Limitation expired during vacation—Suit filed on the re-opening day—Plaint failing to show on what ground exemption was claimed—*Held* that, proper course was not to dismiss the suit but to require plaint to be amended.)

('35) 22 AIR 1935 Oudh 501 (503) : 158 I. C. 267 (DB), *Gappoo Singh* v. *Har Charan.*

5. See Civil Procedure Code, Order 6 Rule 17.

6. ('34) 21 AIR 1934 P C 208 (210) : 151 Ind Cas 45 (P C), *Kalyan Mal* v. *Ahmed Uddin Khan.*

('41) 28 AIR 1941 Nag 100 (101) : I L R (1941) Nag 144, *Shivjiram Dhannalal* v. *Gulabchand Kalooram.* (Plea of minority cannot be raised for first time in second appeal—17 C W N 667 followed.)

('08) 31 Mad 540 (543) : 4 Ind Cas 1131 (DB), *Krishnamachariar* v. *Kuppammal.*

('23) 10 AIR 1923 Lah 645 (646) : 82 Ind Cas 91 (DB), *Ram* v. *Gaman Ram.* (A remand, in order to enable the plaintiff to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation, was refused.)

7. ('18) 5 AIR 1918 Mad 238 (239) : 44 Ind Cas 466 : 41 Mad 446 (DB), *Palaniappa Chettiar* v. *Veerappa Chettiar.*

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Note 31

The Court has also power to allow an amendment of the plaint by introducing an additional ground of exemption or substituting a new one.[8]

As to whether a plaintiff who has relied on one ground of exemption in his plaint can raise another ground at the trial without an amendment of the plaint, see the Authors' Commentary on the Civil Procedure Code, O. 7 R. 6, and the undermentioned cases.[9]

The requirement of O. 7 R. 6, that the plaint should contain the ground of exemption from limitation only applies to cases in which the suit appears *prima facie* to be barred by limitation on the allegations of the plaint itself, and not where the bar appears only during the course of the trial. In such cases the failure of the plaintiff to plead in his plaint exemption from the ordinary rule of limitation will not preclude him from raising such point at the hearing.[10] Moreover, to satisfy the provisions of O. 7 R. 6, it is sufficient if the plaint on the face of it shows the ground of exemption; it is not necessary that the ground of exemption should be set forth in explicit terms.[11]

[*See* ('31) 18 AIR 1931 Cal 670 (671) : 132 I. C. 684 (DB), *Hari Charan Bhunya* v. *Kamal Kumari Dasi.* (New plea as to applicability of particular article of Limitation Act can be taken in second appeal provided defendant is not prejudiced by such course of action.)

('27) 14 AIR 1927 Bom 398 (398) : 103 Ind Cas 418 (DB), *Mahomadsa Khadirsa* v. *Khadirsa Hajisa.*]

[8] ('35) 22 AIR 1935 Mad 158 (159, 160) : 154 Ind Cas 707, *Muthammal* v. *Gurusami Nayakkan.* (No new relief is prayed on the same cause of action, nor fresh cause of action added—Amendment should be allowed.)

[9] ('35) 22 AIR 1935 All 946 (949) : 58 All 261 : 159 Ind Cas 387 (FB), *Udeypal Singh* v. *Lakshmi Chand.* (Plaintiff can rely on ground of exemption different from that mentioned by him in the plaint under Order 7 Rule 6.)

('35) 22 AIR 1935 Bom 213 (214) : 156 I. C. 531, *Percy F. Fisher* v. *Ardeshir.* (Do.)

('10) 8 Ind Cas 788 (789) (Cal) (DB), *Nistarini Debi* v. *Chandi Dasi Debi.* (Do.)

('33) 20 AIR 1933 Mad 874 (876) : 148 Ind Cas 377, *Mahadeva Sastrigal* v. *Marulai Reddiar.* (Without amendment of plaint, new ground of exemption cannot be put forward.)

('36) 23 AIR 1936 Mad 545 (547) : 165 Ind Cas 737, *Ramasamy Chetty* v. *Anaiya Padayachi.* (Do.)

('37) 24 AIR 1937 Oudh 391 (392) : 13 Luck 334 : 168 Ind Cas 799 (DB), *Satgurnath* v. *Brahmadat.* (Ground of exemption from limitation taken in plaint—Plaintiff is not precluded from subsequently taking another and inconsistent ground to get over limitation.)

[10] ('19) 6 AIR 1919 Lah 20 (21) : 51 I. C. 956 : 1 Lah 89, *Khandulal* v. *Fazal.*

('14) 1 AIR 1914 Lah 408 (410) : 1914 Pun Re No. 70 : 25 Ind Cas 463 (DB), *Dev Raj* v. *Shiv Ram.*

('19) 6 AIR 1919 All 227 (228) : 51 Ind Cas 283 (DB), *Kamala Devi* v. *Gur Dayal.*

('22) 9 AIR 1922 Oudh 135 (137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar* v. *Beni Singh.*

[11] ('08) 7 Cal L Jour 560 (562) : 12 Cal W N 617 (DB), *Raghunath Bhagat* v. *Syed Samad Shah.*

('09) 2 Ind Cas 77 (78) (Cal) (DB), *Gangadhar Sarkar* v. *Khaja Abdul Ajij.* (When the plaintiff or all the plaintiffs are minors, it is not usually necessary for them to plead exemption from the law of limitation—The Court can and must see from the record that, being minors, against them time has not yet begun to run.)

('23) 10 AIR 1923 Lah 591 (592) : 82 Ind Cas 866 (DB), *Sukhbir Singh* v. *Piare Lal.* (No statement necessary where there was the endorsement of the Court returning the plaint giving the date of original presentation and the date of return and the circumstances entitling plaintiff to the benefit of S. 14, Limitation Act, appeared on the face of the record.)

The above principles apply also to appeals and applications.[12]

32. Limitation only applies to institution of proceedings, not their continuation.— The bar of limitation arises only where a suit is instituted, an appeal preferred or an application made after the prescribed period of limitation. Thus, the bar only applies where a proceeding has been *instituted* after the period of limitation. The bar does not apply to steps which constitute a mere *continuation* of a pending proceeding. Thus, where a suit dismissed for default is restored to the file, it does not become a fresh suit but is only the continuation of the old suit.[1] So also, where a suit is validly instituted, but the plaint is returned for some purpose and re-presented, such re-presentation is only a continuation of the suit and does not affect the question of limitation.[2] For other instances, see the undermentioned cases.[3] See also Note 5.

See also Article 182 Note 143.

[*See* ('12) 16 Ind Cas 804 (805) : 1913 Pun Re No. 32 (DB), *Hardhian Singh* v. *The Delhi Cloth and General Mills Co., Ltd.* (If facts as stated in the plaint necessarily suggest fraud on the part of a defendant, the mere omission therein expressly to stigmatise the defendant's conduct as fraudulent would be no bar to plaintiff's relying on the provisions of S. 18, Limitation Act, and in such case, the Court should return the plaint to the plaintiff for amendment.)]

See also Section 6 Note 29.

[12] ('33) 20 AIR 1933 Sind 365 (366): 147 Ind Cas 30 (DB), *Kaliandas Balchand* v. *Mohammad Khan.* (Where a person relies upon a particular ground as reviving limitation for an *execution application*, it is incumbent upon him to specify that ground in the application—If he fails to do so, it is not open to him to take advantage of it subsequently.)

('28) 15 AIR 1928 P C 103 (103, 106) : 109 Ind Cas 1 : 6 Rang 302 : 55 Ind App 161 (PC), *Jijibhoy N. Surty* v. *T. S. Chettyar.* (Appeal dismissed as time-barred —Application for review—Ground of exemption from limitation for the first time urged in application for review — Doubtful whether point could be raised — But the lower Court did allow the point to be raised — The Privy Council directed the applicant for review to pay the costs of the application.)

('11) 9 Ind Cas 157 (158) (Mad) (DB), *Yereni Anjayya* v. *Vappulapati Bapayya.* (Where application had been returned for presentation to proper Court, the endorsement of the Court on the application as to dates of receipt and return is substantial compliance with O. 7, R. 6, C. P. C., though application does not expressly mention how limitation was saved.)

Note 32

[1] ('09) 3 Ind Cas 484 (486) : 1909 Pun Re No. 31 (DB) *Dhirta* v. *Kesri.*

[*See also* ('28) 15 AIR 1928 Nag 106 (108) : 106 Ind Cas 575, *Shribalabh* v. *Gulab Mali.* (*Ex parte* decrees set aside on ground of minority and non-representation —On defendant attaining majority plaintiff applying for restoration of suits— Suits held should be restored and treated as pending cases.)]

[2] ('30) 17 AIR 1930 Lah 480(480): 122 I.C. 488, *Md. Baksh* v. *Sikandar Khan.*

('87) 1887 Pun Re No. 22, *Torobaz* v. *Pir Bakhsh.*

[*See also* ('29) 16 AIR 1929 Lah 409 (416) : 116 Ind Cas 317 (DB), *Labhu Ram* v. *Charnu Fauju.*

('29) 16 AIR 1929 Lah 248 (249) : 117 Ind Cas 369, *Amar Nath* v. *Hakim Rai.*

('39) 26 AIR 1939 Mad 397 (399), *Chendrayya* v. *Seethanna.* (Plaint returned for want of pecuniary jurisdiction—Re-presentation of plaint in same Court after omitting a portion of the relief—It can be treated as a continuation of the original suit.)]

[3] ('16) 3 AIR 1916 Nag 31 (33) : 40 Ind Cas 393 : 13 Nag L R 81, *Abu Bakar Abdul Rahman & Co.* v. *Rambux.* (Transfer of suit from one Court to another can never raise a question of limitation.)

('25) 12 AIR 1925 Sind 330 (340) : 18 Sind L R 230 : 88 Ind Cas 116, *Lakhmichand Isardas* v. *Firm of Khushaldas-Mangatram.* (Minor electing under

33. Amendment of plaint, etc. — The bar of limitation under this section only applies where a suit has been *instituted* after the period of limitation. The bar does not apply to the *amendment* of plaints. In other words, the amendment of a plaint does not amount to the institution of a fresh suit. When a plaint is amended, the amendment relates back to the date of the institution of the suit and the suit in the amended form must be deemed as instituted on such date, so that if on that date the suit is not time-barred, the suit in the amended form will not be time-barred, although at the date of the *amendment* limitation for the suit may have expired.[1]

But the power of allowing amendments of pleadings is a *discretionary* power and in exercising its discretion the Court will consider the question whether the proposed amendment alters the substantial character of the suit and whether a fresh suit would have been time-barred if instituted on the date on which the amendment is sought.[2] As a general rule, the Court will refuse the amendment, if it

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O. 32, R. 12, C. P. C., to continue suit brought by next friend is not to be deemed as instituting a fresh suit.)
('72) 17 Suth W R 450 (451) (DB), *Kalee Kishore Sen* v. *Nilamber Sen.* (If instead of appealing from decision of previous suit plaintiff brings a fresh suit on same cause of action it cannot be treated as continuation of previous suit.)
('84) 1884 Bom P J 262 (DB), *Parikh Gokaldas* v. *Raval Jalam.* (Suit instituted by minor without next friend is not nullity and prevents statute of limitation from running, and may be proceeded with on a next friend being appointed.)
('38) 25 AIR 1938 All 552 (554) : 177 Ind Cas 695, *Ramakant* v. *Satya Narain.* (On receipt of stay order from High Court application for restitution ordered to be filed for the time being in record-room—Application is not finally disposed of and no question of limitation arises as to its being continued.)

Note 33

[1] ('38) 25 AIR 1938 Pat 205 (208) : 17 Pat 268 : 175 Ind Cas 354 (DB), *Kesho Das* v. *Hari Kishun Das.*
('85) 9 Bom 373 (402), *The New Fleming Spinning and Weaving Co. Ltd.* v. *Kessowji Naik.*
('20) 7 AIR 1920 Cal 770 (770) : 63 Ind Cas 701 (DB), *Nripendranath Das Gupta* v. *Hemanta Kumar Bhattacharjee.*
('34) 21 AIR 1934 Lah 412 (412) : 150 Ind Cas 739, *Topan Dass* v. *Tharia Ram.* (AIR 1918 Cal 443 distinguished.)
('33) 20 AIR 1933 Mad 153 (156) : 143 Ind Cas 504, *Satyanarayana Rao* v. *Venkataswami.*
('95) 17 All 288 (291): 1895 All W N 80 (DB) *Barkhat-un-nissa* v. *Md. Asad Ali.*
('14) 1 AIR 1914 Lah 263 (265) : 1914 Pun Re No. 62 : 25 Ind Cas 439 (DB), *Jalal Din* v. *Qaim Din.*
('36) 23 AIR 1936 Rang 508 (509) : 14 Rang 383 : 165 I. C. 810, *Krishna* v. *Ma Aye.*
('14) 1 AIR 1914 Nag 77 (78) : 10 Nag L R 32 : 23 Ind Cas 165, *Nemasa* v. *Ram Krishna.* (1 N L R 117, followed.)
('21) 8 AIR 1921 P C 50 (51, 52) : 48 Cal 110 : 47 Ind App 255 : 57 Ind Cas 606 (P C), *Charan Das* v. *Amir Khan.*
(1863) 1 Mad H C R 427 (428) (DB), *Ismail Sahib* v. *Arumuga Chetti.*
('05) 1 Nag L R 117 (121), *Mangal Prasad* v. *Chandramall.*
('71) 16 Suth W R 47 (48) (DB), *Khellat Chunder Ghose* v. *Nusseebunissa Bibee.*
('75) 23 Suth W R 447 (447) (DB), *Mengur Munder* v. *Baboo Huree Mohan.*
('67) 7 Suth W R 157 (158)(DB), *Greesh Chunder* v. *Pran Kishen Bhuttacharjee.*
('66) 6 Suth W R 39 (39) (DB), *Husrutoollah* v. *Aboo Md. Abdool Kader.*
('66) 5 Suth W R 207 (207) (DB), *Ram Coomar Shaha* v. *Dwarkanath Hazra.*
('95) 19 Bom 320 (323) (DB), *Patel Mafatlal* v. *Bai Parson.*
('11) 10 Ind Cas 731 (733) : 7 Nag L R 33, *Durgagir* v. *Kollu.* (Date of amendment is immaterial for purposes of limitation.)
('80) 2 All 832 (834, 835) (DB), *Ram Lal* v. *Harrison.*

[2] See Authors' Commentary on the Civil Procedure Code, 3rd Edition, O. 6, R. 17, Note 3.

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will alter the substantial character of the suit and if, at the time when the amendment is sought, a fresh suit would have been barred by limitation; the principle being that a defendant should not be deprived, by means of an amendment, of a defence of limitation which would otherwise be open to him.[3] But, in exceptional circumstances, the

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[3] ('38) 25 AIR 1938 Pat 44 (47) : 17 Pat 168 : 173 Ind Cas 292 (DB), *Ramkaran Thakur* v. *Baldeo Thakur.* (Application for amendment made when claim asked is time-barred—Although there is still discretion, it would be more wisely exercised by refusing amendment.)
('38) 25 AIR 1938 Pat 205 (208) : 17 Pat 268 : 175 Ind Cas 354 (DB), *Kesho Das* v. *Hari Kishun Das.*
('37) 24 AIR 1937 Mad 122 (123) : 168 Ind Cas 98, *Narayanamurthy* v. *Suryanarayana.*
('29) 113 Ind Cas 87 (88) (Lah) (DB), *Kalyan Dass* v. *Oma Datta Hans Raj.*
('32) 19 AIR 1932 Bom 367 (368) : 138 Ind Cas 797, *Nanjibhai* v. *Popatlal.*
('14) 1 AIR 1914 All 80 (83) : 36 All 370 : 24 I. C. 255 (DB), *Balkaran Upadhya* v. *Gaya Din Kalwar.*
('31) 18 AIR 1931 All 160 (162) : 130 I. C. 702 (DB), *Allah Bakhsh* v. *Hamid Khan.*
('05) 1 Nag L R 117 (120, 121), *Mangal Prasad* v. *Chandramall.*
('14) 1 AIR 1914 All 302 (303) : 26 I. C. 42 (DB), *Bisheshar Prasad* v. *Gobind Ram.*
('14) 1 AIR 1914 Sind 70 (72, 73) : 8 Sind L R 69 : 27 I. C. 344 (DB), *Gulrajmal* v. *Pamanlal.*
('24) 11 AIR 1924 Sind 144 (145) : 78 Ind Cas 905 : 19 Sind L R 262 (DB), *Dipchand Daulat Ram* v. *Firm of Parmanand Chimandas.*
('25) 12 AIR 1925 Rang 49 (54) : 2 Rang 414 : 84 Ind Cas 295 (DB), *Hirjee Devaraj & Co.* v. *Maung Nyun.*
('25) 12 AIR 1925 Rang 264 (265) : 90 Ind Cas 639 (DB), *Nagoor Meera* v. *Haji Moideen Nainar Meera.*
('28) 15 AIR 1928 Mad 828 (829) : 110 Ind Cas 775 (DB), *Seshacharlu* v. *Venkatasubba Rao.*
('26) 13 AIR 1926 Cal 189 (189) : 87 I. C. 218, *Macleod & Co.* v. *Ivan Jones & Co.*
('27) 14 AIR 1927 Mad 650 (652) : 101 Ind Cas 390 (DB), *Santhanakrishna Naidu* v. *Chellappa Iyer.*
('26) 13 AIR 1926 Mad 827 (828) : 96 Ind Cas 700, *Lakshmanacharyulu* v. *Venkataramanuja.* (Amendments sought to be made in second appeal.)
('25) 12 AIR 1925 Mad 441 (442) : 86 Ind Cas 747, *Mayankutti* v. *Kathiri.* (Do.)
('16) 3 AIR 1916 Mad 698 (698) : 28 Ind Cas 828 (DB), *Narayanan Chettiar* v. *Ratnasabapathy Iyer.* (Amendment can be allowed if it sets up no new cause of action but prays for additional relief on facts already alleged in plaint.)
('27) 14 AIR 1927 Cal 733 (736) : 104 I. C. 151 (DB), *Nalinakha* v. *Ram Taran.*
('31) 18 AIR 1931 Nag 74 (79, 80) : 131 Ind Cas 417 : 27 Nag L R 291, *Bhimrao* v. *Mt. Gangabai.*
('30) 17 AIR 1930 Nag 295 (296) : 128 Ind Cas 407 : 27 Nag L R 226, *Govind* v. *Baliram.*
('32) 19 AIR 1932 Rang 26 (26) : 10 Rang 74 : 137 Ind Cas 39, *Byash Chandra Roy* v. *Ajodhyanath Deb.* (Amendment not setting up new cause of action but only introducing fresh matter in plaint—Still if it deprives defendant of his defence of limitation it will not be allowed.)
('32) 19 AIR 1932 Bom 117 (121) : 137 I. C. 710 (DB), *Parbhu Das* v. *Lallubhai.*
('10) 7 Ind Cas 455 (457) : 34 Bom 540 (DB), *Gulam Hussein Tyaballi* v. *Mahammadaly Ibrahimji.*
('23) 71 Ind Cas 270 (272) (Mad) (DB), *Thirumalasseri Kottayil Shreedharam Valia Rajah* v. *Parakkat.*
('31) 18 AIR 1931 Bom 590 (591) : 135 Ind Cas 423, *Bishamberdas* v. *Brijlal.*
('31) 18 AIR 1931 Mad 1 (2) : 132 Ind Cas 311 (DB), *Vaithilingam Pillai* v. *Kandaswamy Pillai.*
('33) 20 AIR 1933 Lah 774 (774) : 144 Ind Cas 822 : 14 Lah 807, *Rulia Ram* v. *Ram Chandar.*
('31) 18 AIR 1931 Mad 542 (549) : 133 Ind Cas 497 (DB), *Chandramma* v. *Seethan.*
('21) 8 AIR 1921 Pat 485 (486) : 64 Ind Cas 125, *Sinehai Ram Bihari Lall* v. *East Indian Railway.*
('09) 4 Ind Cas 726 (727) : 33 Bom 644 (DB), *Kisandas Rupchand* v. *Rachappa.*
('28) 110 Ind Cas 529 (530) (Cal) (DB), *Akshoy Coomar Gope* v. *Kali Narayan Roy.*

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amendment can be allowed even in such cases,[4] as for instance, where natural justice is not on the side of the defendant and his plea of limitation is a purely technical one.[5]

[*See* ('41) 28 AIR 1941 All 49 (49) : I L R 1941 All 74 : 194 Ind Cas 72 (DB), *Banwari Ram* v. *Muhammad Yar Khan.* (Plaintiff having knowledge of plaint being defective given opportunity to amend— Defect not removed — Application for further amendment made beyond limitation — In circumstances of case held no further indulgence could be granted.)]

[*See also* ('25) 12 AIR 1925 All 355 (356) : 87 I. C. 55 : 47 All 450 (DB), *Umar Daraz* v. *Shri Ram Das.* (When pre-emption suit is dismissed for joining a stranger, plaint cannot be allowed to be amended by striking off stranger's name.)
('23) 10 AIR 1923 All 187 (188) : 79 Ind Cas 220 (DB), *Badri Singh* v. *Gobardhan.* (Do.)]

[4] ('21) 8 AIR 1921 P C 50 (51, 52): 48 Cal 110: 47 Ind App 255: 57 Ind Cas 606 (PC), *Charan Das* v. *Amir Khan.* (Plaintiff through clumsy, blundering and asserting rights in form not permitted by statute—Amendment should be allowed.)
('25) 12 AIR 1925 Cal 67 (74) : 83 Ind Cas 110 (DB), *Niranka Chandra* v. *Atul Krishna Ghose.*
('35) 22 AIR 1935 Cal 102 (105) : 155 Ind Cas 1109 (DB), *Indubala Dassi* v. *Lakshminarayana.*
('29) 16 AIR 1929 Bom 51 (53, 54): 114 Ind Cas 262 (DB), *Bhogi Lal Tarachand* v. *Jethlal Motilal.* (Amendment can be allowed where through some blundering or inexperience plaintiff does not assert his rights in proper form.)
('94) 17 Mad 67 (68, 69) (DB), *Sattappa Chetti* v. *Jogi Soorappa.*
('24) 11 AIR 1924 Cal 517 (520): 50 Cal 878: 79 Ind Cas 287 (DB), *Satchidanand Dutt* v. *Nritya Nath Mitter.*
('27) 14 AIR 1927 Lah 819 (820, 821) : 104 Ind Cas 700 : 9 Lah 217 (DB), *Md. Ismail Khan* v. *Said-ud-din Khan.* (Substantial justice is the aim and object of all rules of procedure.)
('14) 1 AIR 1914 Low Bur 173 (174): 25 Ind Cas 136 (DB), *Palaniappa Chetty* v. *P. M. R. M. Firm.*
('14) 1 AIR 1914 Nag 77 (78) : 10 Nag L R 32 : 23 Ind Cas 165, *Nemasa* v. *Ramkrishna.* (Appellate Court can allow amendment even after limitation where request is made within time in original Court.)
('11) 10 Ind Cas 218 (220) (Mad), *Seethi Kutti* v. *Achutan Nair.* (Authorities as to remedy open to plaintiff conflicting — Plaintiff taking one view—Amendment can be allowed.)
('76) 2 Cal 1 (15, 16): 25 Suth W R 425 (DB), *Ramdoyal* v. *Ajoodhia Ram.*
('36) 23 AIR 1936 Mad 785 (787, 788): 165 Ind Cas 301 (FB), *Official Assignee* v. *Kappuswamy Naidu.*
('36) 23 AIR 1936 Mad 632 (633) : 165 I. C. 503, *Chelam Sakka Raja* v. *Muthusami Moopar.*
('25) 12 AIR 1925 Nag 9 (11): 78 Ind Cas 234, *Sitaram* v. *Nand Ram.* (*Bona fide* mistake found out on inspection taken by defendant—Amendment can be allowed.)
('27) 14 AIR 1927 Nag 310 (311, 312): 103 Ind Cas 455: 23 Nag L R 81, *Bhuwan Lal* v. *Sumranlal.* (Defendant himself suggesting amendment—He was held to have waived plea of limitation.)
('25) 12 AIR 1925 Nag 155 (156): 82 I. C. 177, *Bulakidas* v. *Agent, B. N. Ry. Co.*
('29) 116 Ind Cas 871 (874) (All) (DB), *Sheo Prasad* v. *Nawal Kishore.* (Suit for possession on deed of compromise—Amendment into one for possession allowed.)
('25) 12 AIR 1925 Sind 173 (175): 78 I. C. 846, *Jessaram Bhagwandas* v. *Ratanchand Fatehchand.*
('34) 21 AIR 1934 Sind 33 (33) : 148 Ind Cas 974, *Jethanand Moorijmal, In re.*
[*See also* ('39) 26 AIR 1939 Mad 397 (399), *Chendrayya* v. *Seethanna.* (Plaint returned for want of pecuniary jurisdiction—Re-presentation in same Court after omitting portion of the relief—It can be treated as a continuation of the original suit.)
('35) 22 AIR 1935 Mad 202 (203), *Srirangam Chettiar* v. *Sornam Pillai.* (Insolvency proceedings.)]

[5] ('68) 9 Suth W R P C 9 (14) : 11 Moo Ind App 468 : 2 Suther 107 : 2 Sar 320 (PC), *Mahomed Zahoor Ali Khan* v. *Thakooranee Rutta Kooer.* (Suit wholly misconceived—Instead of dismissing the suit, the Privy Council allowed it to be amended as the defence of limitation, if a new suit had to be filed, would be most inequitable in the circumstances of the case.)
See also Note 39.

Where the proposed amendment does not alter the substantial nature of the suit,[6] or where at the time the amendment is sought even a fresh suit would not be time-barred,[7] there is no question of the defendant being deprived of any possible defence of limitation and there will be no reason for refusing such amendment on the ground of the defendant being deprived of such defence. It depends on the circumstances of each case whether the proposed amendment alters the substantial character of the suit[8] or whether a fresh suit would have been barred by limitation when the amendment is sought.

The above principles will also apply to the amendment of memoranda of appeals[9] and applications.[10]

See also the Authors' Commentary on the Civil Procedure Code, 3rd Edn., Notes under O. 6 R. 17, O. 21 R. 17 and O. 41 R. 3.

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[6] ('39) 26 AIR 1939 Nag 23 (25) : 181 Ind Cas 106, *Ram Nath Hajarimal* v. *Mohanlal Radhakisan.* (Merely furnishing particulars and introducing no new cause of action—No question of limitation arises.)

('20) 7 AIR 1920 Low Bur 92 (93, 94) : 64 Ind Cas 29, *Ma E Gywe* v. *Ma Le Wa.* (Amendment nothing more than original claim in another form and one that the other party had already to meet.)

('26) 13 AIR 1926 Mad 128 (129) : 92 Ind Cas 330, *Ramaswami* v. *Venkatanarayana.* (Amendment asking for change not in cause of action but in its date.)

('25) 12 AIR 1925 Nag 9 (11) : 78 Ind Cas 234, *Sitaram* v. *Nandram.* (To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief.)

('11) 10 I. C. 476 (477) : 33 All 616, *Muhammad Sadiq* v. *Abdul Majid.* (Amendment amounting to a mere correction of the description of the property.)

('93) 1893 All 112 (113), *Ajudhia Ram* v. *Muhammad Munir.* (Amendment of clerical error, no question of limitation.)

('95) 22 Cal 692 (712) (DB), *Dhani Ram Shah* v. *Bhagirath Shaha.* (Proposed amendment not likely to result in the inclusion of any new claim or cause of action barred by limitation at date of the proposed amendment.)

('11) 10 Ind Cas 737 (737, 738) : 7 Nag L R 43, *Bansidhar* v. *Raghabir.* (Suit bad for multifariousness — Amendment asking for restricting relief so as to avoid multifariousness.)

('37) 24 AIR 1937 Cal 485 (487) : 173 Ind Cas 707 (DB), *Jogendra Narain* v. *Debendra Narain.* (Petitioner, by amendment, not wanting to substitute one cause of action for another nor to change subject-matter of suit but simply wanting to add another ground of exemption from limitation—Amendment was allowed.)

[*See* ('34) 21 AIR 1934 Cal 554 (555) : 61 Cal 433 : 150 I. C. 982 (DB), *Ramendra Mohan* v. *Keshab Chandra.* (Facts on which the amendment was based were indicated in the plaint itself with sufficient clarity and completeness.)]

[7] ('39) 26 AIR 1939 Mad 397 (398), *Chendrayya* v. *Seethanna.* (Reversed on another point in A I R 1940 Mad 689.)

[*See* ('14) 1 AIR 1914 Nag 77 (78) : 10 Nag L R 32 : 23 Ind Cas 165, *Nemasa* v. *Ramkrishna.*]

[8] ('26) 13 AIR 1926 Sind 264 (266, 267) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas* v. *Gokal Khataoo.* (Court must look to substantial nature of the claim introduced.)

[9] ('31) 18 AIR 1931 Rang 314 (315): 135 Ind Cas 328, *Maung Ba* v. *Maung Tha Yin.* (Court under mistaken impression that leave to file additional ground is obtained—It can be assumed that permission to argue it is impliedly given.)

('21) 8 AIR 1921 Lah 228 (229) : 67 Ind Cas 44, *Jiwan Shah* v. *Mt. Fateh Bibi.*

[10] ('37) 24 AIR 1937 Lah 895 (896) : 171 Ind Cas 31, *Sodhi Lal Singh* v. *Firm Lala Behari Lal Lakshari Mal.* (Application for adjudication in time—Amendment to correct misdescription of property allowed beyond time — Amendment takes effect *nunc pro tunc.*)

('01) 5 Cal W N 816 (817) (DB), *Shama Prosad Ghose* v. *Taki Mullik.* (Application for re-hearing of appeal—Amendment of.)

33a. Conversion of proceedings. — Where a proceeding of one character is converted into one of a different character, the date of institution of the latter proceeding is, on the principles stated in Note 33 above, the date on which the former proceeding was instituted. But, the questions as to what is the period of limitation applicable to the proceeding and when it begins to run must be determined with reference to the proceeding *as converted*. Hence, although the proceeding as originally instituted may have been within time at the date of its institution, if at such date the proceeding as converted would have been barred by limitation, the latter must be held to be barred. Thus, suppose a suit is converted into an application for execution under S. 47, Civil Procedure Code. If at the date of the institution of the *suit* the application would have been barred by limitation, the application must be held to be barred although the *suit* may be within time at such date.

Where a Court has a discretion to convert a proceeding of one character into a different kind of proceeding and where the proceeding as converted would be barred by limitation on the above principles, the Court will refuse to convert the proceeding.[1]

34. Withdrawal of suit and institution of fresh suit.— Where a suit is withdrawn with the permission of the Court to bring a fresh suit, it is clear that the period of limitation with reference to the latter suit must be calculated with regard to the date on which such suit is instituted, and the date on which the previous suit was instituted is immaterial for this purpose. This rule is specifically embodied in O. 23 R. 2, Civil Procedure Code.[1] See also Note 9.

35. Rejection of plaint. — Order 7 Rule 11, Civil Procedure Code, requires that a plaint should be rejected if from the allegations in the plaint the suit appears to be barred by any law. Hence, where from the statements in the plaint the suit appears to have been instituted after the prescribed period of limitation, it is the duty of the Court to *reject* the plaint.[1] But, under this section, the duty of the Court is to *dismiss* the suit if it has been instituted after the period of limitation. Combining the two provisions, the result would be that

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Note 33a

[1] ('17) 4 AIR 1917 Mad 453 (453) : 34 Ind Cas 774 (775) (D B), *Gopisetti Narayanaswamy Naidu* v. *Kunaparaju Chena Venkata Raju.*

Note 34

[1] ('25) 12 AIR 1925 Cal 845 (851) : 88 Ind Cas 637 : 52 Cal 894 (FB), *Becharam Choudhury* v. *Purna Chandra Chatterji.* (Suit withdrawn is one as if never brought.)

See also Authors' Commentary on the Civil Procedure Code, 3rd Edn., Order 23, Rules 1 and 2.

Note 35

[1] ('32) 19 AIR 1932 Cal 146 (146) : 135 Ind Cas 873 : 59 Cal 150 (DB), *Secretary of State* v. *Golabrai Paliram.*

(1863) 2 Mad H C R 51 (53) (D B), *Chetti Gaundan* v. *Sundaram Pillai.* (Court can reject it even though it is registered.)

('69) 6 Bom H C R 125 (127) (DB), *Pandurang Govind* v. *Balakrishna Hari.*

('28) 15 AIR 1928 Oudh 495 (498) : 114 Ind Cas 510 (DB), *Maqsood Ali* v. *Deputy Commissioner, Bara Banki.* (Suit not barred on face of it — Plaint cannot be rejected but suit must be dismissed.)

where the conclusion of the Court that the suit has been instituted after the period of limitation is based on the allegations in the plaint itself, the proper procedure is to *reject* the plaint and that where such conclusion is based on other matters, the Court should *dismiss* the suit.

36. Summary rejection of appeal. — An appeal cannot be rejected summarily without fixing a day for the appearance of the appellant and hearing him (see O. 41 R. 11, C.P.C.) even though it may be barred by limitation.[1]

37. Effect of non-compliance with section. — The effect of the section is not to deprive a Court of its *jurisdiction* to try a suit or other proceeding which has been instituted after the prescribed period of limitation. Hence, the decision of a Court decreeing or allowing a suit or other proceeding which is barred by limitation is not vitiated by want of jurisdiction.[1]

See also Notes 1 and 43.

38. Onus of proof. — It is a general principle that the *onus* of proving that a suit has been instituted within the period of limitation is on the plaintiff.[1] Thus, where a suit is *prima facie* barred by

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Note 36

1. ('25) 12 AIR 1925 Oudh 643 (643, 644):90 Ind Cas 115, *Sripat* v. *Hubdar.*
('09) 2 I. C. 359 (360) : 5 Low Bur Rul 15, *Abdulla Kaka* v. *Palaneappa Chetty.*
[But see ('35) 22 AIR 1935 Nag 109 (110) : 155 Ind Cas 588, *Balwant Rao* v. *Balmukund.* (Notice to appellant not necessary.)]

Note 37

1. ('32) 19 AIR 1932 All 273 (281): 54 All 573 : 138 I.C. 583 (FB), *Gobardhandas* v. *Dau Dayal.* (Limitation is question of procedure and not of jurisdiction.)
('04) 26 All 522 (527) : 1 All L Jour 217 : 1904 All W N 110 (DB), *Nathu Ram* v. *Kalian Das.* (Such decree is perfectly good decree until reversed in some manner provided by law.)
('03) 2 Low Bur Rul 237 (238), *Kyin Bwa* v. *Maung Lon.* (Do.)
('20) 7 AIR 1920 Bom 264 (264) : 44 Bom 227 : 55 Ind Cas 329 (DB) *Dasiappa Khaliappa Desai* v. *Dundappa Malkappa.* (Execution application.)
('82) 8 Cal 51 (60) : 8 Ind App 123 : 4 Sar 248 (P C), *Mungul Pershad* v. *Grija Kant.* (Do.)
('27) 14 AIR 1927 Pat 261 (262) : 101 Ind Cas 694 (DB), *Lachuman Pandey* v. *Dukhi Sahu.* (Do.)
('85) 11 Cal 287 (292) (DB), *Mohamed Hossain* v. *Purandar Mahto.* (Do.)
('78) 1878 Pun Re No. 59, *Mehtab Rai* v. *Nanakchand.*
('98) 25 Cal 789 (794) (DB), *Gunessar Singh* v. *Gonesh Dass.* (Case under Bengal Act, VII of 1880.)
('18) 5 AIR 1918 Pat 492 (493) : 46 Ind Cas 569, *Bhaiga Parida* v. *Gannath Khandai.* (Suit will not lie to set aside a decree absolute for sale merely upon the ground that application for such decree was barred by limitation.)
[But see ('12) 14 I. C. 711 (712) (Oudh) (DB), *Debi Bakhsh Singh* v. *Habib Saha.*
('14) 1 AIR 1914 Cal 46 (47, 48) : 20 Ind Cas 760, *Radhe Shyam Kar* v. *Dinabandhu Biswal.*
('66) 6 Suth W R Misc. 50 (51), *Mahomed Mudsur* v. *Ram Lal Roy.* (Decision under Limitation Act of 1859.)]

Note 38

1. ('40) 27 AIR 1940 Mad 639 (640), *Sankara Menon* v. *Kuttani.* (There is no presumption that a mortgage was executed on a particular day of the month in which it is proved to have been executed — Plaintiff suing for redemption must give positive proof of the execution of the mortgage on a day within limitation — Mere probability of its having been so executed is not enough.)
('29) 16 AIR 1929 All 209 (209) : 115 Ind Cas 451, *Mihi Lal* v. *Soni Ram.*

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limitation, the *onus* of proving the circumstances which save the suit from such bar is on the plaintiff.[2] These principles are the basis of the rules in the Civil Procedure Code which require the plaintiff to state in his plaint the date of the cause of action and, where from the allegations in the plaint the suit appears to be barred by limitation, the ground on which he claims exemption from limitation. But where the defendant *admits*, by his pleadings or otherwise, the allegations of the plaintiff, the latter need not *prove* them. The admission of the defendant may be express or implied. Thus, in the absence of a specific denial in the written statement of an allegation made in the plaint, the defendant may be held to have admitted the truth of the allegation

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('99) 22 Mad 250n : 8 Mad L Jour 201 (DB), *Paramasiva Goundan* v. *Kandappa Goundan.*
('23) 10 AIR 1923 Bom 155 (163) : 67 Ind Cas 761 (DB), *Bank of Bombay* v. *Fazulbhoy Ebrahim.*
('34) 21 AIR 1934 All 11 (12) : 154 Ind Cas 415 (DB), *Mt. Lugdi* v. *Har Prasad.*
('19) 6 AIR 1919 Lah 109 (109) : 50 Ind Cas 735, *Mewa Singh* v. *Narain Singh.*
('30) 17 AIR 1930 Mad 742 (744) : 123 I. C. 197, *Subbarayulu* v. *Vengama.*
('69) 12 Moo Ind App 289 (337) : 12 Suth W R 6 : 2 Beng L R 111 : 2 Suther 225 : 2 Sar 430 (PC), *Rajah Saheb Perhlad Sein* v. *Run Bahadoor Singh.*
('68) 9 Suth W R 131 (132) (DB), *Nobokishore Dey* v. *Ramkishen Mohurir.*
('76) 1876 Bom P J 279 (DB), *Bhikaji* v. *Chimaji.*
('17) 4 AIR 1917 Mad 930 (935) : 33 Ind Cas 969 (DB), *Ramanathan Chetty* v. *Murugappa Chetty.* (Per Seshagiri Aiyar, J.)
('27) 14 AIR 1927 Lah 373 (374) : 103 Ind Cas 742 (DB), *Muni Lal* v. *Kishore Chand Kanshi Ram.*
('12) 13 Ind Cas 661 (662) (Lah), *Ganda Singh* v. *Nathu Ram.*
('26) 13 AIR 1926 PC 9 (12) : 5 Pat 312 : 53 Ind App 24 : 93 Ind Cas 280 (PC), *Lal Chand Marwari* v. *Ramrup Gir.*
('86) 11 Bom 216 (219) : 1886 Bom P J 325 (DB), *Ramchandra Narayan* v. *Narayan Mahadev.* (Case under Art. 127.)
('80) 5 Cal 36 (37) (DB), *Mahomed Ibrahim* v. *Morrison.*
('69) 6 Bom H C R (A C) 125 (128), *Pandurang Govind* v. *Balkishna Hari.*

[2] ('26) 13 AIR 1926 P C 9 (12) : 53 Ind App 24 : 93 Ind Cas 280 : 5 Pat 312 (PC), *Lalchand Marwari* v. *Ramrup Gir.*
('27) 14 AIR 1927 Rang 255 (256) : 104 Ind Cas 368 (DB), *N. K. Ahmedsa Rowther* v. *Mg. San Nyien.*
('13) 20 I. C. 538 (539) (Oudh), *Kashi Ram* v. *Mt. Pragi.* (17 Bom 341 distinguished.)
('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra* v. *Anukul Biswas.*
('22) 9 AIR 1922 All 37 (41) : 66 Ind Cas 171 : 44 All 360 (DB), *Collector of Jaunpur* v. *Jamna Prasad.*
('26) 13 AIR 1926 All 329 (329, 330) : 93 Ind Cas 295, *Bandhu Singh* v. *Kayastha Trading and Banking Corporation, Gorakhpur.*
('28) 15 AIR 1928 Lah 763 (764) : 109 Ind Cas 331, *Jagadish Ram* v. *Mukandlal.*
('11) 12 Ind Cas 453 (454, 455) : 1912 Pun Re No. 6 (DB), *Mansa Ram* v. *Behari.* (Plaintiff must on his own allegations prove that suit is within time—He cannot for this purpose adopt any of defendant's allegations.)
('22) 9 AIR 1922 Cal 157 (158) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose.*
('84) 4 C P L R 57 (58), *Anant Ram Rajput* v. *Takat Singh.*
('23) 10 AIR 1923 Oudh 254 (264) : 74 Ind Cas 517 (DB), *Mirza Yaqub* v. *Mirza Rasul Beg.*
('69) 12 Moo Ind App 292 (337) : 12 Suth W R 6 : 2 Beng L R 111 : 2 Suther 225 : 2 Sar 430 (PC), *Rajah Sahib Prahalad* v. *Maharajah Rajendra Kishore Singh.*
('13) 18 Ind Cas 391 (392) (Cal) (DB), *Panchu Mandal* v. *Sheikh Isaf.*
[But see ('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 : 3 Mad L Jour 193 (Jour) (PC), *Rahimbhoy* v. *Charles Agnew Turner.* (The fraud was of such nature that party injured was necessarily kept in ignorance of it and there was clear finding that he took action within time as soon as he came to know of fraud.)]
See also Section 18 Note 7 and Article 91 Note 19.

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in the plaint.[3] Further, where the plaintiff has given *prima facie* proof in support of his allegations, the *onus* will shift to the defendant and it will be for him to demolish the case made out by the plaintiff.[4]

It has been held that where time does not begin to run unless and until the plaintiff has knowledge or notice of certain facts (*e. g.*, Arts. 32, 48, 48A, 48B, 90 to 92, 94 to 96, 113, 114, 118, 127, 134 and 134A), the *onus* of proving knowledge of facts at a date earlier than that admitted by the plaintiff lies on the defendant.[5]

39. Plea of limitation, if technical.—The word "technical" means, according to the dictionary, "*specially* appropriate to any art, science or business or the like."[1] Hence, a technical plea may be understood to be a plea which is *purely* based on a *positive* provision of law as contradistinguished from *natural justice.*[2] Thus, if a plea though founded on *positive law* is also consistent with *natural justice,* it will not be a technical plea.[3] The question whether a plea of limitation is a technical plea therefore depends on the circumstances of each case. If the effect of the plea in the particular case is to *frustrate* natural justice, it is a technical plea, whereas if its effect is to *promote* natural justice, it cannot be regarded as a technical plea although in both cases the plea is only based on positive law.

The question whether a plea of limitation is a technical one will be material with reference to matters which are within the discretion of the Court. Thus, where a defendant has no merits on his side and succeeds purely on a technical plea of limitation, the Court will take this fact into consideration while passing orders as to the costs of the suit.[4] Similarly, where an application for the amendment of a plaint is opposed on the ground that the defendant would thereby be deprived

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3. ('16) 3 AIR 1916 Bom 103 (103, 104) : 38 Ind Cas 14 : 41 Bom 89 (DB), *Laxminarayan Ram Dayal* v. *Chimni Ram Girdhari Lal.*
('16) 3 AIR 1916 Pat 39 (41) : 38 I. C. 85 (DB), *Baluk Chand* v. *Nathuni* (Pleading of limitation is not denial *per se* of alleged payment or acknowledgment.)
('23) 10 AIR 1923 Cal 578 (578) : 76 Ind Cas 603 (DB), *Sarifun Mandalin* v. *Feradoul Khatun.*
[*See also* ('96) 19 Mad 391 (393), *Chinnatambi Gounden* v. *Chinnana Gounden.*]

4. ('85) 7 All 677 (680, 681) : 1885 All W N 202 (DB), *Radha Prasad Singh* v. *Bhajan Rai.*
('29) 16 AIR 1929 All 908 (910) : 120 Ind Cas 552 (DB), *Ramadhar* v. *Raj Narain.* (Per Bennet, J.)
('17) 4 AIR 1917 Pat 443 (445) : 41 Ind Cas 385 (DB), *Ram Pratap Lal* v. *Kesho Prasad Singh.*
[*See* ('14) 1 AIR 1914 All 512 (513): 25 Ind Cas 353 (DB), *Frank Hay* v. *Rafiuddin.*]

5. ('06) 2 Nag L R 98 (100), *Mt. Tanto* v. *Gajadhar.*

Note 39

1. Webster's Dictionary, 1914.

2. For the distinction between 'positive law' and 'natural justice,' see Salmond's Jurisprudence, 8th Edition, page 26.

3. *See* ('21) 8 AIR 1921 P C 50 (51) : 57 Ind Cas 606 : 48 Cal 110 : 47 Ind App 255 (PC), *Charan Das* v. *Amir Khan.* (Where right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not quite accurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support.)

4. ('96) 20 Bom 109 (116), *Kankuchand Shivchand* v. *Rustomji Hormusji.*

of a defence of limitation which would otherwise be open to him, the Court would generally allow the amendment if it considers that the plea raised by the defendant tends to defeat natural justice and therefore is a technical one.[5]

But, the provisions of the Act must be given effect to, although in the particular case the effect may be inconsistent with natural justice.[6]

40. Delay in filing suit.— In the absence of acquiescence on the part of the plaintiff, mere delay by him in the institution of proceedings where the prescribed period of limitation has not actually expired will not defeat his rights except in cases in which it is within the *discretion* of the Court to grant him the relief asked for.[1] But, at the same time, undue delay on the part of the plaintiff in bringing his suit will be a circumstance that the Court will take into consideration in judging the truth of the allegations put forward by him.[2]

41. Concurrent remedies, limitation for. — Where the law allows two or more remedies to obtain the same relief, each such remedy will be governed by its own period of limitation. Thus, where an *ex parte* decree is passed against a person, the following remedies are open to him :

1. An application under O. 9 R. 13, Civil Procedure Code.
2. An appeal under S. 96, Civil Procedure Code.
3. An application for review.
4. A suit to set aside the decree (in case the decree has been obtained by fraud).

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[5] ('21) 8 AIR 1921 P C 50 (51) : 48 Cal 110 : 47 Ind App 255 : 57 Ind Cas 606 (PC), *Charan Das* v. *Amir Khan*.
See also Note 33.

[6] ('29) 16 AIR 1929 Cal 641 (641) : 56 Cal 575: 120 Ind Cas 714, *Tea Financing Syndicate Ltd.* v. *Chandra Kamal*. (The Judge has not to determine whether the defence is handsome or conscientious but whether it is good in law.)
('24) 11 AIR 1924 Sind 47 (48) : 76 Ind Cas 119 : 17 Sind L R 263 (DB), *Messrs. Manghumal Jethanand* v. *Messrs. Aratmal Satramdas*.

Note 40

[1] ('06) 29 Mad 500*n* (DB), *Sankaralingan Chettiar* v. *Stephen Augustus Ralli*, *cited* in 29 Mad 497 at p. 500. (Suit for mandatory injunction to pull down building constructed by defendant at the cost of lakh of rupees — Plaintiff having knowledge of construction and waiting till construction was over—No injunction can be granted.)
('75) 24 Suth W R 97 (98), *Ramphul Sahoo* v. *Misree Lall*. (*Held*, Courts in India have no discretion to refuse relief merely because of long delay in bringing forward the claim.)
[*See* ('14) 1 AIR 1914 P C 164 (165) : 24 Ind Cas 311 (PC), *Sm. Manokarani Debi* v. *Haripada Mitter*. (Suit for possession by reversioner—Delay in filing—Delay explained—No prejudice to suit.)]

[2] ('22) 9 AIR 1922 P C 378 (382) (PC), *Dataram Jani* v. *Mt. Basant Kunwar*. (Pro-note repudiated by defendant—Suit filed on last day of limitation—Plaintiff though alleging to be businessman not producing account book—Inference drawn against plaintiff.)
('30) 17 AIR 1930 All 322 (322, 323) : 124 Ind Cas 465 (SB), *Mrs. M. B. Hartley* v. *Jack Fleming Hartley*.
('23) 10 AIR 1923 Lah 669 (670) : 78 Ind Cas 11, *Daljit Singh* v. *Hari Chand*.
('29) 16 AIR 1929 All 561 (565) : 118 Ind Cas 154 (DB), *Brij Raj Saran Singh* v. *Basant Singh*. (Plaintiff's delay prejudicing defendant — Court should draw adverse inference unless good cause is shown.)

Each one of these remedies will be governed by its own period of limitation.[1]

But, where a suit has been dismissed for default, or an *ex parte* decree has been passed, an application for review cannot be granted *merely* on the ground that an application for restoring the suit or for setting aside the *ex parte* decree would be barred by limitation if made at that time.[2]

42. High Court, if can make rules inconsistent with provisions of the Act.—See the Authors' Commentary on the Civil Procedure Code, 3rd Edition, S. 122 Note 3.

43. Revision, if lies on question of limitation.

Revision under S. 115 of the Civil Procedure Code:

The power of the High Court to revise the proceedings of the lower Court under the above section arises in the following three cases —

(a) Where the lower Court has exercised a jurisdiction not vested in it by law;

(b) Where the lower Court has failed to exercise a jurisdiction vested in it by law:

(c) Where the lower Court has acted with illegality or material irregularity in the exercise of its jurisdiction.

As seen in Note 37, this section does not affect any question of jurisdiction and hence the failure to dismiss a proceeding although time-barred does not amount to the exercise of a jurisdiction not vested in the Court by law within the first clause of S. 115.[1] Similarly, the erroneous dismissal of a proceeding as barred by limitation, although it is not so barred, does not amount to a failure to exercise a jurisdiction which is vested in the Court by law so as to attract the provisions of the second clause of S. 115.[2] The act of the Court in erroneously dismissing

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Note 41

[1] ('20) 7 AIR 1920 Mad 633 (634) : 55 Ind Cas 444 (DB), *Chokkalingam* v. *Lakshmanan.*
('29) 16 AIR 1929 Sind 38 (39) : 115 Ind Cas 314 (DB), *Khasomal* v. *Bacho.* (26 Cal 598 relied on.)
See also Authors' Commentary on the Civil Procedure Code, 3rd Edn. S. 96 Note 12, O. 9 R. 13 Note 9 and O. 47 R. 1 Note 24.

[2] ('33) 20 AIR 1933 Pat 557 (558) : 147 Ind Cas 179, *Decruze* v. *Pitts.*
[*See also* ('25) 12 AIR 1925 Lah 517 (518): 86 I. C. 616, *Abdul Razak* v. *Muhammad Sharif.* (Application for restoration of suit under O. 9 R. 9, C. P. C., dismissed as time-barred—Subsequent application for review cannot be entertained.)]

Note 43

[1] ('27) 14 AIR 1927 All 358 (359) : 100 Ind Cas 638 : 49 All 454, *Baburam* v. *Munna Lal.*
('78) 1878 Pun Re No. 59, *Mehtab Rai* v. *Nanak Chand.*
The following decisions to the contrary are not correct:
('96) 1 Cal W N 67 (70) (DB), *Kailash Chandra Halder* v. *Bissonath Parmanic.*
('12) 14 Ind Cas 711 (712) (Oudh) (DB), *Debi Baksh Singh* v. *Habib Shah.*
('26) 13 AIR 1926 Lah 344 (345) : 94 Ind Cas 117, *Wiru Ram* v. *Amar Chand.*
('26) 13 AIR 1926 Lah 379 (381) : 7 Lah 161 : 95 Ind Cas 124, *Piroj Shah* v. *Qarib Shah.*
('18) 5 AIR 1918 Low Bur 140 (142) : 9 Low Bur Rul 71 : 39 Ind Cas 154, *Kaliyaparama Padayachi* v. *V. C. U. A. R. Chetty Firm.*

[2] ('38) 25 AIR 1938 Bom 209 (210) : 175 Ind Cas 221, *Veerappa* v. *Iratappa.*

such a proceeding is an *exercise* of jurisdiction and not a *failure to exercise* jurisdiction. As regards the third clause of S. 115, it only applies to the *manner* of the exercise of jurisdiction and not to an erroneous decision on any question. Hence, erroneous decision even on a question of law in connexion with limitation will not, by itself, make revision competent.[3] But, where the decision of the Court on the point of

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('87) 11 Bom 488 (492) (DB), *Amritarav Krishna Deshpande* v. *Balakrishna Ganesh Amrapurkar.* (Question was about *res judicata.*)
('69) 12 Suth W R 129 (130) (DB), *Kalee Prasad Choudhury* v. *Ram Soondur Sircar.* [*See* ('13) 18 Ind Cas 391 (392) (Cal), *Panchu Mandal* v. *Sheikh Isaf.*]
The following decisions to the contrary are not correct :
('16) 3 AIR 1916 Mad 927 (927) : 31 Ind Cas 536, *Ratnam* v. *Ramasamy Chetty.*
('23) 10 AIR 1923 Mad 435 (436) : 46 Mad 938 : 70 Ind Cas 888 (DB), *The British India Steam Navigation Co.* v. *H. M. Sharafally.*

3. ('24) 11 AIR 1924 Cal 493 (493, 494) : 80 Ind Cas 205, *East Indian Railway Co.* v. *Kanai Lal.* (Section 115, C. P. C., is not directed against conclusions of law or fact in which question of jurisdiction is not involved.)
('20) 7 AIR 1920 All 181 (181, 182) : 55 Ind Cas 871, *Hashmat Ali* v. *Mohan.*
('26) 13 AIR 1926 Lah 355 (355, 356) : 93 Ind Cas 855, *Hardwari Mal* v. *Chironji Lal.*
('24) 11 AIR 1924 Lah 666 (667) : 76 Ind Cas 14, *Surjit Singh* v. *Lieut. Capt. C. J. Torrie,* (Mere error of law is not necessarily an illegality.)
('15) 2 AIR 1915 All 54 (55) : 28 Ind Cas 270 (DB), *Mahabir Sahu* v. *Bhirgurai.*
('30) 17 AIR 1930 Lah 112 (113) : 123 I. C. 571, *Nur Ahmad* v. *Hamid Khan.*
('29) 16 AIR 1929 Lah 26 (27) : 116 Ind Cas 221, *Beli Ram* v. *Padam Sain.*
('15) 2 AIR 1915 Mad 907 (907): 30 Ind Cas 264, *Thomas Pillai* v. *Muthuraman.*
('17) 4 AIR 1917 Mad 76 (76) : 32 Ind Cas 3 (DB), *Kuppuswamy Iyenyar* v. *Narayana Iyengar.* (Erroneous decision on point of limitation by Presidency Small Cause Court—High Court will not interfere in revision when no question of jurisdiction is involved.)
('17) 4 AIR 1917 Cal 572 (572) : 32 Ind Cas 982 (DB), *Rampat Mahato* v. *Ram Ghulam Singh.* (Proceeding under S. 105, Bengal Tenancy Act, 1885.)
('16) 3 AIR 1916 Cal 907 (908) : 33 Ind Cas 346 (DB), *Mohini Chunder Pal Choudhry* v. *Mirza Ahmed Ali Khan.* (But revision lies if decision is without considering point of limitation.)
('28) 15 AIR 1928 Cal 189 (190): 107 I. C. 733, *Satish Chandra* v. *Rakhal Chandra.*
('28) 15 AIR 1928 Cal 202 (204) : 106 Ind Cas 561 (DB), *Tamirannessa Bibi* v. *Mt. Kachhiman Bewa.*
('36) 23 AIR 1936 Nag 157 (159) : I L R (1936) Nag 73 : 164 Ind Cas 848, *Devidas* v. *Nilakanth Rao.* (Test for applicability of cl. (c) of S. 115, C. P. C., laid down.)
('34) 21 AIR 1934 Pesh 103 (105) : 153 I. C. 398, *Quadir Bakhsh* v. *Ujagar Singh.*
('30) 17 AIR 1930 Nag 88 (88) : 120 Ind Cas 414, *Mt. Rahmatbi* v. *Badridas.*
('27) 14 AIR 1927 Oudh 615 (615) : 107 Ind Cas 191, *Sheopal* v. *Chitoria.*
('27) 14 AIR 1927 Nag 389 (389) : 103 Ind Cas 113, *Madhorao* v. *Govind Raghoba.*
('24) 11 AIR 1924 Pat 37 (38) : 75 Ind Cas 430 : 2 Pat 800 (DB), *Mt. Bibi Zainabi* v. *Paras Nath.*
('25) 12 AIR 1925 Oudh 373 (373) : 86 Ind Cas 918, *Bankey Lal* v. *Ram Lal.*
('25) 12 AIR 1925 Oudh 148 (148) : 80 Ind Cas 617, *Bharat* v. *Basant.*
('85) 1885 All W N 32 (32) (FB), *Ali Mazhar* v. *Sheo Bakhsh.*
('32) 19 AIR 1932 All 543 (544) : 54 All 525 : 138 Ind Cas 396 (DB), *Bhajja* v. *Muhammad Said Khan.*
('08) 4 Nag L R 184 (185), *Duri* v. *Mohanlal.*
('97) 20 All 78 (79) : 1897 All W N 168 (DB), *Sunder Singh* v. *Doru Shankar.*
('12) 15 Ind Cas 679 (681) (Cal) (DB), *Benode Behari Bhadra* v. *Ram Sarup Chamar.* (7 All 345, dissented from.)
('12) 14 Ind Cas 52 (53) (All) (DB), *Bisesar Dayal* v. *Har Govind.*
('10) 6 Ind Cas 745 (746) (Mad), *Karnam Sama Rao* v. *Roddam Vencoba Rao.*
('12) 15 Ind Cas 547 (548) : 39 Cal 473, *Ramagopal* v. *Joharmall Khemka.*
('80) 5 Cal 807 (810, 811) : 6 Cal L R 223 (DB), *Ram Sahai Singh* v. *Maniram.* [*See also* ('11) 11 Ind Cas 60 (61) (Lah), *Jalu* v. *Samand.* (Revision under S. 70 (1) (a), Punjab Courts Act, XVIII of 1884.)
('11) 10 Ind Cas 293 (294) (Lah), *Hukum Singh* v. *Sham Singh.* (Court of revision can review finding upon a question of limitation.)]

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limitation is affected with any irregularity or illegality as to the *manner* in which such decision has been arrived at, revision will be competent.[4] Similarly, the failure to decide a material issue will amount to an irregularity in the manner of the exercise of jurisdiction and may be a ground for revision.[5] Hence, the refusal or failure of the Court to decide a material question of limitation which arises in the case may be a ground for interference in revision.[6]

[**But see** ('35) 22 AIR 1935 Pesh 186 (189) : 160 Ind Cas 457, *Mt. Zainab Bibi* v. *Bihari Lal.* (Article 181 applicable — Court erroneously applying Art. 163 — *Held*, that this constitutes material irregularity.)]

[4] ('29) 16 AIR 1929 All 593 (595):119 Ind Cas 103:51 All 910 (DB), *Dipchand* v. *Sheo Prasad.*

('87) 12 Bom 617 (620): 13 Ind Jur 217 (DB), *Venkubai* v. *Lakshman Venkoba.*

('15) 2 AIR 1915 All 161 (162) : 28 Ind Cas 969, *Shankar Singh* v. *Mt. Rekha.* (Case under S. 25, Provincial Small Cause Courts Act, IX of 1887.)

[*See* ('34) 21 AIR 1934 Pat 50 (52): 155 Ind Cas 957, *Akhauri Herambo Narain Sinha* v. *Jamuna Sonar.*]

[5] See Authors' Commentary on the Civil Procedure Code (3rd Edition), S. 115 Note 12.

[6] ('38) 25 AIR 1938 Bom 209 (210) : 175 Ind Cas 221, *Veerappa Channappa* v. *Iratappa.* (Judge ignoring provisions of S. 4, Limitation Act, and dismissing suit.)

('38) 25 AIR 1938 Rang 87 (87): 176 Ind Cas 134 (DB), *Chattal Trading Co. Ltd.* v. *Babu Mahim Chandra.*

('19) 6 AIR 1919 Lah 422 (422) : 50 Ind Cas 610, *Asa Nand* v. *Jhangi Ram.*

('23) 10 AIR 1923 Mad 503 (504) : 72 Ind Cas 137, *Gopalasamy Iyer* v. *Ramachandra Iyer.* (Lower Court excusing delay without evidence.)

('27) 14 AIR 1927 Mad 436 (437) : 100 Ind Cas 634, *Sanjivappa* v. *Venkatanaranappa.* (Lower Court not referring to proper Article as amended.)

('26) 13 AIR 1926 Cal 444 (445) : 87 Ind Cas 173 (DB), *Hem Kanta* v. *Manoj Prova Singh.* (Order setting aside abatement without considering limitation for such application.)

('15) 2 AIR 1915 All 240 (241) : 29 Ind Cas 975 (DB), *Janki Prasad* v. *Parameshwar Din Pandey.* (Court granting time-barred application for setting aside *ex parte* decree on ground that defendant being in jail had not fair chance of defending suit.)

('25) 12 AIR 1925 Rang 381 (382) : 92 I. C. 775, *Ma Shwe U* v. *Ma Shin.* (Lower Court overlooking S. 6 (1), Limitation Act, and dismissing application to sue in *forma pauperis.*)

('33) 20 AIR 1933 Pat 132 (134):144 Ind Cas 147, *Kakraul Co-operative Society* v. *Durganand Jha.* (Lower Court allowing time-barred application under inherent power.)

('13) 18 Ind Cas 392 (392) (Cal) (DB), *Jagabandhu Biswas* v. *Srinath Chaterjee.*

('29) 16 AIR 1929 Rang 304 (306) : 124 Ind Cas 260, *Maung San* v. *Ma Shin.*

('24) 11 AIR 1924 Pat 36 (36) : 82 Ind Cas 1028 (DB), *Mode Narain Singh* v. *Bikram Singh.*

('13) 18 Ind Cas 391 (392) (Cal) (DB), *Panchu Mandal* v. *Isaf.*

('13) 19 Ind Cas 425 (426) : 9 Nag L R 35, *Habibullah* v. *Karanjee.* (Lower Court instead of inquiring into question of limitation holding that it had no jurisdiction to go into the question.)

[*See* ('18) 5 AIR 1918 Mad 1173 (1173) : 42 Ind Cas 536, *British India Steam Navigation Co.* v. *Hussain Kasim Shet.* (Appellate Court cannot be said to have acted with material irregularity in not adjudicating on plea of limitation which had not been raised before it.)]

[*See also* ('85) 7 All 345 (347): 1885 All W N 73 (DB), *Har Prasad* v. *Jafar Ali.* (Lower Court admitting time-barred application in contravention of law of limitation.)]

[**But see** ('17) 4 AIR 1917 Mad 667 (667) : 32 Ind Cas 785, *Duraisamy Udayan* v. *Kadirsa Rowthen.* (Mere fact that the judgment of an Appellate Court does not deal with a point of limitation arising in the case does not amount to a material irregularity.)

('27) 14 AIR 1927 Mad 660 (661) : 101 Ind Cas 514, *Mangamma* v. *Pedda Ammanna.* (Where application to set aside award was dismissed as barred by limitation without considering provisions of S. 12, Limitation Act, *held*, there was no question of jurisdiction and revision was not competent.)]

Even where otherwise revision is competent, the High Court will refuse to interfere except where it is necessary in the interests of justice to do so.[7]

Revision under S. 25, Provincial Small Cause Courts Act, 1887:

The powers of the High Court under the above section are not confined to the three classes of cases specified in S. 115, Civil Procedure Code, and hence, even a mere error in the decision on a question of limitation may be a ground for revising the decision of a Provincial Small Cause Court, provided that such decision has caused substantial injustice to any of the parties.[8]

44. Review, if lies on question of limitation. — A review lies in regard to a question of limitation under the conditions specified in O. 47 R. 1, Civil Procedure Code. Thus, where the bar of limitation is clear on the facts found by the Court, and the Court has failed to notice such bar, the decision is vitiated by an error apparent on the face of the record and can be set aside in review.[1] But the mere fact

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7. ('25) 12 AIR 1925 All 164 (165): 82 I. C. 1011, *Mohammad Naqi* v. *Hargu Lal.*
('11) 11 Ind Cas 445 (446) (Lah), *Ghasita* v. *Sultan.* (Revision under S. 25 of Act IX of 1887.)

8. ('15) 2 AIR 1915 All 449 (450) : 27 Ind Cas 637, *Singar Manufacturing Co.* v. *Mrs. E. Felyun.*
('35) 22 AIR 1935 Lah 137 (138), *Charan Das* v. *Ram Rattan.* (No substantial injustice—High Court refused to interfere.)
('12) 17 Ind Cas 470 (471) : 15 Oudh Cas 319, *Rajah Raghuraj* v. *Sahib Din.* (Do.)
('11) 11 Ind Cas 445 (446) (Lah), *Ghasita* v. *Sultan.* (Do.)
('25) 12 AIR 1925 Oudh 34 (34) : 79 I. C. 848 (DB), *Mt. Mohanya* v. *Panna Lal.*
('13) 19 Ind Cas 782 (782) (All), *Sheoram* v. *Badri Das Behari Lal.*
('13) 20 Ind Cas 175 (176) (All) (DB), *Sheo Pershad* v. *Sheo Pershad.*
('26) 95 Ind Cas 4 (5) (Lah), *Thakar Das* v. *Bhola Shah Duni Chand.*
('36) 161 Ind Cas 423 (423, 424) (Oudh), *Lal Jagendra Bakhsh Singh* v. *Mr. Andrews A. Ferns.* (Powers under S. 25 of Act IX of 1887 are discretionary to be exercised only when substantial injustice is done.)
('03) 1903 Pun L R No. 138 (p. 589) : 1904 Pun Re No. 66 (DB), *Sayad Mir Shah* v. *Atar Singh.*
('18) 5 AIR 1918 Oudh 329 (330, 331) : 21 Oudh Cas 139 : 46 Ind Cas 804, *Madho Singh* v. *Badil Singh.* (Powers of High Court under S. 25 of Act IX of 1887 are not to be measured by language of S. 115, C. P. C.)
('09) 3 Ind Cas 817 (818) (All), *Jamna Das* v. *Bishnath Singh.*
('36) 23 AIR 1936 Oudh 247 (248) : 161 Ind Cas 389 (DB), *C. P. Clarke* v. *Aga Aziz Khan.* (No substantial injustice—High Court refused to interfere.)
('28) 15 AIR 1928 Lah 274 (275) : 115 Ind Cas 757, *Mohamed Shafi* v. *Delhi House of Multan.* (Powers of revision under S. 25 of Act IX of 1887 are wider than those under S. 115, C. P. C.)
('27) 14 AIR 1927 Lah 396 (397) : 100 Ind Cas 922, *Dil Mohamed* v. *Sain Das.* (Wrong decision on point of limitation—Substantial justice done—No revision.)
('35) 22 AIR 1935 All 716 (717) : 154 I. C. 713, *Gajadhar Prasad* v. *Dharma Nand.*
('15) 2 AIR 1915 Lah 209 (210) : 30 Ind Cas 429, *Sher Khan* v. *Gokal Chand.*
('28) 15 AIR 1928 Lah 51 (52) : 100 Ind Cas 874, *Karam Chand Sant Ram* v. *Daya Nand Damodar Das.* (Wrong decision on point of limitation not *per se* ground for revision.)
[*See also* ('10) 9 Ind Cas 467 (468) (Low Bur), *Maung Ba Kyaw* v. *Me Saw.* (No revision against interlocutory orders.)]

Note 44

1. ('28) 15 AIR 1928 Lah 919 (919, 920) : 10 Lah 184 : 112 Ind Cas 540 (DB), *Debi Sahai Gulzarimal* v. *Basheshar Lal Bansi Dhar.*
('29) 16 AIR 1929 Nag 185 (190) : 116 Ind Cas 427 (DB), *Kawdu* v. *Berar Ginning Co. Ltd., Akot.* ("Aggrieved person" need not be a party to original proceedings.)

that the judgment does not state that certain aspects of the question of limitation were considered is not a sufficient ground for review.[2]

Where Court is closed when period expires.

4.* Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

Synopsis

1. History of the section.
2. Principle of the section.
3. Applicability to act for which limitation is prescribed by S. 48 or by O. 45, R. 7 of the Civil Procedure Code.
4. Applicability to payments under O. 21, Rule 89 of the Civil Procedure Code.
5. Applicability to acts directed to be done by decree or order of Court.
6. Applicability to payments to be made under private agreement between parties.

6a. Section, if affects court-fee payable on application for review under Articles 4 and 5 of the Court-fees Act.

6b. Applicability to proceedings under special or local laws.

7. Expiry of period 'prescribed.'
8. Acknowledgment or payment of interest during vacation.

8a. Assignment of interest during vacation.

9. Section 4 and Sections 6 to 8 of the Act.
10. Section 4 and S. 12 of the Act.
11. Section 4 and S. 31 (repealed) of the Act.
12. "When the Court is closed."
13. "Court" means the "proper Court."
14. "Suit, appeal or application may be instituted, preferred or made."
15. "Day that the Court re-opens."
16. Fact of the Court having been closed, whether should be mentioned in the pleading.
17. Adjudication of debtor as insolvent on re-opening day — Effect.

Other Topics (miscellaneous)

Applicability to periods prescribed by special or local laws. See S. 29.

Further holidays after vacation. See Note 12.

Judge holding Court on Gazetted holiday. See Note 12.

No extension of period by S. 4. See Notes 2 and 7.

Office of Court open during holidays. See Note 12.

Section 4 and Section 14 — Distinction. See Notes 2 and 7.

Unauthorized holiday. See Note 12.

1. History of the section. — There was no provision corresponding to this section in the Act of 1859, but there was a provision (corresponding to s. 3 of the present Act) to the effect that no *suit* should be maintained in any Court unless the same was instituted within the prescribed period, any law or regulation to the contrary notwithstanding. In view of that provision it was held that a *suit* instituted on the re-opening day when the period prescribed expired on

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*** Acts of 1877 and 1871.**

First paragraph of Section 5 of the Act of 1877 and Section 5 (a) of the Act of 1871 were the same.

Act of 1859.

Contained no corresponding provision.

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[2] ('29) 16 AIR 1929 Nag 89 (90) : 115 Ind Cas 178, *Trimbak v. Krishna Rao.*

Section 4
Notes 1–2

a day on which the Court was closed was barred by limitation.[1] As regards *appeals* and *applications* and acts directed to be performed by a decree of the Court, to which the said provision did not apply, it was held that the presentation thereof on the re-opening day was a valid presentation.[2]

Section 5 (a) of the Limitation Act of 1871 introduced a provision corresponding to this section, and the same has been re-enacted in the subsequent Acts.[3]

2. Principle of the section. — This section is based on the general principle of law enunciated by the maxims "*Lex non cogit ad impossibilia*"—the law does not compel a man to do that which he cannot possibly perform,[1] and "*Actus curiæ neminem gravabit*"

Section 4 — Note 1

[1] (1861) 2 Mad H C R 268 (269) (DB), K. J. S. *Nayani Varu* v. *U. Venkataraya.*
('71) 16 Suth W R 230 (231) (D B), *Ununto Ram* v. *Protab Chunder.* (A plaint may be received and admitted by a Munsif on Sunday or other holiday on which the time for bringing an action was to expire.)
('73) 1873 Pun Re No. 56, *Bhaggat Singh* v. *Mt. Rupan.* (Before the 1st April 1873 when S. 5 of Act IX of 1871 came into force, the fact that the Courts were closed was held not to extend the period of limitation.)
(1865) 3 Suth W R S C C Ref 5 (6) : Beng L R Sup Vol. 360 (FB), *Rajkisto Roy* v. *Denobundhoo Surmah.*
(1865) 3 Suth W R 209 (210) (DB), *Messrs. Collis & Grant* v. *Tarinee Churn.*
('66) 6 Suth W R 39 (40) (DB), *Holee Ram Das* v. *Mihee Ram Gogooee.*
('73) 20 Suth W R 167 (168) (DB), *Kudomes Suree Dassee* v. *Enamali Mookhtear.*
('69) 11 Suth W R 259 (259) (DB), *Dewan Ali* v. *Munsoor Ali.*
[*See also* ('71) 16 Suth W R (O C) 1(3) : 8 Beng L R 24 (DB), *Tarachand Ghose* v. *Munshi Abdul Ali.* (Quære.)]

[2] ('70) 13 Suth W R 105 (106) : 5 Beng L R App 57*n*(DB), *Girijabhusan Haldar* v. *Akhay Nikari.* (Notice of application for new trial.)
('66) 6 Suth W R Misc 106 (106) (DB), *Gopeenath Roy* v. *Gopinath Chatterjee.*
('67) 8 Suth W R 73 (74, 75) (DB), *Raja Bishen Perkash Narain Singh* v. *Babooa Misser.* (If last day for preferring an appeal falls on an unexpected and unauthorised closed day, the appellant will not be barred by limitation if he can prove that he was prepared to file the appeal on that day, and if he did file it on the first open day thereafter.)
(1865) 1865 Beng L R Sup Vol. 361*n*, *Govind Chunder* v. *Sreenath Mookerjee.*
(1864) 1864 Suth W R (Gap) Misc 40 (40, 41) (DB), *Mosuruf Ali* v. *Janokenath.*
('69) 6 Bom H C R A C 50 (50) (DB), *Ex parte Krishna Padhe.*
('69) 12 Suth W R 21 (24) : 4 Beng L R 32 (FB), *Narayan Mandal* v. *Beni Madhab Sirkar.* (Application for review.)
('69) 12 Suth W R 293 (294), *Luchmun Chunder Gir* v. *Kali Churn Singh.*
('67) 8 Suth W R 223 (224, 225, 226) (DB), *Dabee Rawoot* v. *Heeramun.* (Act directed to be done under a decree.)
[But see ('70) 13 Suth W R 122 (123) : 4 Beng L R A C 131 (DB), *Khodie Lall* v. *Mt. Biswasu Kunwar.* (Application for execution.)
('67) 1 Beng L R O C 39 (40), *Tamvaco* v. *Skinner.* (Time expired during vacation—Petition of appeal presented on the re-opening day—But there was a vacation Judge for the transaction of any business of a pressing nature — *Held* that the petition was too late.)]

[3] ('76) 1 All 263 (265)(DB), *Bishan Chand* v. *Ahmad Khan.* (Period for suit expired during vacation—It was instituted on the re-opening day—*Held* that it was in time.)
('09) 3 Ind Cas 400 (401) (Cal) (DB), *Venkata Ramania* v. *Kherode Mull.* (Application for leave to appeal to Privy Council filed after limitation expiring during vacation.)

Note 2

[1] ('12) 14 Ind Cas 173 (174) (Cal) (DB), *Ahad Baksh Molla* v. *Babar Ali.*
('23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh* v. *Kesheoprasad.*
('12) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balakrishna* v. *Tima.*

Section 4
Note 2

—an act of the Court shall prejudice no man.[2] In *Dharamsi Morarji Chemical Co., Ltd.* v. *Occhavlal Hargovandas Shah*,[3] their Lordships of the Bombay High Court observed as follows:

> "When a party has to do something before a certain day and if upon that day or before that day he cannot do that thing by reason of the act of the Court, then he is entitled to an extension of time over that period during which he is delayed by the Court's action."

And this principle has been followed in numerous cases.[4]

This section is, however, limited in its applicability to the institution, preferring, or making of *suits*, *appeals or applications* where a *period of limitation has been prescribed* therefor. It does not, for instance, apply to *other acts* allowed to be done by law on a certain day or within a prescribed period. Such cases are governed by S. 10 of the General Clauses Act, 1897, which is also based on the same general principle[5] and which runs as follows:

> "Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day afterwards on which the Court or office is open.
>
> Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies."

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[2] ('38) 25 AIR 1938 Nag 454 (455) : I L R (1939) Nag 377 : 178 Ind Cas 479, *Balkisan Seth* v. *Bhanu Prasad*.
('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal* v. *Amar Singh*.
('03) 6 Oudh Cas 68 (71, 72), *Ram Nath* v. *Murlidhar*.

[3] ('27) 14 AIR 1927 Bom 480 (481) : 51 Bom 848 : 103 Ind Cas 540 (DB).

[4] ('31) 18 AIR 1931 Cal 785 (786, 787) : 58 Cal 1148 : 134 I. C. 1132, *Anisuddin Ahmed* v. *Kalipada Ray*.
(1868) L R 3 Q B 173 (176) : 9 B & S 23 : 37 L J Q B 65 : 17 L T 468 : 16 W R 358 (DB), *Waterton* v. *Baker*.
('71) 6 Beng L R 292 (294), *Munshi Abdul Ali* v. *Tarachand Ghose*.
('06) 3 Cal L Jour 339 (342, 343) : 10 Cal W N 535 (DB), *Surendra Narain Mustafi* v. *Souravini Dasi*.
('11) 9 Ind Cas 181 (183) (Cal), *Lachmi Narain Marwari* v. *Sukhraj Rai*.
('12) 14 Ind Cas 173 (174) (Cal) (DB) (L.P.A.), *Ahad Baksh Molla* v. *Babar Ali*.
('25) 12 AIR 1925 Mad 743 (744) : 87 Ind Cas 560, *Sankaran Unni* v. *Raman*.
('27) 14 AIR 1927 Mad 1196 (1196, 1197) : 106 Ind Cas 502 (DB), *Chinna Nadan* v. *Arumugam Chetty*.
('21) 8 AIR 1921 Lah 6 (8, 9) : 67 Ind Cas 772 (FB), *Himmun* v. *Fauja*.
('31) 18 AIR 1931 Lah 386 (387) : 133 Ind Cas 434 (DB), *Fateh Khan* v. *Chhajju*.
('23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh* v. *Kesheoprasad*.
('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal* v. *Amar Singh*.
('11) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balakrishna* v. *Tima*.
('03) 6 Oudh Cas 68 (71, 72), *Ram Nath* v. *Murlidhar*.
('27) 14 AIR 1927 All 608 (608) : 102 I. C. 523, *Ram Sarup* v. *Khaderan Kohar*. (Act required to be done by rule of High Court—Last day a holiday—Act may be done next day.)
('91) 18 Cal 231 (234) (DB), *Shooshee Bhusan* v. *Gobind Chunder Roy*.
('91) 18 Cal 631 (634) (DB), *Peary Mohun* v. *Anunda Charan*.
('98) 21 Mad 385 (387) (DB), *Aravamudu Ayyangar* v. *Samiyappa Nadan*.
('99) 22 Mad 179 (182) : 8 M L J 265 (DB), *Sambasiva Chari* v. *Ramasami Reddi*.
('24) 11 AIR 1924 All 218 (219, 220) : 46 All 328 : 78 Ind Cas 1014 (FB), *Muhammad Jan* v. *Shiam Lal*.
('80) 5 Cal 314 (317), *Golap Chand* v. *Krishto Chunder*.

[5] ('06) 3 Cal L Jour 339 (342, 343) : 10 Cal W N 535 (DB), *Surendra Narain Mustafi* v. *Souravini Dasi*.
('10) 5 Ind Cas 416 (418) (Cal), *Ahad Baksh Molla* v. *Babar Ali*.

This section, also, is limited in its scope and applies only to acts and proceedings allowed *by any Central Act or Regulation*, to be done on a certain day or within a prescribed period. It will not apply, for instance, to cases where the act is to be done under a *decree or order* of a Court within a particular period and the period expires on a holiday. In such cases, however, the *general principle* stated above will apply.[6] See Note 5.

The language of the section indicates that it has nothing to do with *computing* the prescribed period of limitation. In *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*,[7] their Lordships of the Privy Council observed as follows:

> "What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period; whereas in S. 14, and other sections of a similar nature in the Act, the direction begins with the words 'In computing the period of limitation prescribed for any application,' certain periods shall be excluded."

3. Applicability to act for which limitation is prescribed by Section 48 or by Order 45, Rule 7 of the Civil Procedure Code. — In *Peary Mohun Aich* v. *Ananda Charan*,[1] which was decided before the General Clauses Act, 1897, was passed, an application for execution, which would become barred by the twelve years' rule of limitation under the Civil Procedure Code, 1882, was filed on the re-opening day of the Court, the last day of the said period having expired when the Court was closed. It was held by the Calcutta High Court that on *general principles* of law, the application was

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6. ('11) 9 Ind Cas 181 (183) (Cal), *Lachmi Narain Marwari* v. *Sukhraj Rai*.
('12) 14 Ind Cas 173 (174) (Cal) (DB) (L.P.A.), *Ahad Baksh Molla* v. *Babar Ali*.
('25) 12 AIR 1925 Mad 743 (744) : 87 Ind Cas 560, *Sankaran Unni* v. *Raman*.
('27) 14 AIR 1927 Mad 1196 (1196, 1197) : 106 Ind Cas 502 (DB), *Chinna Nadan* v. *Arumugam Chetty*.
('21) 8 AIR 1921 Lah 6 (9) : 67 Ind Cas 772 (FB), *Himmun* v. *Fauja*.
('31) 18 AIR 1931 Lah 386 (387) : 133 I. C. 434 (DB), *Fateh Khan* v. *Chhajju*.
('23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh* v. *Kesheoprasad*.
('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal* v. *Amar Singh*.
('02) 6 Oudh Cas 68 (71, 72), *Ram Nath* v. *Murlidhar*.
('80) 5 Cal 906 (909, 910) : 6 Cal L R 239 (DB), *Hossein Ally* v. *Donzelle*.
('91) 18 Cal 231 (234) (DB), *Shooshee Bhushan Rudro* v. *Gobind Chunder Roy*.
(1900) 1900 Pun L R No. 9, p. 24 (24) (DB), *Muhammad Yusaf* v. *Karim Baksh*.
('82) 4 All 430 (434) : 1882 All W N 71 (DB), *Baghelin* v. *Mathura Prasad*.
('35) 22 AIR 1935 Lah 369 (370) : 158 Ind Cas 352, *Amolak Ram Dwarka Das* v. *Roda Mal Ramsaran Das*.
('24) 11 AIR 1924 All 218 (219, 220) : 46 All 328 : 78 Ind Cas 1014 (FB), *Muhammad Jan* v. *Shiam Lal*.
[But see ('18) 5 AIR 1918 Sind 50 (51) : 11 Sind L R 106 : 45 Ind Cas 168, *Moosaji Ahmad and Co.* v. *The Asiatic Steam Navigation Co.* (Time prescribed by Karachi Port Trusts Act—Section 4 of Limitation Act and S. 10 of General Clauses Act not applying—General principle also not held to apply as it was not impossible to file the suit before the holiday—Submitted wrong.)]

7. ('35) 22 AIR 1935 P C 85 (87) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC).

Note 3

1. ('91) 18 Cal 631 (634) (DB).

within time. In the undermentioned cases,[2] where the period prescribed by Act VI of 1874 (now O. 45, R. 7, Civil Procedure Code) for deposit of costs in a Privy Council appeal expired on a day on which the Court was closed, it was held that it would be a reasonable exercise of discretion to allow the deposit to be made on the day that the Court re-opened. The cases would, it is submitted, now be governed by S. 10 of the General Clauses Act, 1897.[3]

4. Applicability to payments under Order 21, Rule 89 of the Civil Procedure Code. — An *application* to set aside a sale under O. 21, R. 89 of the Civil Procedure Code is one for which a limitation period of thirty days has been prescribed by Art. 166 of the Limitation Act. Where on the day on which the period expires the Court is closed, the application may, by virtue of this section, be made on the day that the Court re-opens.[1]

But under O. 21, R. 89, the party can apply only *on his depositing* the amounts referred to in that rule. It has been held in the undermentioned case[2] that the tender of such amount must also be considered as an *application* governed by S. 4 of the Act. According to the cases cited below,[3] the tender is governed by S. 10 of the General Clauses Act, 1897, as being an act allowed by a Central Act, to be done within a particular period. Where a tender of deposit under O. 21, R. 89 was made on the last day, and the Court though not closed, was unable to receive the deposit, it was held by the late Judicial Commissioner's Court of Nagpur, that it could be received the next day on the general principle that the act of the Court shall prejudice no party.[4] See also Article 166 Note 7.

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[2] ('77) 2 Cal 272 (273) (DB), *In the matter of the petition of Soorjmukhi Koer.* [*See also* ('77) 2 Cal 128 (129) : 1 Ind Jur 374, *In the matter of the petition of Lalla Gopee Chand.* (Deposit not made on the re-opening day but much later — Delay was not excused.)]

[3] *See* ('39) 26 AIR 1939 Pat 667 (677):19 Pat 123:185 I.C. 353 (FB), *Lachmeshwar Prasad* v. *Girdhari Lal.* (Per Agarwala, J. — The furnishing of security or the deposit of costs is not an application within the meaning of S. 4, Limitation Act — An appellant to the Federal Court who deposits the printing charges as required by O. 45, R. 7 (1), C. P. C., as applied to Federal Court appeals, does not move the Court to do anything — Section 4, Limitation Act, does not apply to such cases — Matter is governed by S. 10, General Clauses Act.)

Note 4

[1] ('38) 25 AIR 1938 Bom 209 (209) : 175 Ind Cas 221, *Veerappa Channappa* v. *Iratappa Malagi.* (Decree transferred to Collector for execution — Limitation for application under O. 21, R. 89 for setting aside sale expiring on day when Civil Court was closed but Collector's Court was open — Application made to Civil Court after it opened is in time as O. 21, R. 91A (Bombay Amendment) does not compel the applicant to apply to the Collector.)
('22) 9 AIR 1922 All 195 (196) : 67 Ind Cas 321, *Durga Prasad* v. *Babulal.*
('12) 17 Ind Cas 783 (784) : 35 All 65 (DB), *Munshi Lal* v. *Ram Narain.* (No section referred to.)
See also Article 166 Note 17.

[2] ('22) 9 AIR 1922 All 195 (196) : 67 Ind Cas 321, *Durga Prasad* v. *Babulal.*

[3] ('06) 9 Oudh Cas 214 (216) (DB) *Radhe Lal* v. *Sheo Prasad.*
('97) 19 All 140 (140):1897 All W N 7 (DB), *Bashir-ud-din* v. *Jhori Singh.* (Case governed by cls. (1) and (2) of S. 7, General Clauses Act of 1887.)
('03) 13 Mad L Jour 271 (272) (DB), *In re Ari Chetty.* (Auction-purchaser—Balance of purchase money — Court closed for vacation — Fifteen days expiring during recess — Payment on re-opening day.)

[4] ('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raot Mal* v. *Amar Singh.*

Section 4
Note 5

5. Applicability to acts directed to be done by decree or order of Court. — Where money is payable under a direction in a decree, it may, under the provisions of Order 21, Rule 1 of the Civil Procedure Code, be paid either into Court or out of Court to the decree-holder. The person bound to pay under the decree is entitled to choose the method of payment.[1] Suppose he chooses the alternative of depositing the amount in Court and finds that the last day on which the amount is to be deposited falls on a holiday on which the Court is closed. Can he deposit it on the next day on which the Court re-opens? As has been seen in Note 2, neither section 4 of this Act, nor section 10 of the General Clauses Act, 1897, applies to such a case. It has been held, however, generally that the *general principle of law* referred to in Note 2 will apply in such cases.[2] It has also been held that a valid *tender* of money to Court on the re-opening day will be equivalent to actual deposit and that if the Court is unable, for no fault of the party, to accept the deposit on that day, the deposit on the next day will be accepted as proper on the principle that the act of the Court shall prejudice no man.[3]

In *Wana Ravji* v. *Natu Murha*,[4] however, it was held that S. 10 of the General Clauses Act, 1897, applied to such cases. It is submitted that this view is not correct.

It has also been held in the undermentioned case[5] that where for

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[*See* ('11) 10 Ind Cas 51 (53) (Cal) (DB), *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday.*]

See also Article 166 Note 7.

Note 5

1. ('10) 7 Ind Cas 992 (992) : 35 Bom 35 (DB), *Wana Ravji* v. *Natu Murha.*

('25) 12 AIR 1925 Mad 743 (744) : 87 Ind Cas 560, *Sankaran Unni* v. *Raman.*

('21) 8 AIR 1921 All 44 (44) : 60 Ind Cas 894 (DB), *Reoti Ram* v. *Sita Ram.*

('23) 10 AIR 1923 Nag 246 (247) : 72 Ind Cas 388 : 19 Nag L R 116, *Dhanu Singh* v. *Keshcoprasad.*

('25) 12 AIR 1925 All 687 (687) : 87 Ind Cas 620 (DB), *Mahomed Hashim* v. *Radha Krishun.*

2. ('06) 3 Cal L Jour 339 (342) : 10 Cal W N 535 (DB), *Surendra Narain Mustafi* v. *Souravini Dasi.* (Compromise decree.)

('70) 2 N W P H C R 112 (112) (DB), *Mt. Muchul Kooer* v. *Laljee.* (Pre-emption decree.)

('84) 7 All 107 (108) : 1884 All W N 224 (DB), *Ram Sahai* v. *Gaya.* (Do.)

('77) 1877 Pun Re No. 31, *Shams-ud-din* v. *Pir Baksh.* (Do.)

('31) 18 AIR 1931 Lah 386 (387) : 133 Ind Cas 434 (DB), *Fateh Khan* v. *Chhajju.* (Do—A I R 1924 All 218 followed; Dissenting from A I R 1918 All 13 which was approved in A I R 1921 Lah 6.)

('08) 11 Oudh Cas 144 (146), *Ganga Dhar* v. *Anrudh Singh.* (Pre-emption decree.)

('23) 10 AIR 1923 All 516 (517) : 45 All 456 : 74 Ind Cas 745 (DB), *Girdhari Singh* v. *Bhupal Singh.* (Do.)

('24) 11 AIR 1924 All 218 (219) : 46 All 328 : 78 Ind Cas 1014 (FB), *Muhammad Jan* v. *Shiam Lal.* (Do. — Overruling AIR 1918 All 13 and AIR 1922 All 278.)

('98) 21 Mad 385 (387) (DB), *Aravamudu Ayyangar* v. *Samiappa Nadan.*

('21) 8 AIR 1921 Lah 6 (8, 9) : 67 Ind Cas 772 (FB), *Himmun* v. *Fauja.*

3. ('08) 11 Oudh Cas 144 (146), *Ganga Dhar* v. *Anrudh Singh.*

('11) 10 Ind Cas 51 (53) (Cal) (DB), *Md. Akbar Jaman Khan* v. *Sukhdeo Panday.*

4. ('10) 7 Ind Cas 992 (992) : 35 Bom 35 (DB).

[*See* ('06) 9 Oudh Cas 214 (216) (DB), *Radhe Lal* v. *Sheo Prasad.*]

5. ('29) 16 AIR 1929 All 207 (208) : 115 Ind Cas 796 : 51 All 527 (DB), *Kunj Behari Singh* v. *Bindeshri Prasad Singh.*

some time after decree directing payment is passed, the Court is open, but is closed on the date on which the period allowed for payment expires, the judgment-debtor cannot wait till the re-opening of the Court to deposit the amount, and is bound to have paid the amount either direct to the decree-holder or to have deposited it before the Court closed for the vacation. It is submitted that this view also is not correct and is against the trend of judicial opinion.

6. Applicability to payments to be made under private agreement between parties. — Section 4 of this Act has been held not to apply to payments to be made under a *private agreement* between the parties.[1] It is submitted that neither S. 10 of the General Clauses Act, 1897, nor the general principle of law will be applicable to such cases.

6a. Section, if affects court-fee payable on application for review under Articles 4 and 5 of the Court-fees Act. — The court-fee leviable on an application for review of judgment is that leviable on the plaint or memorandum of appeal, if such application is presented *on or after* the ninetieth day from the date of the decree, but is only half of that fee if such application is presented before the ninetieth day. Suppose now that the eighty-ninth day expires on a day on which the Court is closed and the application is consequently presented on the day on which the Court re-opens. What is the court-fee payable ? It has been held that the full court-fee must be paid, the reason being that this section excuses the delay only for purposes of *limitation* and does not affect the payment of court-fee.[1]

6b. Applicability to proceedings under special or local laws. — The section has been held to be applicable to the following proceedings under special or local laws :

(1) Application under S. 23 of the Press (Emergency Powers) Act, 1931.[1]

(2) Application under S. 19 of the Madras Agriculturists' Relief Act, 1938.[2]

Note 6

[1] ('20) 7 AIR 1920 Pat 122 (123): 56 I.C. 495 (DB), *Adya Singh* v. *Nasib Singh.*
('34) 21 AIR 1934 Oudh 303 (305) : 149 Ind Cas 258 : 9 Luck 475, *Salamat Ali* v. *Nur Muhammad Khan.*

Note 6a

[1] ('86) 9 Mad 134 (136) : 9 Ind Jur 423 (DB), *In re Kota.*
('10) 15 Ind Cas 455 (456) (Cal) (DB), *Sayera Bibi* v. *Bhutnath Haldar.*
('99) 2 Oudh Cas 302 (303), *Jegatpal Singh* v. *Jageshwar Baksh Singh.*
('93) 7 C P L R 111 (112), *Hiralal Ramdhan* v. *Mt. Gangabai.* (Application filed after the 90th day from the date of the decree though it was within time in view of S. 12 of the Limitation Act — *Held* that it must bear full stamp because the Court-fees Act and the Limitation Act are not *in pari materia.*)
('79) 1879 Pun Re No. 39, *Ruldu Mal* v. *Sobha.*

Note 6b

[1] ('39) 26 AIR 1939 Pesh 6 (7): 180 Ind Cas 252 (DB), *In re Sant Singh Sardar Rattan Singh.*

[2] ('39) 26 AIR 1939 Mad 613 (614) : I L R (1939) Mad 886 : 186 Ind Cas 379 (DB), *Kumaraswami Pillai* v. *Thiruvengadatha Ayyangar.*

(3) Application under S. 54 of the Provincial Insolvency Act.[3]

(4) Application under S. 12 (2) of the Oudh Courts Act.[4]

(5) Appeals from Revenue Courts to the District Judge under the Oudh Rent Act.[5]

See also section 29 Note 3.

7. Expiry of period "prescribed." — It is important to remember that this section *does not alter or modify* the length of the "prescribed" period. It assumes that the period prescribed *expires* on a day on which the Court is closed and it says that *notwithstanding such expiry* the proceeding may be taken on the day the Court re-opens.[1] In *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*,[2] their Lordships of the Privy Council observed as follows:

> "The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period."

There are, however, other sections in the Act which extend or modify the periods prescribed by the first schedule in particular cases. Thus, Ss. 6 to 8 of the Act *extend* the period prescribed by the first schedule, where the person entitled to institute a suit or make an application is a minor, or insane or an idiot. Sections 12 to 24 prescribe

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3. ('38) 25 AIR 1938 Nag 454 (455): ILR (1939) Nag 377: 178 I. C. 479, *Balkisan Seth* v. *Bhanu Prasad.*

4. ('38) 25 AIR 1938 Oudh 186 (188) : 14 Luck 138 : 177 Ind Cas 48 (DB), *Ram Dass* v. *Chhedi Lal.*

5. ('14) 1 AIR 1914 Oudh 255 (255) : 17 Oudh Cas 254 : 25 Ind Cas 703, *Binda Parshad* v. *Ram Bhajan.*

Note 7

1. ('40) 27 AIR 1940 Mad 908 (909), *Thimmanna Bhat* v. *Adyanthaya.* (The observations in this case seem to suggest that the words "period prescribed" refer to the period prescribed by the first schedule (which is the expression used in S. 3)—But the words are really general and refer to the period prescribed by the first schedule as modified by the provisions in the body of the Act.)

('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji* v. *Yadao Raghoba.* (Section 4 does not extend the prescribed period in S. 20.)

('38) 25 AIR 1938 All 606 (608) : I L R (1938) All 861 : 178 Ind Cas 668 (DB), *Puran Chand* v. *Abdullah.* (Do.)

('38) 25 AIR 1938 Lah 234 (236) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.* (A I R 1937 Lah 642 reversed on another point.)

('37) 24 AIR 1937 Lah 642 (643) : 174 Ind Cas 258, *Shanti Parkash* v. *Harnam Das.* (Reversed in A I R 1938 Lah 234 (FB) on another point.)

('32) 19 AIR 1932 Mad 287 (289) : 55 Mad 630 : 136 Ind Cas 822 (FB), *Fatma Bi* v. *Nagoor Khan.*

('35) 22 AIR 1935 P C 85 (87) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (PC), *Maqbul Ahmad* v. *Onkar Pratap Narain Singh.*

('83) 13 Cal L R 153 (156), *Deb Narain Singh* v. *Ishan Chunder Malo.* (Where the last day is not a holiday, time will not be extended because the *next* day is a holiday.)

('16) 3 AIR 1916 Mad 734 (734) : 30 Ind Cas 832 (DB), *Chennama Shettithi* v. *Krishnaya Setti.* (Do.)

('13) 18 Ind Cas 574 (575): 1912 Upp Bur Rul 146, *Nga Po Yin* v. *Mi Shan Nu.* (Where a suit on a promissory note executed on the 7th May 1907 was instituted on the 9th May 1910, the 8th being a Sunday, *held* the suit was barred.)

2. ('35) 22 AIR 1935 P C 85 (87) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (PC).

the method by which the periods prescribed in the first schedule in particular cases are to be computed or reckoned. In *Maqbul Ahmad's case*,[2] referred to above, where one of the questions was when the period of limitation expired in a case to which S. 14 of the Act applied, their Lordships observed as follows :

> " In S. 14 and other sections of a similar nature in the Act, the direction begins with the words: 'in computing the period of limitation prescribed for any application,' certain periods shall be excluded. It therefore seems to their Lordships that, where there is ground for excluding certain periods under S. 14, in order to ascertain what is the date of the *expiration of the prescribed period*, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period ; that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained."

If on the date of the expiration of the prescribed period as ascertained in the above manner, the Court is closed, then, under this section, the proceeding may be taken on the day that the Court re-opens.[3]

8. Acknowledgment or payment of interest during vacation. — Suppose the period prescribed by the first schedule for a particular suit expires on a day during the vacation of the Court, and an acknowledgment or a payment of interest is made after that date but before the Court re-opens, can it be said that such acknowledgment or payment is made "before the expiration of the period prescribed for the suit" within the meaning of Ss. 19 and 20 of the Act so as to save limitation ? It is clear from what has been stated in Note 7 that this section does not alter or extend the period of limitation but merely allows a suit to be filed on the re-opening day, *notwithstanding that the period has expired.* It follows that the acknowledgment or payment, as the case may be, made under the above circumstances cannot be said to be made "*before* the expiration of the prescribed period" and cannot give a fresh period of limitation under Ss. 19 and 20.[1] A contrary view has been held in the undermentioned cases,[2] which in view of the decision of the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*[3] can be considered to be no longer good law. See also S. 19 Note 12 and S. 20 Note 10.

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[3] (29) 16 AIR 1929 Cal 315 (318) : 123 Ind Cas 246 (DB), *Bejoy Kumar Sen* v. *Kusum Kumari Debi.*

('21) 8 AIR 1921 Lah 124 (125) : 60 Ind Cas 259, *Kanshi Ram* v. *Karam Narain.* [*See* ('37) 24 AIR 1937 Cal 454 (455) : I L R (1937) 2 Cal 612 : 174 Ind Cas 1009 (DB), *Khirode Chandra Das* v. *Ramani Mohan Dhar.*]

Note 8

[1] ('41) 28 AIR 1941 Nag 100 (101) : I L R (1941) Nag 144 (DB), *Shivjiram Dhannalal* v. *Gulabchand Kalooram.* (Courts closed for summer vacation when the previous acknowledgment was due to expire—Fresh acknowledgment during vacation but after three years from previous acknowledgment—Suit on later acknowledgment is barred. A I R 1928 Nag 192 overruled.)

('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji* v. *Yadao Raghoba.* (Period prescribed in S. 20 (1) does not mean period prescribed by the schedule as modified by S. 4. A I R 1928 Nag 192 held no longer good law.)

('39) 26 AIR 1939 All 252 (252) : 181 Ind Cas 899 (DB), *Mt. Shayam Peare* v. *Ram Autar Singh.* (Section 4 cannot be used to extend period prescribed under S. 20. A I R 1927 All 577 not followed.)

('38) 25 AIR 1938 All 606 (609) : I L R (1938) All 861 : 178 Ind Cas 668 (DB), *Puran Chand* v. *Abdullah.* (Section 4 does not extend the prescribed period in Section 20.)

8a. **Assignment of interest during vacation.** — Where on the last day of limitation for filing a suit on a pro-note the Courts were closed for the summer vacation and on the re-opening day the payee under the promissory note assigned his rights and the assignee filed a suit on the same day, it was held that the suit was within time in view of this section.[1]

9. **Section 4 and Sections 6 to 8 of the Act.**—A is under a legal disability on 1st January 1920 when he becomes entitled to sue for the recovery of a loan. The disability ceases on 1st January 1925. Under Ss. 6 and 8 of the Act he can institute the suit within three years from that date, *i. e.*, before the 1st January 1928. The Court is closed on that date and re-opens only on the 5th January 1928. Can A validly institute the suit on the 5th January 1928? The answer to the question depends upon the answer to another question, namely "Does the period of limitation prescribed for the suit *expire on a day on which Court is closed?*" It would clearly follow from what has been stated in Note 7 that in order to ascertain the expiration of the period prescribed for the suit, the days excluded under Ss. 6 to 8 from operating by way of limitation have to be added to what is primarily the prescribed period. In the illustrative case above, the period so calculated will expire on the 1st January 1928 when the Court is

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('38) 25 AIR 1938 Lah 234 (236, 237) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.*

('31) 18 AIR 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmad* v. *Kalipada Roy.* (Section 4 does not apply to acknowledgments.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (DB), *Bai Hemkore* v. *Masamali.* (Acknowledgment.)

('29) 16 AIR 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendra Nath Roy* v. *Kartic Prasad Das.* (Payment of interest.)

('37) 24 AIR 1937 Lah 642 (643, 644) : 174 Ind Cas 258, *Shanti Prakash* v. *Harnam Das.* (Section 4 does not apply to acknowledgment. Reversed in A I R 1938 Lah 234 (FB) on another point.)

('37) 24 AIR 1937 Mad 367 (368) : 169 Ind Cas 653, *Chidambaram Chettiar* v. *Venkatasubba Naik.*.

[2] ('37) 24 AIR 1937 Lah 162 (164) : 164 Ind Cas 650, *Kishan Singh* v. *Sardar Ali.* (Period prescribed means period prescribed in schedule read with S. 4.)

('27) 14 AIR 1927 All 577 (577, 578) : 49 All 726 : 102 Ind Cas 111, *Abdul Ghani* v. *Chiranji Lal.* ('Period prescribed' does not mean 'period prescribed' by the schedule alone but by entire Limitation Act.)

('13) 19 Ind Cas 820 (821) (Bom), *Visram* v. *Tabaji.* (Obiter.)

[3] ('35) 22 AIR 1935 P C 85 (87) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (PC).

Note 8a

[1] ('40) 27 AIR 1940 Mad 908 (909), *Thimmanna Bhat* v. *Adyanthayya.* (Limitation bars remedy but does not extinguish right—So notwithstanding the expiry of limitation there is an assignable right and suit is saved from bar of limitation by this section.)

('40) 27 AIR 1940 Cal 443 (445) : I L R (1940) 1 Cal 323 : 191 Ind Cas 52, *Srilal Singhania* v. *Anantlal.*

closed. The suit is therefore validly instituted on the 5th January 1928 by virtue of this section.[1]

10. Section 4 and Section 12 of the Act.— It follows from what has been stated in Note 7 that in a case to which S. 12 applies, the date of the expiration of the period prescribed must be ascertained by adding the days excluded to what is primarily the prescribed period. If on such date the Court is closed, the appellant or the applicant as the case may be can, under this section, prefer the appeal or make the application on the date when the Court re-opens.[1]

Illustrations.

1. A decree is passed in a suit on 1-1-1935. The period of limitation prescribed for an appeal from such judgment is thirty days from the date of the decree. Application for copies is made on 20-1-1935 and copies are got on 13-2-1935. In order to ascertain when the period of limitation prescribed for the appeal expires, the period excluded, namely twenty-five days (from the 20th January to 13th February both inclusive) must be added to the prescribed period of thirty days and so adding it, the period will expire on the fifty-fifth day from 1-1-1935 (excluding 1st January under S. 12, sub-s. (1)) which will be 25-2-1935. If on that day the Court is closed, the appeal can be presented on the re-opening day.[2]

2. A decree is passed in a suit on 1-1-1935. The period of limitation prescribed for an appeal from such judgment is thirty days from that date. The Court is closed from 25-1-1935 to 25-2-1935. Application for copies is made on 26-2-1935 which is the day on which the Court re-opens and copies are got on 30-3-1935. In order to ascertain when the period of limitation for the appeal expires, the period excluded under S. 12, namely thirty-three days (from 26-2-1935 to 30-3-1935 both inclusive), should be added to the prescribed period of thirty days and so adding it, the period will expire on the sixty-third day from 1-1-1935 which will be 5-3-1935. An appeal presented on the 31st March after the copies are obtained will be barred.[3] It has, however, been held in the undermentioned cases[4] that

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Note 9

[1] ('32) 19 AIR 1932 Mad 139 (141): 135 Ind Cas 587 : 55 Mad 286 (DB), *Naganna* v. *Krishnamurthy.* (The phrase "the period of limitation prescribed for any suit" etc., in S. 4 of the Limitation Act is wide enough to include a period of time contained in the first schedule of the Limitation Act but computed with the aid of one or more of the Ss. 12 to 16 of the Limitation Act or starting from the date of attaining majority under S. 6 of the Act.)

('28) 15 AIR 1928 Mad 1255 (1258) : 115 Ind Cas 509, *Narasayya* v. *Krishnamurthy.* (Period of *limitation prescribed* means period of limitation prescribed by Schedule 1 as qualified by Ss. 6 and 8.)

('24) 11 AIR 1924 Oudh 385 (387) : 81 Ind Cas 484 (DB), *Bans Bahadur Singh* v. *Sakalraj Kuar.* ("Prescribed" means prescribed by the Act, i.e., by the first schedule and by the provisions of Ss. 4 to 25.)

See also Section 6 Note 41.

Note 10

[1] ('35) 22 AIR 1935 P C 85 (87, 88) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (P C), *Maqbul Ahmad* v. *Onkar Pratap.*

[2] ('34) 21 AIR 1934 Pat 367 (368): 13 Pat 632 : 151 Ind Cas 380 (DB), *Dhanna Mistry* v. *Bengal Nagpur Railway Co., Ltd.*

[3] ('05) 28 Mad 452 (453) : 15 Mad L Jour 109 (DB), *Venkatarao* v. *Venkatachalam Chetty.*

('16) 3 AIR 1916 Lah 407 (407) : 35 Ind Cas 233 : 1916 Pun Re No. 79, *Guran Rakha* v. *Bindraban.*

('34) 21 AIR 1934 Pat 367 (368): 13 Pat 632 : 151 I. C. 380 (DB), *Dhanna Mistry* v. *Bengal Nagpur Railway Co., Ltd.* (A I R 1931 Pat 60 held not correct law.)

('20) 7 AIR 1920 Mad 1025 (1025): 63 Ind Cas 922 (DB), *Masilamani* v. *Arumuga.* (Following 11 Ind Cas 339 and A I R 1920 Mad 359.)

('79) 1879 Pun Re No. 82, *Jiwan Singh* v. *Nagina Singh.*

[4] ('38) 25 AIR 1938 Lah 317 (318) : 177 Ind Cas 672, *Asa Singh* v. *Hira Singh.* (Limitation for appeal expiring on 30-5-1936 which was a holiday — Application

the appeal is in time, on the ground that the right of appeal subsisted on the re-opening day by virtue of S. 4, and that, therefore, the period of the closing of the Court must be excluded in addition to the period that can be excluded under S. 12. In other words this view proceeds on the ground that S. 4 itself *extends* the period of limitation up to the re-opening of the Court. As has been seen in Note 7 this view is not correct, as explained by the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*,[5] and consequently the said decisions can no longer be considered to be good law.

3. A decree is passed on 1-1-1935 and immediately the Court closes for the vacation and re-opens on 1-3-1935. Copies are applied for on the same date and obtained on 5-3-1935 and an appeal is preferred on the same date. Is the appeal in time? On the principle and method of calculation referred to in illustration 2 above, the appeal would be barred if the "time requisite" for obtaining the copies is taken to be the period from 1-3-1935 to 5-3-1935 both inclusive. There is, however, a difference of opinion as to whether in a case such as the above, where it is impossible for the party to apply for copies before the re-opening day, the "time requisite" should not be taken to include the whole vacation also. See Note 21 to section 12.

11. Section 4 and Section 31 (repealed) of the Act. — There was a conflict of opinions as to whether the period allowed by S. 31 (now repealed) was a "prescribed" period within the meaning of S. 4; in other words, whether if the period allowed by S. 31 for a proceeding expired on a day on which the Court was closed, such proceeding could be taken on the re-opening day. It was held in the undermentioned cases[1] that the word "prescribed" in S. 4 meant only

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for copies on 1-6-1936, the opening day—Copies obtained on 2-6-1936 — 3rd June being again a holiday, appeal preferred on 4-6-1936—*Held* appeal was within time.)

('97) 19 All 342 (347): 1897 All W N 76 (DB), *Siyadat-un-nissa* v. *Md. Mahmud.*

(1900) 2 Bom L R 221 (223) (DB), *Sitaram* v. *Ramji.*

('26) 13 AIR 1926 All 111 (112) : 89 I. C. 956, *Megh Baran Singh* v. *Rama Das.*

('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu* v. *Sultan.*

('01) 25 Bom 584 (586) : 3 Bom L R 143 (DB), *Tukaram* v. *Pandurang.*

('01) 25 Bom 586 (588) : 3 Bom L R 244 (DB), *Pandharinath* v. *Shankar.*

('26) 13 AIR 1926 Lah 121 (122) : 89 Ind Cas 437, *Naman* v. *Gurditta.*

('30) 17 AIR 1930 Lah 216 (216, 217) : 11 Lah 111 : 120 Ind Cas 169 (DB), *Mt. Attri* v. *Ram Kishan.*

('29) 16 AIR 1929 Rang 96 (96) : 6 Rang 743 : 115 Ind Cas 667 (DB), *Ma Dan* v. *Tan Chong San.*

('20) 7 AIR 1920 Pat 818 (819) : 60 Ind Cas 493, *Farzand Ali* v. *Abdul.*

('15) 2 AIR 1915 Nag 117 (118) : 11 Nag L R 104 : 29 Ind Cas 833, *Kashibai* v. *Kannoo.*

[*See also* ('38) 25 AIR 1938 Lah 707 (708, 709): 182 I. C. 108, *Mahomed Zaman* v. *Hans Raj Shah.* (In this case, on the day on which the application for copy of decree was made the period of limitation for the appeal had expired but owing to the intervention of holidays, the appeal could have been filed on that day under this section — It was contended that under these circumstances the time taken to get copy of the decree could not be excluded but it was held that as the appeal could have been preferred under this section on the day on which the application for copy was made, such application was in time and the appellant was entitled to deduct the time taken for getting copy of the decree — It is submitted that there is no period of limitation for an application for copy of decree as was assumed in this case and such application is not also required under S. 12 to be made within the period of limitation for the appeal.)]

[5] ('35) 22 AIR 1935 P C 85 (87): 155 I. C. 205 : 62 Ind App 80 : 57 All 242 (PC).

Note 11

[1] ('12) 15 Ind Cas 439 (440) (Oudh) (DB), *Rahmatul Fatime* v. *Ashraf Ali.* (Section 10, General Clauses Act, was however held to apply.)

('11) 12 Ind Cas 811 (813) (Bom) (DB), *Sheodas Doulatram* v. *Narayan Asaji.* (Section 10, General Clauses Act, also will not apply.)

the periods prescribed by the first schedule to the Act, that the period allowed by S. 31 was therefore not a "prescribed period" and that S. 4 could not be applied so as to validate the proceeding taken on the re-opening day. A contrary view was taken in the cases cited below,[2] namely that the word "prescribed" meant prescribed by the *Act*, i.e., prescribed primarily by the first schedule but computed, altered or substituted by the sections of the Act, that consequently the period allowed by S. 31 was a "prescribed" period within the meaning of S. 4 and that if such period expired on a day on which the Court was closed, the proceeding might be taken on the day on which the Court re-opened. In view of the repeal of S. 31 of the Act, this conflict would no longer be of any importance and even otherwise would now be taken to have been set at rest by the decision of the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*[3] to the effect that the date of the expiration of the prescribed period must be ascertained by considering the sections along with the period primarily prescribed by the first schedule. See also Notes 7 to 10.

12. "When the Court is closed." — The question whether in any particular case the Court is closed is one of fact which must depend upon the practice which prevails in the particular Court.[1] There may be a vacation; yet the Court may be open for certain classes of business, such as admission of plaints, filing of written statements and hearing of short cases.[2] A Court cannot be deemed to be closed within the meaning of this section during a vacation, if for the purpose of the particular business in question the office of the Court is open.[3]

('30) 17 AIR 1930 Lah 127 (128, 129) : 10 Lah 681 : 122 Ind Cas 86 (DB), *Jai Dev Singh* v. *Abdul Rahman.* (Section 5, Punjab Loans Limitation Act, corresponded to Section 31 of this Act — Section 4 of this Act assumed not to apply, but S. 8, Punjab General Clauses Act, I of 1898, corresponding to S. 10, Indian General Clauses Act, was applied.)

('11) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balkrishna* v. *Tima.*

[2] ('24) 11 AIR 1924 Oudh 385 (387): 81 Ind Cas 484 (DB), *Bans Bahadur Singh* v. *Sakalraj Kuar.* ('Prescribed' means prescribed by the Act, and not merely by the first schedule.)

('28) 15 AIR 1928 Mad 1255 (1258): 115 Ind Cas 509, *Narasayya* v. *Krishnamurthy.* ('Period of limitation prescribed' means prescribed by the first schedule but calculted in the manner provided by the sections of the Act.)

('14) 1 AIR 1914 Mad 663 (663) : 21 Ind Cas 770 (DB), *Murugesa Mudali* v. *Ramasamy Chettiar.* (Section 31 prescribed a period of limitation — 'Prescribed' means prescribed whether as a matter of grace or otherwise.)

('12) 14 Ind Cas 154 (155) : 34 All 375 (DB), *Hira Singh* v. *Amarti.*

('32) 19 AIR 1932 Mad 139 (141) : 135 Ind Cas 587 : 55 Mad 286 (DB), *Naganna* v. *Krishnamurthy.* (Words 'the period of limitation prescribed for any suit' etc. in S. 4 are wide enough to include a period of time contained in Schedule 1, Limitation Act, but computed with the aid of one or more of the sections of the Act.)

[3] ('35) 22 AIR 1935 P C 85 (87, 88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC).

Note 12

[1] ('27) 14 AIR 1927 Bom 480 (482) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co. Ltd.* v. *Occhavlal Hargovandas.*

[2] ('24) 11 AIR 1924 Bom 144 (147) : 89 Ind Cas 529, *Tata Industrial Bank* v. *Abdul Hussein.*

[3] ('27) 14 AIR 1927 Bom 480 (481) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co., Ltd.* v. *Occhavlal Hargovandas.*

('83) 1883 All W N 254 (254) (DB), *Hijab Banu* v. *Muhammad Shafi.*

According to the prevailing practice in the Bombay High Court, suits on the Original Side can be filed in the summer vacation and therefore the Bombay High Court Original Side is not closed in the vacation within the meaning of S. 4.[4]

When a Court was adjourned for the recess, and during the recess the office was open twice a week for the purpose of receiving papers under the rules framed by the High Court in that behalf, an appeal, the time for which had expired during the recess, was held to be time-barred, when presented on the day the Court re-opened after the recess.[5] But when the day on which the period of limitation expired for an appeal is a *gazetted holiday*, and the District Judge holds Court on that day, a presentation of papers on the next following day is not barred.[6] The reason is that a Court is deemed closed for purposes of this section on a gazetted holiday, in spite of the fact that the Judge holds Court on that day.[7]

A Court is not closed within the meaning of this section, if the officer authorised to receive plaints is absent from headquarters and is in camp.[8]

Where the Court was in vacation, but there was a notification in the Gazette providing that "plaints, execution applications and other papers will be received only on the days on which the Judge sits," and further providing for the sitting of a vacation Judge on Wednesdays and Thursdays, it was held that the Court was not closed.[9]

Where the period of limitation prescribed for a suit expired when the Court was closed for vacation and the Court did not sit on the re-opening day, but on a later day, it was held that the suit was within time, if it was filed on the day that the Court actually re-opened.[10]

Where the Court was open, but so far as the act, namely, depositing purchase money, which a party desired to carry out through the Court, was concerned, he was refused facilities so as not to enable him to carry it out on the day in question, it was held that the Court must be considered to have been closed.[11]

[*See also* ('21) 61 Ind Cas 714 (715) (Cal), *Sona Sheikh* v. *Naib Ali*. (Limitation for criminal appeal expiring during Court's civil vacation—Vacation Judge sitting but appeal not filed in time due to want of notice of time and place where vacation Judge was to hold his sittings—Appeal filed on re-opening day should be admitted.)]

[4] ('27) 14 AIR 1927 Bom 480 (482) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co., Ltd.* v. *Occhavlal Hargovandas.*

[5] ('82) 5 Mad 189 (193) (FB), *Nachiyappa* v. *Ayyasami.*

[6] ('97) 20 Mad 469 (469) (DB), *Boyamma* v. *Balaji Rau.*

[7] ('03) 13 Mad L Jour 316 (317) (DB), *Ghulam Ghouse* v. *Venkatachalam Pillai.*

[8] ('16) 3 AIR 1916 Mad 3 (4) : 38 Mad 295 : 29 Ind Cas 449 (FB), *Receiver of Nidadavole & Medur Estate* v. *Suraparazu.*

[9] ('23) 10 AIR 1923 Mad 435 (436) : 46 Mad 938 : 70 Ind Cas 888 (DB), *British India Steam Navigation Co.* v. *Sharafally.*

[10] ('75) 1 All 263 (265) (DB), *Bishan Chand* v. *Ahmed Khan.*

[11] ('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal* v. *Amarsingh.* (Extension of period under S. 151, C. P. C.)

In an earlier case, where the Chief Court of the Punjab was in vacation but by an arrangement of the Court it was kept open for reception of petitions by the Deputy Registrar of the Court, an application, the period of limitation for which expired during vacation, was held to be validly presented on the re-opening of the Court.[12] But the trend of later decisions is to the contrary effect. Where the Court was in vacation, but the Court office was open, to which appeals could be presented during the vacation, it was held that the Court was not closed.[13]

The Subordinate Judge of S used to sit for a week every month at L. During his absence from S, the plaintiff presented his plaint at S, which was accepted by the Naib-Sheriff of the Court, who was not authorised to receive plaints and no other arrangement existed for reception of plaints at S. It was placed before the Subordinate Judge on his return from L, who dismissed it as time-barred. It was held that the Court at S should be deemed to have been closed during the time that the Subordinate Judge was absent from S.[14]

13. "Court" means the proper Court. — There was a conflict of opinion as to whether the words "the Court" mean the *proper Court* (that is, the Court in which the suit ought to have been instituted), or the Court in which the suit happens to be filed, whether it is the proper Court or a wrong Court. According to the High Courts of Allahabad, Calcutta, Madras and Lahore, the words "the Court" meant only the *proper Court*. Where therefore on the date of the expiry of the period of limitation for a suit, the proper Court was open and another Court was closed and the suit was filed in the latter Court on its re-opening day, the period between the expiry of the period of limitation and the re-opening of the wrong Court could not, according to the said High Courts, be saved under this section, in addition to the period which may be deducted under S. 14 of the Act.[1]

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12. ('91) 1891 Pun Re No. 29, *Ganpat Rai* v. *Hira Singh*.

13. ('21) 8 AIR 1921 Lah 237 (238) : 60 Ind Cas 737 (DB), *Fatteh Muhammad* v. *Chothu Ram*. (Appeal under Letters Patent, Lahore, cl. 10.)

[*See also* ('33) 20 AIR 1933 Lah 239 (239) : 142 Ind Cas 307, *Hira Lal* v. *Sojan Chand*. (Mere absence of presiding officer of Court on leave is not tantamount to Court being closed where the office of the Court is open and the establishment of the Court is present.)]

[See however ('39) 26 AIR 1939 Pat 667 (677) : 19 Pat 123 : 185 Ind Cas 353 (FB), *Lachmeshwar Prasad* v. *Girdhari Lal*. (The office of the Court is merely the hand with which the Court performs some of its functions—The fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which S. 10, General Clauses Act, applies—Per Agarwala, J.)]

14. ('34) 21 AIR 1934 Lah 622 (622) : 15 Lah 308 : 152 Ind Cas 618, *Nur Muhammad* v. *Ghulaman*.

Note 13

1. ('16) 3 AIR 1916 All 222 (223) : 35 I. C. 292 (DB), *Makund Ram* v. *Ramraj*. (Limitation expiring on holiday—Plaint filed in wrong Court on next day—Plaint returned—Plaintiff is not entitled to exclusion of extra day on ground that it was a holiday.)

('75) 24 Suth W R 26 (27, 28)(DB), *Abhoya Churn Chuckerbutty* v. *Gour Mohun*.

The High Court of Bombay,[2] on the other hand, held that such period should also be deducted on the ground that, otherwise, the result would be inequitable. The conflict has now been set at rest by the decision of the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*,[3] in which their Lordships observed as follows:

> "The language of S. 4 is such that it seems to their Lordships to be impossible to apply it to a case like the present. What it provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court re-opens. In their Lordships' view that means the proper Court in which the application ought to have been made."

As has been seen in Note 2 the principle on which this section is based is that the law does not compel a man to do that which he cannot possibly perform. It cannot be said that he cannot possibly file the suit in the proper Court when that Court is open, just because he is under a mistake as to the Court in which the suit is to be filed. See also the cases cited below.[4]

Where a party is entitled to file a suit or make an application in two Courts of concurrent jurisdiction and one of the Courts in which he wishes to file his suit or make an application is closed on the last

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('13) 18 Ind Cas 121 (122) (Cal) (DB), *Hari Das Roy* v. *Sarat Chandra Dey.*

('11) 12 Ind Cas 58 (60) : 36 Mad 131 (DB), *Mira Mohideen* v. *Nallaperumal Pillai.* (Although the word 'Court' in S. 4 is not qualified by the adjective 'proper' as it is in other parts of the Act, it would be unreasonable to take account of the closing and re-opening of any other Court than that in which the suit was rightly instituted.)

('19) 6 AIR 1919 Mad 845 (845, 846) : 47 Ind Cas 624 (DB), *Ramalingamiyer* v. *Subbaier.* (Section 4 can be availed of only if the suit etc., is filed in the proper Court when the time for doing so has expired on a holiday.)

('21) 8 AIR 1921 Mad 654 (655) : 44 Mad 817: 63 I. C. 924 (DB), *Ummathu* v. *Pathumma.* (Court closed on the last day of limitation — Plaint presented in wrong Court on re-opening day—Plaint presented in proper Court subsequently—Suit time-barred.)

('23) 10 AIR 1923 Mad 114 (115, 116): 69 I. C. 724 (DB), *Govindasami Padayachi* v. *Sami Padayachi.* (Liberal construction of S. 4 cannot be taken, when to do so, would involve disregard of the words of the statute.)

('12) 14 I. C. 157 (158): 36 Mad 482 (DB), *Seshagiri Rao* v. *Vajra Velayudam Pillai.*

('29) 16 AIR 1929 Lah 425 (426) : 116 Ind Cas 314 : 11 Lah 12 (DB), *Dharman Ram Ladha Ram* v. *Ganga Ram.*

('20) 7 AIR 1920 Lah 346 (347) : 55 Ind Cas 55, *Banomal* v. *Banomal.*

[2] ('21) 8 AIR 1921 Bom 379 (380) : 45 Bom 443 : 59 Ind Cas 743 (DB), *Basavanappa* v. *Krishnadas Goverdhandas.* (Plaint returned for presentation to proper Court—The plaintiff is entitled to take advantage of those days during which the first Court was closed for the vacation, and the calculation should be made in the same way as if the second Court had been closed for the vacation. 12 Ind Cas 58 (Mad) dissented from.)

[3] ('35) 22 AIR 1935 P C 85 (88): 155 Ind Cas 205: 62 Ind App 80: 57 All 242 (PC).

[4] ('36) 41 Cal W N 956 (957) (DB), *Anil Prokash Chatterjee* v. *Dhirendranath.*

('37) 24 AIR 1937 Lah 464 (465) : 173 I. C. 740, *Firm Bujamal Govindamal* v. *Mukta Parshad.* (What is necessary in view of the wording of S. 4, Limitation Act, is that the plaint must have been presented to the proper Court — Where, therefore, a plaintiff presents a plaint to a wrong Court of first instance, he is not entitled to any deduction on account of holidays under S. 4.)

('37) 24 AIR 1937 Nag 215 (216): 170 Ind Cas 798: I L R (1937) Nag 217, *Waman Rao* v. *Umrao.* (Period of limitation expiring during summer vacation — Suit instituted on opening day in Court of Sub-Judge, First Class — Plaint returned for presentation to proper Court — Suit instituted in the Court of Sub-Judge, Second Class, next day—Section 4 has no application as suit is not filed in proper Court on opening day—Suit held barred by time.)

day of limitation, the party is entitled to the benefit of this section notwithstanding that the other Court is open at that time.[5]

14. "Suit, appeal or application may be instituted, preferred or made."—Order 4, R. 1, sub-rule (1) of the Civil Procedure Code provides: "Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." Order 41, Rule 1 sub-rule (1) of the same Code provides: "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and *presented to the Court or to such officer* as it appoints in this behalf. . . . . ." As regards proceedings other than suits and appeals, S. 141 of the same Code provides: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." The explanation to section 3 of this Act also provides that a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer.

It follows from the above that a suit, appeal or application is instituted, preferred or made when it is presented to the proper officer.[1] A proceeding presented to a wrong Court[2] or to an officer who is not authorised to receive plaints[3] is not a valid institution of such proceeding. But where according to the practice of the Court petitions are used to be thrown in a box kept for that purpose, the act of throwing an application into such box is a valid presentation.[4]

A proceeding presented on an insufficient stamp is not validly presented. But if the Court grants time to make good the deficiency and the deficiency is made good within that time, then under S. 149

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5. **('40) 27 AIR 1940 Mad 495 (496) : ILR (1940) Mad 684,** *Subba Rao* v. *Kandregula Narsiah.* (District Munsif's Court closed during vacation — Person having right to sue in that Court is entitled to benefit of S. 4—Fact that Village Munsif's Court under Madras Village Courts Act has concurrent jurisdiction and is open during vacation does not deprive plaintiff of benefit of S. 4.)

('40) 27 AIR 1940 Cal 443 (444) : I L R (1940) 1 Cal 323 : 191 Ind Cas 52, *Srilal Singhania* v. *Anant Lal.* (Pronote executed at *A* but payable at *B*—On last date of limitation Court at *A* open but at *B* closed for vacation — Suit instituted at *B* on re-opening day—Suit held within time.)

('38) 25 AIR 1938 Bom 209 (209) : 175 Ind Cas 221, *Veerappa Channappa* v. *Iratappa Malagi.* (Decree transferred to Collector for execution — Limitation for application to set aside execution sale expiring on day when Civil Court was closed but Collector's Court was open—Application made to Civil Court after it opened is in time — Order 21, R. 91A, C. P. C. (Bombay Amendment) does not compel him to apply to the Collector.)

Note 14

1. **('27) 14 AIR 1927 Bom 480 (481):103 Ind Cas 540:51 Bom 848 (DB),** *Dharamsi Morarji Chemical Co., Ltd.* v. *Occhavlal Hargovandas.*

2. **('21) 8 AIR 1921 Mad 654 (655) : 44 Mad 817:63 Ind Cas 924 (DB),** *Ummathu* v. *Pathumma.*

3. **('69) 6 Bom H C R A C J 254 (256),** *Nandvallabh* v. *Alibhai.* (Plaint was presented to a karkun left in charge of a Court during vacation.)

('23) 10 AIR 1923 Pat 150 (151) : 71 Ind Cas 426 : 2 Pat 264, *Anand Ram Pranhans* v. *Ramgulam Sahu.* (Appeal presented to officer not authorized to receive papers.)

4. **(1900) 1900 Pun L R No. 138,** *Kaim Din* v. *Nihal Singh.*

of the Civil Procedure Code, it shall have the same effect as if the full stamp had been paid in the first instance.[5]

A memorandum of appeal must, under O. 41, R. 1, sub-rule (1) of the Civil Procedure Code be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. A memorandum of appeal not so accompanied is not a valid appeal. (See Note 6 to S. 3.)

An appeal otherwise properly presented will not be too late, simply because it was presented after the hour fixed by the Judge for the reception of papers; for, a Judge is not empowered to assign by rule certain hours of the working day to certain kinds of business, so as to deprive a suitor of any portion of the period within which he is entitled by law to do a particular act.[6]

15. "Day that the Court re-opens." — "Day" here means the day on which the Court *actually* re-opens. Where the period of limitation prescribed for an application expired during the vacation and the Court re-opened on the 18th November 1903, but the application was made on the 19th November 1903, for that was according to the rules of practice the day for motions, it was held that the re-opening day was the day on which the Court *actually* re-opened, and not the first day after re-opening on which the Court in the ordinary course took motions.[1] Where, however, the period of limitation prescribed for filing an application for the substitution of the heirs of a deceased appellant expired during Easter holidays and the office of the Court re-opened on 3rd April 1937 but the application was made on the 5th April 1937 which was the first date on which the Registrar was sitting, it was held that the application was within time as it had to be moved before the Registrar.[2]

16. Fact of the Court having been closed, whether should be mentioned in the pleading. — Where the period of limitation for a suit expired on a Gazetted holiday and the plaint was presented on the day the Court re-opened, it was held that it was not necessary for the plaint to state explicitly under O. 7, R. 6 of the Civil Procedure Code, that on the day on which the period of limitation expired, the Court was closed.[1]

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5. ('10) 4 Ind Cas 503 (505, 506) : 32 Mad 305 (FB), *Gavaranga Sahu* v. *Boto Krishna Patro.* (Insufficiently stamped plaint is not *void ab initio.*)

6. ('84) 1884 Pun Re No. 140, *Shivdial* v. *Aladia.*

Note 15

1. ('04) 31 Cal 150 (153) : 8 Cal W N 97, *Hinga Bibee* v. *Munna Bibee.*

2. ('37) 24 AIR 1937 Cal 454 (455):ILR (1937) 2 Cal 612 :174 Ind Cas 1009 (DB), *Khirode Chandra* v. *Ramani Mohan.* (41 C W N 492 followed.)

Note 16

1. ('20) 7 AIR 1920 Nag 200 (202) : 16 Nag L R 198 : 56 Ind Cas 926, *Tek Chand* v. *Mt. Patto.* (Under S. 57 (9), Evidence Act, the Court is bound to take judicial notice of public holidays notified in the Official Gazette.)

('37) 24 AIR 1937 Pesh 41 (41) : 168 Ind Cas 384, *Ghulam Hussain* v. *Ghulam Sarwar.* (Do.)

17. Adjudication of debtor as insolvent on re-opening day — Effect. — Where limitation for a debt expires on a day on which the Court is closed and the debtor is adjudicated insolvent on the day on which the Court re-opens, the debt is one to which the debtor is "subject" at the time of his adjudication, within the meaning of S. 46 (3) of the Presidency Towns Insolvency Act and is provable in the Insolvency Court. The reason is that the creditor could have sued for the debt on the re-opening day under this section.[1]

See also section 3 Note 30.

Extension of period in certain cases.

5.* Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. — The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

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* **Act of 1877 : S. 5, para. 2, and S. 5A.**

Proviso as to appeals and applications for review.

(2) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

5A. Whenever it is shown to the satisfaction of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by an order, or practice, or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor.

Act of 1871 : S. 5 (b).

Proviso as to appeals and applications for review.

(b) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

Act of 1859.

No corresponding provision.

Note 17

[1] ('32) 19 AIR 1932 Mad 287 (287) : 55 Mad 630 : 136 Ind Cas 822 (FB), *Fatma Bi v. Nagoor Khan.*

Synopsis

1. History of the section.
2. Scope of the section.
3. Section applies to appeals and certain specified applications.
4. Section applies only to matters for which limitation is prescribed by this Act.
5. Applicability to cases arising under Court-fees Act.
6. "Sufficient cause."
7. Exercise of discretion, when sufficient cause shown — General principles.
8. Reasonable diligence in prosecution of proceeding.
9. Existence of circumstances contemplated by section 14.
10. Negligence of party.
11. Negligence of party's agent.
12. Mistake of fact of party or his agent.
13. Mistake of law of party or his agent.
14. Amendment of decree.
15. Illness of party.
16. Minority, if sufficient cause.
17. Fraud.
18. Poverty or want of funds.
19. Subsequent decisions altering law.
20. Imprisonment of party.
21. Non-availability of court-fee stamps.
22. Mistake of Court or its officers — Explanation.
23. Discovery of fresh evidence.
24. Party misled by declaration as to holidays.
25. Party being a woman or a pardanashin lady.
26. Party being Government or body corporate.
27. Importance of matter.
28. Being engaged in important litigation.
29. Application for leave to appeal in forma pauperis.
30. Application in revision treated as appeal.
31. Two appeals against same decree—One decree copy filed.
32. Failure of Court of Wards to file proceeding, if sufficient cause.
33. Delay in filing copy of first Court's judgment in second appeal, or the copy of the judgment in review.
34. Unforeseen circumstances causing delay.
35. Other cases of delay.
36. Admission ex parte — Right of other person to re-open it.
37. Burden of proof.
38. Exercise of discretion, when binding on appeal.
39. Order under section 5, if open to revision.
40. Question of exercising discretion, when arises.
41. Order under section 5 must give reasons.
42. Valuation of application under section 5.
43. Formal application, if necessary.
44. Order under section 5, if "judgment" within the meaning of the Letters Patent.
45. Order under section 5, whether one "passed on appeal."
46. Section 5 and Madras High Court Original Side Rules, Rule 356.
47. Appeal on behalf of or against dead person.

Other Topics (miscellaneous)

Applicability to applications under Provincial Insolvency Act. See Note 4.

Applicability to cases under Companies Act. See Note 4.

Applicability to criminal appeals. See Note 3.

Applicability to special or local laws. See Note 4.

Defective vakalatnama. See Note 12.

Duty of appellant. See Notes 7, 8 and 37.

Duty of Court. See Note 7.

Judgment not pronounced in open Court and notice of judgment not given. See Note 22.

Mistake or negligence of counsel or his clerk. See Notes 11, 12 and 13.

Only admission—Not granting or allowing application or appeal. See Note 2.

Proceedings in wrong Court through *bona fide* mistake. See Note 9.

Reasonable diligence antecedent to cause for delay — Whether party bound to show. See Note 8.

Sudden accident. See Notes 8, 15 and 34.

Sufficient cause — Question of law or fact. See Notes 6 and 38.

Unsuccessful proceedings. See Note 9.

Wrong proceedings in good faith and not in good faith. See Note 9.

Section 5
Note 1

1. History of the section.

Before the Act of 1859 —

There was a provision in Bengal Regulation, XXVI of 1814, that a petition for review should be presented within three calendar months, provided that if the parties preferring the same should be able to show just and reasonable cause for not having preferred it within the time limited, such review should be allowed.[1]

Act of 1859 —

The Limitation Act of 1859 provided limitation only for suits and not for appeals or applications for review. But under the Code of Civil Procedure (Act VIII of 1859) limitation was provided for such proceedings with a proviso that the Court may extend the period under certain circumstances. Section 333 of the Code provided as follows:

> "Appeals shall be made in the form of a memorandum which shall be presented to the appellate Court within the period hereinafter specified, unless the appellant shall show sufficient cause to the satisfaction of the appellate Court for not having presented it within such limited period."

And section 377 provided as follows:

> "An application for review of judgment shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period."[2]

Acts of 1871 and 1877 —

The provisions for limitation as to appeals and applications for review which occurred in the Code of Civil Procedure, 1859, were incorporated in these Acts, and S. 5 thereof corresponding to this section ran as follows:

> "Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period."

The section did not refer to applications for leave to appeal, and it was held that such applications could not be treated as "appeals" within the meaning of that section.[3] The section did not also contain

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Section 5 — Note 1

[1] *See* (1857-59) 7 Moo Ind App 283 (305) : 3 Suth W R 45 : 1 Suther 325 : 1 Sar 645 (PC), *Maharajah Moheshur Singh* v. *The Bengal Government.*

[2] *See* ('66) 2 Bom H C R 270 (274), *Edalji Shapurji* v. *Tulsidas Sundardas.*

[3] ('79) 2 Mad 230 (231) : 3 Ind Jur 452 (DB), *Lakshmi* v. *Ananta Shanbaga.* (In the Act it was intended to draw clear distinction between *applications* and *appeals.*)
('03) 30 Cal 790 (793) : 8 Cal W N 906, *Sarat Chandra Dey* v. *Brojeshwari Dassi.*
('89) 12 All 79 (83) : 1890 All W N 25 (FB), *Parbati* v. *Bhola.*
('81) 1881 All W N 130 (130) (DB), *Ganga Gir* v. *Balwant Gir.*
('98) 1898 All W N 80 (80) (DB), *In the matter of Anthoney Derridon.*
[*See also* ('90) 12 All 461 (487): 1830 All W N 149 (FB), *Bechi* v. *Ahsanullah.*
('92) 15 All 14 (19) : 1892 All W N 152 (DB), *In re Sita Ram Kesho.* (Leave to appeal to Privy Council.)
('06) 28 All 391 (393) : 1906 All W N 55 : 3 All L Jour 165 (DB), *Shib Singh* v. *Gandharp Singh.* (Do.)
('95) 19 Bom 301 (302) (DB), *Moroba Ramchandra* v. *Ghanasham Nilkant* (Do.)]

any provision corresponding to the explanation in the present section. But in the year 1892 by the Amending Act VI of that year a new S. 5A was inserted, which corresponded to the present explanation.

Act of 1908 —

The section was enlarged so as to include within its scope, applications for leave to appeal, and also any other application to which it may be made applicable "by any enactment or rule for the time being in force." The section was amended by Act X of 1922 by substituting the words "by or under any enactment" for the words "by any enactment or rule."

2. Scope of the section. — The general rule is that every suit instituted, appeal preferred or application made after the period prescribed therefor by the first schedule *shall* be dismissed (S. 3). This section is one of the provisions to which the general rule is subject, and provides for the extension of time in the case of appeals and certain specified applications under the circumstances referred to in it, namely, that the appellant or applicant, as the case may be, satisfies the Court that he had "sufficient cause" for not filing the proceeding within the period prescribed.

But mere proof of the existence of sufficient cause for not filing the proceeding within the prescribed period does not, under the section, *ipso facto* compel the Court to extend the time. The Court has a *discretion* to admit or refuse to admit the proceeding, even if sufficient cause is shown, as is made clear by the words "may be admitted." In *Brij Indar Singh* v. *Lala Kanshi Ram,*[1] their Lordships of the Privy Council quoted with approval the observations of Plowden, J., in *Karm Baksh* v. *Daulat Ram*[2] to the following effect :

> "All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown, the Court may in its discretion, which is, of course, a judicial and not an arbitrary discretion, admit the appeal."

The existence of sufficient cause for not filing the proceeding in time is thus merely a *condition* that must be satisfied before the Court can exercise its power of granting or refusing to grant the extension of time.[3] If the condition is not satisfied, there is no room for the applicability of the power to excuse delay. Thus, where no cause has, at all, been shown, that is, where no explanation has been given for filing the proceeding out of time, there arises no opportunity of considering the sufficiency or otherwise of the reasons for that fact, and there cannot be any room for the exercise of the discretion given by the section.[4] If the condition is satisfied, then the Court gets a discre-

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Note 2

[1] ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

[2] ('88) 1888 Pun Re No. 183 (FB).

[3] ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Kanshi Ram.*

[4] ('14) 1 AIR 1914 All 521 (523) : 25 Ind Cas 30, *Dewan* v. *Buddhu.*
('20) 7 AIR 1920 Cal 207 (208): 56 Ind Cas 551 (DB), *Abdul Sheikh* v. *Md. Ayab.*

tionary power to grant or refuse the prayer for extension of time.[5] It may in its discretion *refuse* to extend the time even though there may be sufficient cause for the delay.[6] The extension of time is thus a matter of *concession or indulgence* to the applicant and cannot be claimed by him as a *matter of absolute right.*[7] The principles guiding the exercise of this indulgence or discretion are discussed in the subsequent Notes.

The section deals only with the *admission* of appeals and applications after time. But to *admit* an appeal or application is not to

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('19) 6 AIR 1919 Cal 958 (959) : 47 Ind Cas 677 (DB), *Prosunno Kumar Baidya v. Ram Chandra De.*

('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas v. The Manager, Encumbered Estates.*

('25) 12 AIR 1925 Oudh 371 (372) : 28 Oudh Cas 378 : 86 Ind Cas 270, *Mumtaz Ali v. Ugraj Singh.*

('33) 20 AIR 1933 Pat 134 (135) : 142 Ind Cas 599, *Munshi v. Bansropan.*

('30) 17 AIR 1930 Cal 422 (424) : 57 Cal 148 : 124 Ind Cas 817 (DB), *Janakinath Singha v. Nirodbaran Ray.*

('25) 12 AIR 1925 Cal 735 (736) : 52 Cal 342 : 89 Ind Cas 277 (DB), *Kamruddin Hyder v. M. N. Mitter.*

('69) 11 Suth W R 22 (22) : 5 Beng L R A C 318 (Note) (DB), *Mahomed Gazee Chowdhury v. Doollub Bebee.* (9 Suth W R 181 followed.)

('77) 1877 Bom P J 188 (188), *Damodharrav v. Krishnarav.* (2 Ind App 58 followed.)

('74) 2 Ind App 58 (68, 69) : 14 Beng L R 373 : 3 Sar 437 (PC), *Luchmun Singh v. Shunshere Singh.* (8 Suth W R 184 approved.)

(1864) 1864 Suth W R (Gap) 287 (287) (DB), *Gossie Doss v. Narain Das.*

(1864) 1864 Suth W R (Gap) 91 (92) (DB), *Kasheenath Roy v. Luckeenarain.*

('75) 24 Suth W R 294 (294) (DB), *Gour Pershad v. Anjub Ali.*

('72) 18 Suth W R 286 (286) (DB), *Sreenath Choudhry v. Kritato Moyee.*

('72) 17 Suth W R 230 (231) (DB), *Jhubhoo Sahoo v. Mt. Jusoda Kooer.*

('70) 13 Suth W R 33 (33) (DB), *Assur Ali v. Woolfutoonissa.*

('12) 17 Ind Cas 99 (100) (Cal) (DB), *Hem Chandra Bakshi v. Jadub Chandra.*

('69) 12 Suth W R 94 (95) (DB), *Kristo Gobind Joardar v. Jugobundhoo Sircar.* (Admission without reference to sufficient cause for delay is without jurisdiction.)

('84) 1884 All W N 330 (331) (DB), *Kuber Singh v. Fateh Singh.*

('76) 1876 Pun Re No. 114, *Hyat v. Rahim-ud-din.*

('76) 1876 Pun Re No. 101 (FB), *Mt. Fatto v. Lashkar Khan.*

[*See also* ('69) 11 Suth W R 130 (131) : 2 Beng L R App 35 (DB), *Omra Nushyo v. Gugun Sootur.*

('25) 12 AIR 1925 Mad 709 (709) : 88 Ind Cas 278 (DB), *Janakiramayya v. Brahmayya.*

('31) 18 AIR 1931 Nag 101 (101, 102) : 122 Ind Cas 257, *Mahadya v. Emperor.* (No cause for delay was even alleged.)

('17) 4 AIR 1917 Lah 436 (437) : 41 Ind Cas 918 : 1917 Pun Re No. 67, *Dhanpat Mal v. Mela Mal.* (Copy of judgment filed after expiry of limitation.)]

[5] ('38) 25 AIR 1938 Bom 408 (409) : ILR (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram.*

('38) 25 AIR 1938 Pat 413 (421) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy v. Trigunand.*

('24) 11 AIR 1924 Bom 399 (404) : 48 Bom 442 : 80 Ind Cas 862 (SB), *Nagindas Motilal v. Nilaji Moroba.*

('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale v. Maung Tun Win.*

[*See* ('15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Mg. Tun U v. Palaniappa Chetty.*]

[6] ('35) 22 AIR 1935 All 620 (624) : 57 All 983 : 157 Ind Cas 347 (FB), *Mt. Shamzadi Begum v. Alakh Nath.*

[*See also* ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Lala Kanshi Ram.*]

[7] ('35) 22 AIR 1935 All 620 (624) : 57 All 983 : 157 I. C. 347 (FB), *Mt. Shamzadi Begum v. Alakh Nath.*

('19) 6 AIR 1919 Cal 958 (959) : 47 I. C. 677, *Prosunno Kumar v. Ram Chandra.*

grant or allow the appeal or application in favour of the appellant or applicant.[8] To admit the proceeding is merely to entertain it and not dismiss it as barred by limitation. It has been held by the Lahore High Court that this section only applies to the original institution of an appeal and not to the addition of parties to an appeal already instituted and that when a person is sought to be added as a party to an appeal after the period of limitation for an appeal against him has expired, this section cannot be made use of to excuse the delay.[9]

3. Section applies to appeals and certain specified applications. — The section applies only to —

1. Appeals,
2. Application for review of judgment,
3. Application for leave to appeal,
4. Any other application to which this section is made applicable by or under any enactment for the time being in force.

An application not falling within the above classes cannot be entertained after the period prescribed therefor. See the cases cited below.[1]

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[8] (1857-59) 7 Moo Ind App 283 (305, 306) : 3 Suth W R 45 : 1 Suther 325 : 1 Sar 645 (PC), *Maharajah Moheshur Singh* v. *The Bengal Government.*

[9] ('40) 27 AIR 1940 Lah 314 (315) : 190 Ind Cas 332, *Shangara Singh* v. *Imam Din.* (Following A I R 1938 Lah 35.)

Note 3

[1] **Does not apply to —**

Suits.

('25) 12 AIR 1925 Oudh 369 (369) : 87 Ind Cas 17, *Ram Pher* v. *Ajudhia.* (Pre-emption suit.)

('34) 21 AIR 1934 Nag 145 (146) : 30 Nag L R 294 : 149 Ind Cas 956, *Model Mills, Nagpur Ltd.* v. *Hiralal Ramgopal.* (Suit for damages for breach of contract — Time between return of plaint and its presentation to proper Court prayed to be excluded—*Held* section inapplicable.)

('19) 6 AIR 1919 Lah 25 (26) : 52 Ind Cas 587 : 1919 Pun Re No. 86 (DB), *Mt. Hussain Bibi* v. *Hakim.* (Pre-emption suit—One of several vendees dying before institution of suit — Legal representative brought on record after limitation — Section held inapplicable.)

Application under Order 9, Rule 4, C. P. C.

('29) 16 AIR 1929 All 127 (128) : 51 All 487 : 113 Ind Cas 767, *Kali Prasad Tewari* v. *Parmeshwar Prasad Marwari.*

('28) 15 AIR 1928 Mad 556 (557) : 110 Ind Cas 47, *Veerayya* v. *Sreesalam.*

('33) 20 AIR 1933 Pat 557 (558) : 147 Ind Cas 179, *E. C. D'Cruz* v. *Mrs. L. T. Pitts.*

Application under O. 9 R. 9, C. P. C., (except in Bombay).

('31) 18 AIR 1931 Cal 319 (320) : 129 Ind Cas 778, *Madha Ram* v. *Mt. Tupoo Rubhani.*

('02) 1902 Pun Re No. 83, *Sahib Ditta* v. *Roda.*

[*See* ('79) 1879 Pun Re No. 141, *Mahi* v. *Jiwan.*]

Application under Order 9, Rule 13, C. P. C.

('20) 7 AIR 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi* v. *Amar Nath.*

('27) 14 AIR 1927 Lah 342 (343) : 100 Ind Cas 936, *Pal Singh* v. *Harnam Singh.*

('22) 9 AIR 1922 Lah 266 (266) : 66 Ind Cas 270, *Khairati* v. *Umar Din.*

('23) 10 AIR 1923 All 319 (320) : 45 All 332 : 84 Ind Cas 538, *S. T. Gadre* v. *Brijnandan Saran.*

('16) 3 AIR 1916 Cal 651 (652): 29 Ind Cas 476 (DB), *Tara Sankar* v. *Nasaruddi.*

('33) 20 AIR 1933 Rang 110 (111) : 144 Ind Cas 980, *Ramanathan Chettiar* v. *Baldeo Singh.*

('10) 6 Ind Cas 901 (902) (Bom), *Abdool Hoosein* v. *Esmailji Abdool Hossein.*

('10) 8 Ind Cas 616 (618) (Bom), *Sharaksha Rattonji* v. *Hugh Hogarth.*

('25) 12 AIR 1925 Rang 187 (188) : 2 Rang 655 : 85 Ind Cas 324, *Ma Naw* v. *Somasundaram.*

('35) 22 AIR 1935 Rang 466 (471) : 13 Rang 595 : 159 Ind Cas 945 (DB), *K. P. L. S. S. Chettiar* v. *Official Receiver, Ramnad.*

('25) 12 AIR 1925 Oudh 446 (446) : 89 Ind Cas 482, *Mt. Sitaba* v. *Mata Din.*

See also Article 164 Note 9.

Application for execution.

('41) 28 AIR 1941 Rang 56 (57) : 1940 Rang L R 725 : 193 Ind Cas 318 (DB), *Subramanian Chettiar* v. *L. N. Chettiar Firm.*

('32) 19 AIR 1932 All 601 (602) : 138 Ind Cas 692 (DB), *Sukhnandan Singh* v. *Mt. Ramdeyi Kunwar.*

('26) 13 AIR 1926 All 345 (345) : 93 I. C. 292, *Ram Raj Dassundhi* v. *Mt. Umraji.*

('18) 5 AIR 1918 All 401 (402) : 45 Ind Cas 531, *Sundar Lal* v. *Banarasi Das.*

('14) 1 AIR 1914 Cal 691 (691) : 23 Ind Cas 240 (DB), *Shekambari* v. *Ram Kumar.*

('17) 4 AIR 1917 Pat 132 (132, 133) : 44 Ind Cas 570 (DB), *Mindnapore Zamindari Co.* v. *Deputy Commissioner of Manbhum.*

Application to set aside execution sale.

('39) 26 AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452 : 184 Ind Cas 453, *Amal Chandra* v. *Ram Swarup.*

('19) 6 AIR 1919 Lah 422 (422) : 50 Ind Cas 610, *Asa Nand* v. *Jhangi Ram.*

('19) 6 AIR 1919 Lah 152 (154) : 51 Ind Cas 447, *Bashi Ram* v. *Hassan Muhammad.*

('34) 21 AIR 1934 All 314 (314) : 151 Ind Cas 244 (DB), *Narotam Das* v. *Bhagwan.*

('25) 12 AIR 1925 Oudh 411 (412) : 87 Ind Cas 722, *Ram Autar* v. *Sheo Piary Lal.*

('34) 21 AIR 1934 Pesh 25 (26) : 148 I. C. 1082, *Bhag Chand* v. *Mt. Najab Sultan.*

('26) 92 Ind Cas 839 (839) (Lah), *Umrao Singh* v. *Beni Pershad Mehr Chand.*

Application under O. 21, R. 2, C. P. C.

('39) 26 AIR 1939 Mad 163 (164) : 180 Ind Cas 437, *Kailasa Padayachi* v. *Duraiappa Kachirayar.*

Application under O. 21, R. 95, C P. C.

('32) 19 AIR 1932 Cal 75 (76) : 134 Ind Cas 1188 (DB), *Anarjan Bibi* v. *Chandramani Shaha.* (Reversed on another point in A I R 1934 P C 134.)

See also Article 180, Note 5.

Application to bring legal representative on record.

('22) 9 AIR 1922 Lah 131 (131) : 65 Ind Cas 121 (DB), *Shah Muhammad* v. *Choudhri Karam Ilahi.*

('14) 1 AIR 1914 All 94 (95) : 36 All 243 : 25 Ind Cas 48 (DB), *Secretary of State* v. *Jawahir Lal.*

See also Article 177 Note 7.

Application under O. 41, R. 20, C. P. C.

('38) 25 AIR 1938 Lah 35 (37) : I L R (1937) Lah 746 : 175 Ind Cas 819 (DB), *Hayat* v. *Mutalli.*

Application for final decree.

('35) 22 AIR 1935 P C 85 (88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC), *Maqbul Ahmad* v. *Onkar Partab Narain Singh.* (Execution of preliminary decree in mortgage suit dismissed—Subsequent application for final decree for sale—Execution period cannot be excluded.)

Application for leave to defend summary suit.

(1900) 5 Cal W N 259 (262), *Quazie Mahumdar Rohman* v. *Sarat Chandra Dutt.*

Application governed by Article 168, Limitation Act.

('33) 20 AIR 1933 Rang 96 (98) : 142 I. C. 185 (DB), *Ma Sein* v. *S. T. R. M. Firm.*

('25) 91 Ind Cas 168 (169) (Lah) (DB), *Devi Das* v. *Anant Ram.* (Court cannot exercise its inherent powers as that would be tantamount to overriding express statutory provisions.)

('89) 1889 All W N 151 (151) (DB), *Bhundar Tewari* v. *Thakur Tewari.*

Application to set aside award.

('14) 1 AIR 1914 Cal 723 (724) : 17 Ind Cas 7 (DB), *Surya Narain* v. *Banwari.*

('27) 14 AIR 1927 Lah 273 (273) : 8 Lah 274 : 100 Ind Cas 955, *Devi Ditta* v. *Babu Ram.*

Application under Schedule II Paragraph 20, C. P. C.

('15) 2 AIR 1915 All 369 (371) : 38 All 85 : 31 Ind Cas 899 (DB), *Ram Ugrah Pande* v. *Achraj Nath Pande.*

Application for leave to appeal :

The words "leave to appeal" are wide enough to include leave to appeal as a pauper.[2] The contrary view[3] is, it is submitted, not correct as it seems to unduly curtail the meaning of the words "leave to appeal." The section applies to an application for leave to appeal under S. 449 (c) of the Criminal Procedure Code.[4]

"Any other application to which . . . . . . in force":

The following are examples of applications to which this section has been made applicable by other enactments :

1. Application under O. 9 R. 4, Civil Procedure Code, in Bombay.
2. Application under O. 9 R. 13, Civil Procedure Code, in Bombay, Madras[5] and Nagpur.
3. Application under O. 9 R. 9, Civil Procedure Code, in Bombay.[6]
4. Application under O. 22 R. 9, Civil Procedure Code.[7] (See O. 22, R. 9 sub-r. (3).)

4. Section applies only to matters for which limitation is prescribed by this Act. — Section 29 shows that this section does not apply to periods of limitation prescribed by any special or local law different from that prescribed by this Act. Thus, it has been held that this section cannot be applied for the purpose of extending time for applications under S. 18 of the Rangoon Rent Act,[1] or under the Registration Act,[2] or under S. 17 of the Press Act of 1910,[3] or under S. 108 of the Oudh Rent Act,[4] or under the Burma Courts Act,[5] or under the Martial Law Ordinance, I of 1922.[6] Similarly, the period of limitation prescribed by the rules of the High Court for Letters Patent appeals cannot be extended by applying the provisions of this section if there is no power under the said rules to extend it.[7] See also the undermentioned cases.[8]

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[2] ('28) 15 AIR 1928 All 499 (499) : 111 Ind Cas 655 (DB), *Ram Charan* v. *Banshidar.* (A I R 1915 All 310 distinguished.)

[3] ('40) 186 Ind Cas 161 (161) : 15 Luck 390 (DB), *Ram Pheran* v. *Sri Ram.*
('27) 14 AIR 1927 Nag 197 (198): 101 I. C. 320, *Sabuddin* v. *Pundlik.* (Following 30 Cal 790 which was decided under the old Act. In view of amended section this decision cannot be supported.)

[4] ('27) 14 AIR 1927 Cal 307 (309) : 54 Cal 52 : 101 Ind Cas 657 (DB), *Gallagher* v. *Emperor.*

[5] ('17) 4 AIR 1917 Mad 957 (957) : 32 Ind Cas 975, *Sennimalai Goundan* v. *Palani Goundan.*
('25) 12 AIR 1925 Mad 14 (17) : 80 Ind Cas 877 : 47 Mad 824 (FB), *Krishnamachariar* v. *Sri Rengammal.*
('22) 9 AIR 1922 Mad 186 (187) : 45 Mad 628 : 66 Ind Cas 104 (DB), *Sudalaimuthu Kudumban* v. *Andi Reddiar.* (Full amount of decree not paid within time—Court can excuse delay.)
See also Article 164 Note 9.

[6] ('29) 16 AIR 1929 Bom 262 (263, 264) : 53 Bom 453 : 122 Ind Cas 76 (DB), *Pandarinath Kikalal* v. *Thakoredas Shankardas.*

[7] ('40) 1940 All W R (CC) 120 (120), *Bhagwan Din* v. *Muru.*
('39) 26 AIR 1939 All 717 (718, 719) : I L R (1939) All 892 : 185 Ind Cas 402 (DB), *Gokaran Singh* v. *Brij Bhukan Singh.*
('39) 26 AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452 : 184 Ind Cas 453, *Amal Chandra* v. *Ram Swarup.*
('20) 7 AIR 1920 All 284 (285) : 42 All 540 : 59 Ind Cas 903, *Lachmi Narain* v. *Muhammad Yusuf.* (C. P. Code, V of 1908, O. 22, R. 9 (3) — Scope of sub-r. (3) is wider than this section.)
('32) 19 AIR 1932 All 459 (460) : 54 All 280 : 135 Ind Cas 159 (DB), *Lakshmi Chand* v. *Behari Lal.* (Ignorance of death of the party in absence of negligence is sufficient cause.)
('32) 19 AIR 1932 All 698 (699) : 143 Ind Cas 35 (DB), *Badri Nath* v. *Raja Ram.*
('28) 15 AIR 1928 Mad 404 (406) : 108 Ind Cas 288, *Ramachandran* v. *Sabapathy Mudaliar.* (Abatement of suit by minor through next friend, his mother — Suit conducted by aged father of next friend — Ignorance of law pleaded as excuse — Delay was excused.)
('22) 9 AIR 1922 Cal 335 (336) : 49 Cal 62 : 67 Ind Cas 917 (DB), *Sarat Chandra Sarkar* v. *Maihar Stone & Lime Co. Ltd.*
('35) 22 AIR 1935 Lah 443 (444), *Budhu Ram* v. *Ali Shah.*
('21) 8 AIR 1921 Mad 650 (651) : 62 I. C. 795 (DB), *Vaithinatha Iyer* v. *Govindaswamy Odayar.* (Pleader's mistake may be sufficient cause to excuse delay.)
('25) 91 Ind Cas 560 (561) (Oudh), *Muhammad Mohsin* v. *Muhammad Abid.*
('38) 25 AIR 1938 Bom 6 (9) : I L R (1938) Bom 64 : 172 Ind Cas 919, *Khodadad Mundegar* v. *Bai Jerbai.*

But, though by virtue of the Limitation Act itself this section does not apply to special or local laws, such special or local laws may expressly or by necessary implication make this section applicable to applications under those laws. Thus, S. 5 has been made applicable to appeals and applications under S. 78 of the Provincial Insolvency Act.[9]

Note 4

[1] ('24) 11 AIR 1924 Rang 377 (377) : 84 I. C. 284 (DB), *F. Mires* v. *R. R. Khan.* (Application to Small Cause Court under S. 18 of Rangoon Rent Act is not appeal.)

[2] ('38) 42 C W N 1174 (1177), *Mafizur Rahman* v. *Jamila Khatun.*
('06) 5 Cal L Jour 188 (191), *Baban Sahai* v. *Uudit Narain.*

[3] ('14) 1 AIR 1914 Lah 8 (9) : 1914 Pun Re Cr No. 16 : 22 Ind Cas 1006 (SB), *Abdul Haq* v. *Emperor.* (Even if Court holds that sufficient cause for delay is established.)

[4] ('01) 4 Oudh Cas 182 (188) (DB), *Raghubar Dayal* v. *Sheo Charan.*

[5] ('72-92) 1872-92 Low Bur Rul 338 (340), *M. Ramasamy Pillai* v. *E. Manuel.*

[6] ('23) 10 AIR 1923 Mad 95 (95): 71 I. C. 217 (DB), *In re Mittoor Moideen Hajee.*

[7] ('28) 15 AIR 1928 All 708 (708) : 50 All 865 : 110 Ind Cas 719, *Baijnath* v. *Doolarey Hajjam.*
[*See also* ('17) 4 AIR 1917 Cal 494 (495) : 34 Ind Cas 584 (DB), *Adwaitya Charan Chowdhuri* v. *Sorajranjan Choudhury.* (The High Court extended the time having regard to the unusual circumstances of the case.)]

[8] ('18) 5 AIR 1918 Mad 213 (216, 218) : 41 Mad 169 : 44 Ind Cas 805 (FB), *Lingayya* v. *Chinnarayana.* (The general provisions of the Limitation Act including S. 5 are not applicable to petitions under the Provincial Insolvency Act of 1907.)
('27) 14 AIR 1927 Pat 333 (334) : 103 Ind Cas 295, *Kristo Singh Sardar* v. *Secretary of State.* (Not applicable to proceedings under Land Acquisition Act.)
('33) 20 AIR 1933 Cal 132 (133) : 60 Cal 618 : 142 I. C. 280 (DB), *Manmathanath* v. *Emperor.* (Does not apply to Bengal Emergency Powers Ordinance of 1931.)
('36) 23 AIR 1936 Cal 388 (388) : 166 Ind Cas 493, *Gajendra Nath Mandal* v. *Kunja Behari Mistri.* (Does not apply to application under Bengal Tenancy Act VIII of 1885, S. 26F.)
('36) 23 AIR 1936 Cal 343 (346) : 63 Cal 1079 : 166 I. C. 641, *Gadadhar Sarkhel* v. *Gopal Chandra Das* (Do—*Obiter.*)
('33) 20 AIR 1933 Cal 124 (125, 126) : 60 Cal 571 : 143 Ind Cas 802 (DB), *Nil Ratan Ganguli* v. *Emperor.* (Does not apply to Ordinance II of 1932.)
('26) 13 AIR 1926 Mad 657 (658) : 49 Mad 419 : 93 I. C. 341 (DB), *Ahmed Koya* v. *Aisamma.* (The Limitation Act does not apply to periods prescribed by the Laccadive Islands and Minicoy Regulation I of 1912.)
('37) 24 AIR 1937 Lah 876 (876) : ILR (1938) Lah 229 : 176 Ind Cas 171 (DB), *Merchants Mohini Flour Mills Ltd.* v. *Commissioner of Income-tax.* (Does not apply to applications under S. 66, Income-tax Act.)

[9] ('39) 26 AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452 : 184 I. C. 453, *Amal Chandra* v. *Ram Swarup.*
('34) 21 AIR 1934 Lah 83 (34) : 149 I. C. 935, *Mangat Rai* v. *Lala Mohan Lal.*
('24) 11 AIR 1924 Mad 400 (400): 80 I.C. 376, *Karuthian Chettiar* v. *Raman Chetty.*
('24) 11 AIR 1924 Mad 345 (346) : 47 Mad 673 : 79 Ind Cas 395 (DB), *Ananthanarayana Iyer* v. *Ramasubba Iyer.*
('37) 24 AIR 1937 Rang 283 (283, 284) : 172 Ind Cas 253 (DB), *U Tha Yun* v. *Messrs. Sobhraj & Sons.*

It may be noted that an insolvency *petition* is not an "application" for the purpose of extending time under S. 5 as provided by S. 78.[10] Section 5 has been held to apply by implication to cases arising under the Indian Companies Act.[11]

5. Applicability to cases arising under Court-fees Act. —This section has no application to cases under the Court-fees Act, 1870, under which a review application presented on or after the ninetieth day of the judgment must be stamped with the full court-fee leviable on the plaint. Thus, where a review application is filed on the ninetieth day because the eightyninth day was a holiday, full stamp cannot be excused by any reference to section 5.[1]

6. "Sufficient cause." — As has been seen in Note 2, the existence of sufficient cause is a condition precedent for the exercise of the discretion under this section. The expression "sufficient cause" is not defined but it has been held that it must mean a cause which is *beyond the control of the party invoking the aid of the section.*[1] A cause for delay which, by due care and attention, the party *could have avoided* cannot be a "sufficient cause."[2] The test, therefore, whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention : in other words, whether it is a *bona fide* cause, inasmuch as nothing shall be deemed to be done *bona fide* or in good faith which is not done with due care and attention.[3] Subject to the above test, the words "sufficient cause" should receive a liberal construction so as to advance substantial justice. The leading case on the point is *Krishna* v. *Chathappan*,[4] decided by the High Court of Madras in the year 1889. Their Lordships observed that the words "sufficient cause" should receive "a liberal construction so as to advance substantial justice when *no negligence, nor inaction, nor want of bona fides is imputable to the appellant.*" And this view has been generally followed.[5]

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[10] ('32) 19 AIR 1932 Mad 112 (114) : 135 Ind Cas 613, *Vaithinatha Aiyer* v. *Vaithinatha Aiyar.*
('28) 15 AIR 1928 Sind 177 (178) : 112 Ind Cas 646 (DB), *Bulomal Variomal* v. *Sumar Khan.*
('32) 19 AIR 1932 Mad 352 (356) : 55 Mad 766 : 137 Ind Cas 740 (DB), *Gangjee Premjee & Co.* v. *O. L. K. K. N. Firm, Colombo.*
('23) 10 AIR 1923 Mad 462 (463) : 72 Ind Cas 488 (DB), *Aiyapparaju* v. *Venkatakrishnayya.*
[*See also* ('30) 17 AIR 1930 Lah 417 (418) : 127 I. C. 215 (DB), *Hazara Singh* v. *Ditta Ram.* (Doubting.)]

[11] ('29) 16 AIR 1929 Nag 185 (189) : 116 Ind Cas 427 (DB), *Kawdu* v. *Berar Ginning Co. Ltd., Akot.*

Note 5

[1] ('12) 15 Ind Cas 455 (456, 457) (Cal) (DB), *Sayera Bibi* v. *Bhutnath Haldar.*
('79) 1879 Pun Re No. 39, *Ruldu Mal* v. *Sobha.*

Note 6

[1] ('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 I. C. 338 (DB), *Bhairon Ghulam* v. *Ram Autar Singh.* (Appellant's failure to obtain and file copy of judgment — Cause beyond control, not shown—*Held*, extension could not be granted.)

[2] *See* ('38) 25 AIR 1938 Bom 408 (410) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.* (Want of care and attention or want of due diligence negatives the existence of sufficient cause.)

[3] ('40) 27 AIR 1940 Rang 14 (16) : 1939 Rang L R 639 : 186 Ind Cas 715, *Firm R. M. A. L.* v. *Ko Shan.* (In considering what is "sufficient cause" within the meaning of S. 5, the good faith with which a person must be shown to have acted will appropriately be taken to mean that variety which presupposes due care and attention rather than mere "honesty.")
See Section 2 sub-section (7).

In *Kichilippa* v. *Ramanujam*,[6] the same High Court observed :

> " 'Sufficient cause' is evidently something more than 'legally sufficient' or 'sufficient according to the rules laid down in the law of limitation' ; for, if any case fell within these rules it would be governed thereby as in the case of suits, and there would be no scope for the application of S. 5. 'Sufficient cause' seems to mean not only those circumstances (such as the Courts being closed, or time being spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time, but also such circumstances as are not expressly recognized but which may appear to the Court to be reasonable looking to all the facts of the case."

The question of the existence of 'sufficient cause' is thus one of fact to be decided from the facts and circumstances of the particular case.[7] The various circumstances, which may or may not amount to sufficient cause, have been discussed and illustrated in the Notes below.

7. Exercise of discretion, when sufficient cause shown —General principles.—It has been seen in Note 2 that the existence of a "sufficient cause" for the delay is only a *condition* which must exist before the power to exercise the discretion under this section comes into play, and that it is not enough merely to show the existence

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4. ('89) 13 Mad 269 (271) (FB). (Error in law can be sufficient cause within meaning of this section.)

5. ('38) 25 AIR 1938 Bom 408 (409) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.*
('11) 12 Ind Cas 677 (678, 679) (Cal) (DB), *Sundar Koer* v. *Raghunath Sahai.*
('07) 9 Bom L R 893 (894) (FB), *Emperor* v. *Shiva Adar.* (Delay in filing of appeal ought not to be excused unless there are special circumstances.)
('96) 11 C P L R 3 (4), *Gopal Modi* v. *Mt. Ganga.* (Decree — Judgment-debtor applying for permission to appeal in *forma pauperis* — Application dismissed — Fresh appeal on payment of court-fees but after period of limitation had expired, was allowed.)
('13) 19 Ind Cas 931 (932, 933) (Cal) (DB), *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh.* (*Bona fide* mistake committed by pleader in calculating period of limitation, in consequence of which appeal is filed out of time, may constitute sufficient cause.)
('09) 1 Ind Cas 73 (76) (Mad) (DB), *Krishnaswamy Panikundar* v. *Ramasamy Chettiar.* (Want of funds or entrusting work to incompetent agent is not "sufficient cause.")
('01) 4 Oudh Cas 372 (373), *Jang Bahadur Singh* v. *Raghuraj Singh.*
('97) 19 All 348 (351) : 1897 All W N 86 (FB), *Brij Mohan Das* v. *Mannu Bibi.*
('15) 2 AIR 1915 All 459 (460) : 31 I. C 876, *Gurprasad Singh* v. *Ram Samajh Singh.* (Memorandum of appeal unaccompanied by copy of decree appealed against but accompanied by a copy of decree in connected case where whole procedure of appellant was too slack—*Held*, this section did not apply.)
('18) 5 AIR 1918 All 229 (232) : 43 Ind Cas 490 : 40 All 68, *Khurshed Alam Khan* v. *Rahmat Ullah Khan.*

6. ('02) 25 Mad 166 (170, 171) : 11 Mad L Jour 406 (DB).

7. ('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.* (Erroneous advice of pleader cannot always be taken as "sufficient cause.")
('13) 19 Ind Cas 931 (933) (Cal), *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh.*
('08) 12 Cal W N 25 (27, 28) (DB), *Bishendut Tewari* v. *Nandan Pershad.*
('92-96) 1892-96 Upp Bur Rul 452 (453), *Ma Hmon* v. *Ma Shwe Me.*

of "sufficient cause" in order to claim, as of right, that the time should be extended. What then are the limits of this discretion? It is, of course, a general principle of law that whenever a Court is vested with a discretionary power, such discretion must be exercised, not in any arbitrary, vague or fanciful manner, but on *judicial principles.*[1] Adverting to the danger of giving a rigid definition of these principles, Bowen, L. J., in *In re Manchester Economic Building Society,*[2] observed as follows :

> "It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances, and in a defined way, would be very perilous. The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and the discretion ought to be exercised upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case, otherwise there is great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the rules of the Court have, for the best of all reasons, left undetermined and unfettered."

See also the undermentioned cases[3] expressing the same view.

But, without *defining* the principles there may be *general rules* of guidance laid down for the exercise of the discretion.[3a] In *Brij Indar Singh* v. *Lala Kanshi Ram,*[4] Lord Dunedin in delivering the judgment of the Privy Council observed as follows :

> "The learned Judge says that each case depends upon its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There

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Note 7

[1] ('38) 25 AIR 1938 Bom 408 (409) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.*
('38) 25 AIR 1938 Pat 413 (417, 421) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand.*
('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale* v. *Maung Tun Win.* (Discretion must be based on materials judicially cognizable.)
('14) 1 AIR 1914 Upp Bur 49 (50): 27 Ind Cas 967, *Nga Po Kan* v. *Nga Shwe Dat.* (Discretion when applied to a Court of law means discretion guided by law.)
('26) 13 AIR 1926 Cal 677 (678) : 92 Ind Cas 1031, *Ramdhani Muchi* v. *Khakshardas Tati.*
('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.* (Liberal construction must be with reference to judicial principles having regard to the respondent's side of the question.)
('25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad* v. *Hassomal.*

[2] ('83-84) 32 W R (Eng) 325 (328) : 24 Ch D 488 : 49 L Tim 793.

[3] ('11) 12 Ind Cas 677 (678) (Cal) (DB), *Sunder Koer* v. *Raghunath Sahai.*
('12) 16 Ind Cas 425 (427) (Cal) (DB), *Bonamali Gaontia* v. *Padma Lochan.*
('13) 19 Ind Cas 931 (933) (Cal) (DB), *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh.* (*Bona fide* miscalculation by pleader may constitute 'sufficient cause' having regard to all facts and circumstances of a case.)
('32) 19 AIR 1932 Cal 589 (596) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan Rai* v. *Mohendra Nath Banerjee.*
('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.* (Affirming A I R 1930 Oudh 49.)

[3a] ('32) 19 AIR 1932 Cal 589 (596): 59 Cal 781: 140 Ind Cas 662 (DB), *Surendra Mohan Rai* v. *Mohendra Nath Banerji.*

[4] ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

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may be a general rule as to the exercise of discretion but each case must, nevertheless, be examined as to its own circumstances, to see whether they make it fall within or without the terms of the general rule."

The fundamental rule, which has been universally recognised as the true rule of guidance for the exercise of discretion under the section, is to see whether the party claiming the indulgence *has been reasonably diligent in prosecuting his appeal or application.*[5]

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[5] ('38) 25 AIR 1938 Nag 156 (161) : I L R (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak.* (Period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence.)

('17) 4 AIR 1917 P C 156 (158, 159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Lala Kanshi Ram.*

('25) 12 AIR 1925 Cal 291 (292, 293) : 92 Ind Cas 563 (DB), *Gobind Lal Dutt* v. *Official Assignee of Calcutta.* (High Court decree in favour of *A* and against *B*—*A* not filing requisition for drawing up of decree as per High Court rules—*B*, who could in such a case have filed a requisition, not doing anything — Delay caused in not drawing up the decree cannot be excused.)

('19) 6 AIR 1919 Cal 374 (378) : 52 Ind Cas 582 (DB), *Pramatha Nath Roy* v. *W. A. Lee.* (Per Chitty, J.—No application or steps whatever, towards procuring copy of order appealed from—Appellant cannot be allowed after limitation expires, exclusion of time requisite for 'obtaining copy'.)

('25) 12 AIR 1925 Oudh 371 (372) : 28 Oudh Cas 378 : 86 Ind Cas 270, *Md. Mumtaz Ali Khan* v. *Ugraj Singh.* (Unnecessary laches—No discretion can be exercised in applicant's favour.)

('25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad* v. *Hassomal.*

('24) 11 AIR 1924 Bom 399 (409) : 48 Bom 442 : 80 Ind Cas 862 (DB), *Nagindas Motilal* v. *Nilaji Moroba Naik.* (Applicant's application for leave to appeal to His Majesty in Council was out of time by about a fortnight, owing to legal adviser not knowing recent change in law — *Held* delay should be excused.)

('29) 16 AIR 1929 All 351 (352) : 119 Ind Cas 447, *Lachmi Chand Babu Lal* v. *Unkar Mal Chote Lal.*

('32) 19 AIR 1932 All 459 (460) : 54 All 280 : 135 Ind Cas 159 (DB), *Lakshmichand* v. *Behari Lal.* (Ignorance of death in absence of negligence is sufficient cause for extension.)

('20) 7 AIR 1920 Oudh 42 (43) : 22 Oudh Cas 379 : 55 Ind Cas 837, *Habibullah* v. *Banarsi Das.*

('36) 23 AIR 1936 Oudh 9 (10, 11) : 158 Ind Cas 19, *Gaya Charan Misra* v. *Jagan Nath.* (Appeal filed without copy of decree—Copy not applied for till after filing of appeal—Delay pleaded due to mistake—Delay held not condonable as appellant was not diligent.)

('13) 21 Ind Cas 306 (308) : (1913) 1 U B R 175, *Mi Ein Zi* v. *Mi Ni.* (Appeal filed against deceased person — Application to substitute names of his legal representatives after expiry of time for filing appeal was not allowed.)

('12) 13 Ind Cas 714 (715) (Lah) (DB), *Lal Singh* v. *Pala Singh.* (Plea that appeal is strong on merits is no ground for granting indulgence of this section.)

('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal Ganguli* v. *Dasarathi Mukerjee.* (Question of *bona fides* should be taken into account in proof of "*sufficient cause*".)

('30) 17 AIR 1930 Lah 216 (217) : 11 Lah 111 : 120 Ind Cas 169 (DB), *Mt. Attri* v. *Ramkishan.* (Copies of judgment and decree sent to lawyer for advice lost in transit—New application made on last day of limitation and copies obtained on expiration and appeal filed immediately — Extension under this section was granted.)

('23) 10 AIR 1923 Lah 208 (209) : 79 Ind Cas 812, *Mt. Nazko* v. *Mt. Gopal.* (Laches disentitles party to benefit of this section.)

('27) 14 AIR 1927 Lah 747 (748) : 105 Ind Cas 689 (DB), *Mathra* v. *Ram Singh.* (Last date of limitation was 20th July—Appeal filed on 18th July, but without necessary copy of judgment—Copy of the judgment applied for on 19th July, was delivered to appellant on 20th July and was filed on 23rd July—*Held*, there was no sufficient cause for delay.)

('27) 14 AIR 1927 Lah 717 (717) : 103 Ind Cas 498 (DB), *George Gowshala* v. *Balak Ram.* (It is appellant's duty to explain every day's delay.)

The basis of the above rule of guidance would seem to lie in the fact that when the time for appeal or applying is once past, a very valuable right is secured to the successful party of which he should not be deprived lightly.[6] In *Coles and Ravenshear, In re,*[7] Collins, M. R., quoted with approval the observations of Davey, L. J., in *In re Helsby,*[8] to the following effect :

> "Upon the question whether time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James, L. J., that a party has a vested

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('27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu Singh* v. *Mangat Rai.* (Delay in obtaining copy of judgment—Time not extended.)

('27) 14 AIR 1927 Lah 59 (59, 60) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co.* v. *Firm Ram-Sarup.* (Delay in taking delivery of copies not sufficiently explained —Extension of time was not allowed.)

('26) 95 Ind Cas 236 (238) (Lah) (DB), *Sher Bahadur* v. *Abezar.* (Death of party living at distance—Ignorance of death — Application by representative beyond time but with due diligence—Extension of time for setting aside abatement was allowed.)

('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu* v. *Sultan.* (Judgment on 1-10-13—Court closed from 3-10-13—Re-opened on 3-11-13—Copies applied for and obtained on 14-11-13 at Muzaffarnagar—Appeal filed at Meerut on 15-11-13 —*Held*, there was reasonable diligence.)

('34) 21 AIR 1934 Oudh 10 (10) : 147 Ind Cas 799 (DB), *Mt. Patraji* v. *Radhika Baksh Singh.* (The element of good faith is necessary to bring a case within the purview of S. 5.)

('88) 1888 Pun Re No. 183 (FB), *Karm Baksh* v. *Daulat Ram.*

[*See* ('38) 25 AIR 1938 Bom 408 (410) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.* (Ignorance of the legal representatives of a deceased domiciled in a Native State or a foreign place may be sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay.)]

[6] ('38) 25 AIR 1938 Nag 156 (161): I L R (1938) Nag 409: 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak.*

('14) 1 AIR 1914 All 521 (522, 523) : 25 Ind Cas 30, *Dewan* v. *Budhu.* (Appeal beyond time—Explanation being that papers were returned by counsel after time for appeal expired—Explanation held insufficient within this section.)

('16) 3 AIR 1916 Bom 153 (154, 155) : 41 Bom 15 : 36 Ind Cas 439 (DB), *Babu Ganesh* v. *Sitaram Martand.*

('25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad* v. *Hassomal.*

('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas* v. *The Manager Encumbered Estates.*

('13) 20 Ind Cas 513 (515) (Cal) (DB), *Dand Bahadur Singh* v. *Deo Nandan.* (When appeal is admitted under this section, *ex parte* order can be re-opened on objection of respondent.)

('13) 18 Ind Cas 37 (40) : 1913 Pun Re No. 59 (DB), *Fakir Chand* v. *The Municipal Committee of Hazro.*

('11) 12 Ind Cas 677 (679) (Cal) (DB), *Sunder Koer* v. *Raghunath Sahai.*

('28) 15 AIR 1928 Lah 216 (218) : 9 Lah 76 : 104 Ind Cas 281 (DB), *Secretary of State* v. *Tirath Ram.* (Misconstruing law is not sufficient cause.)

('23) 10 AIR 1923 Lah 144 (144) : 73 Ind Cas 910, *Lakhmidas* v. *Mehar Chand.* (Case good on merits is not sufficient cause for excusing delay.)

('22) 9 AIR 1922 Lah 390 (392) : 3 Lah 215 : 77 Ind Cas 541 (DB), *Md. Din* v. *Mt. Zeb-un-nissa.*

[See however ('12) 16 Ind Cas 425 (427) (Cal) (DB), *Bonamali Gaontia* v. *Padma Lochan Gaontia.* (Acquisition of valuable right is made subject, by Legislature, to judical discretion in Court to affect such supposed right by its order in interest of substantial justice.)

('20) 7 AIR 1920 Lah 241 (242) : 1 Lah 508 : 59 Ind Cas 556, *Surta Singh* v. *Emperor.* (Criminal appeal presented to wrong Court—Re-presentation to proper Court—In such a case it could not be said that there was a 'successful litigant' who had secured 'valuable right'—Delay excused.)]

[7] (1907) 1 K B 1 (5) : 76 L J K B 27 : 95 L T 750 : 23 T L R 32.

[8] (1894) L R 1 Q B 742 (746) : 63 L J Q B 265 : 70 L T 144 : 42 W R 218.

right in an order of the Court in his favour and ought not to be deprived of an advantage given him by the rules, 'unless there has been on his part, some conduct raising an equity against him'."

In *Karsondas Dharmsey* v. *Bai Gangabai*,[9] Sir Lawrence Jenkins, C. J., observed :

> " When the time for appealing is once past, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained."

In *Sakarchand Hathisingh* v. *Manilal Rewadas*,[10] the same learned Judge observed :

> " The law prescribes that an appeal must, apart from special circumstances, be presented within a limited time, and if effect is not given to the provisions of the law, a successful litigant may be wrongly deprived of the benefit which has been secured to him by the adjudication of the first Court."

It is thus necessary before a party can claim indulgence under this section that he should prove not only the existence of 'sufficient cause' for the delay but also that he was reasonably diligent in prosecuting his proceeding.[11] Where, though there may be said to be sufficient cause, the party has *not* been reasonably diligent in prosecuting his proceeding, time will not be extended in his favour.[12] (See Note 8 for further discussion.) In some cases,[13] however, the existence of sufficient cause has been regarded, without any advertence to the other element of reasonable diligence, as sufficient to enable the Court to extend the time in favour of the appellant or the applicant. It is submitted that this view is not correct.

8. Reasonable diligence in prosecution of proceeding.—

Want of due diligence in prosecuting his proceeding *after the cause for the delay is removed*, will disentitle the party to any indulgence under this section. In *Ram Narain Joshi* v. *Parameswar Narain Mahta*,[1] the appellant had, owing to a mistake in the valuation of the suit, presented his appeal to the District Court instead of to the High Court and when the mistake was discovered the limitation period for the

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[9] ('06) 30 Bom 329 (330) : 7 Bom L R 965.

[10] ('04) 6 Bom L R 373 (374) (DB).

[11] ('29) 16 AIR 1929 Cal 240 (241) : 119 Ind Cas 383 (DB), *Kamiruddin Mullik* v. *Bishupriya*.
('33) 20 AIR 1933 Oudh 83 (84) : 142 Ind Cas 826 (DB), *Abid Ali Khan* v. *Kidar Nath*. (Party prosecuting case in good faith and with due diligence—Delay satisfactorily explained—Delay of four years excused.)

[12] ('03) 30 Cal 309 (311, 312, 316): 30 Ind App 20: 8 Sar 431 (PC), *Ram Narain Joshi* v. *Parmeswar Narain Mahta*.
('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383 (DB), *Kamiruddin Mullick* v. *Bishupriya*.

[13] ('34) 21 AIR 1934 All 367 (368) : 56 All 591 : 148 Ind Cas 290 (DB), *Gauri Shankar* v. *Kashi Nath*. (Limitation expiring on 26th — Applicant ill for 3 or 4 days—Men sent on 26th — Application found barred — Affidavit and petition by applicant on 30th—Four days were condoned.)
('23) 10 AIR 1923 All 536 (536): 76 Ind Cas 375 (DB), *Deo Indar Singh* v. *Khushi Ram*. (Sudden illness of party on way held sufficient cause.)

Note 8

[1] ('03) 30 Cal 309 (311, 312, 316): 30 Ind App 20: 8 Sar 431 (PC).

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appeal had expired. The High Court of Calcutta in refusing to extend the time under this section observed as follows :

> " But even supposing that that mistake could be overlooked and *could be treated as a sufficient cause* for not having filed this appeal within time, still there is another circumstance which, we think, would preclude the applicant from having this rule made absolute, and that is, that although he became aware of this mistake on the 9th August 1895, he made no application to this Court until the 16th of September or more than five weeks afterwards and then only in the form of the application to which we have referred. There was no reason whatever why the application could not have been made within a few days of the discovery of the mistake.
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> * * * * * * *
>
> That being so, we are of opinion that due diligence was not shown in making this application."

On appeal to the Privy Council, their Lordships observed that they could not interfere with the decision of the High Court unless they were satisfied that the refusal to admit the appeal after time was wrong, and that they were not so satisfied. See also the undermentioned cases[2] to the same effect. The question whether there was due diligence exercised, after the cause for the delay was removed would depend upon the facts and circumstances of the case.[3] A delay of eighteen days after the cause for delay was removed was considered in the case cited below[4] as not unreasonable in the circumstances of the case and as not showing want of due diligence. In another case[5] a delay of twenty three days in applying for copies for appeal after the previous mistaken proceeding was dismissed, was considered reasonable time having regard to the circumstances of the case.

There is a difference of opinion as to whether the party is bound to show reasonable diligence even during the period *antecedent* to the cause for the delay. The general view is that he should show diligence during such period also. It proceeds on the principle that every litigant is expected to know the last date for filing the appeal or application and that he should not wait till the last moment to find that by some mistake or unforeseen circumstance he is out of time.[6] Thus, in *Jahar Mal* v. *Pritchard*,[7] where the party was inactive till almost the last day of limitation, when he fell ill, which prevented his filing the appeal in time, Dawson-Miller, C. J., observed as follows :

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[2] ('33) 20 AIR 1933 Cal 462 (463) : 145 Ind Cas 116 (DB), *Khajeh Habibullah* v. *Abdul Karim.* (Appeal filed out of time by two days—Pleader's clerk inquired from stamp reporter's office about last day for filing appeal and then filed appeal—*Held* extension could not be granted.)
('03) 30 Cal 655 (659) (DB), *Shabiuddin* v. *Deomoorat Koer.* (Application to prefer an appeal not thought of until very late—No due diligence.)
('26) 94 Ind Cas 121 (121) (Nag) (DB), *Kutuab-ud-din* v. *Gulam Rabbani.* (Appellant filing his application on the very last possible day, even according to mistaken view of his pleader is not entitled to benefit of Section 5.)
('21) 8 AIR 1921 Nag 141 (142): 61 Ind Cas 889, *Gandaji* v. *Kisan.* (An appellant who does not display promptitude must suffer if his calculation is wrong.)
[*See* ('23) 10 AIR 1923 Pat 417 (418) : 2 Pat 168 : 84 Ind Cas 1001 (DB), *Mt. Bibi Khojaima* v. *Official Liquidator.*]

[3] ('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383, *Kamiruddin Mullick* v. *Bishupriya.* (Application to adduce further evidence rejected and final order made against applicant—Appeal only against order rejecting application to adduce further evidence in *bona fide* belief that whole relief would be granted — Appeal dismissed—Subsequent appeal against final order preferred out of time—Extension under this section was granted.)

[4] ('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383, *Kamiruddin Mullick* v. *Bishupriya.*

[5] ('16) 3 AIR 1916 Cal 670 (671, 672) : 31 Ind Cas 705 (DB), *Sudhakar Raut* v. *Sadasiv Jhatap Singh.* (Appellant's minors residing in out-of-way village—Their father's death during hearing of appeal by lower appellate Court — Review by them of judgment passed against them rejected — Appeal afterwards though out of time was registered.)
[*See also* ('35) 22 AIR 1935 Oudh 30 (32, 33) : 10 Luck 250 : 152 Ind Cas 419 (DB), *Gokul Prasad* v. *Kunwar Bahadur.* (Time considered reasonable for preparation of appeal.)]

> "There is one other matter I should like to draw attention to. It is a matter which is continually being brought to the notice of the Courts in this country, and that is this : It almost invariably happens that one party or the other intending to appeal or to take some other step in the course of an action for which a time limit is prescribed by the rules, waits until the very last moment before taking that step. Sufficient time in all these cases is granted to the parties for doing whatever may be necessary for furthering their suit, and if they choose to put off until the very last minute either the filing of the appeal or the taking of any other steps which are a necessary part of the prosecution of their case, they run a very great risk, and it does not seem to me that it is sufficient for a party to come to Court and say that if everything had gone absolutely smoothly, and if no unexpected accident had happened, he would have been in time in taking the steps required for his appeal. One is not entitled to put things off to the last moment, and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other might happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and if they choose to rely upon everything going absolutely smoothly and wait till the very last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court."

In *Kedarnath* v. *Zumber Lal*,[8] a decree was made on 28th March 1916, but copies were applied for only on the 2nd May 1916 and were obtained on the 9th June 1916. The last day of limitation was the 26th of July 1916. The appeal was filed on the 27th of July 1916. The explanation given was that owing to a river across the way being in flood, he was able to reach Akola only on 26th July, too late to catch the train to Nagpur that day. Stanyon, A. J. C., in refusing to extend the time observed as follows :

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[6] ('19) 6 AIR 1919 Cal 585 (585) : 46 Ind Cas 480 (DB), *Guru Charan* v. *Kashi Chandra.* (Mistake in calculating period of limitation is not sufficient cause.)
('20) 7 AIR 1920 Pat 594 (595) : 55 Ind Cas 17 (DB), *Jaleswar Dayal Singh* v. *Ram Hari Sahu.* (Papers handed over to clerk for engaging vakil — No enquiry made until the last moment as to what had happened to the papers — Discovery at the last moment that clerk had fallen ill—No excuse.)
(1864) 1864 Suth W R (Gap) Misc 13 (13), *Krishtoproshad* v. *Radakanto.* (Party not caring to apply for copies until within three days of expiry of limitation of ninety days—No diligence after getting copies—No ground to excuse delay.)
('02) 5 Oudh Cas 183 (185, 186), *Hardwar Prasad* v. *Raja Pratab Bahadur.* (Want of funds to file appeal is not sufficient cause.)
('23) 10 AIR 1923 Lah 96 (97) : 68 Ind Cas 777, *Madan Gopal* v. *Malawa Ram.* (Judgment delivered on 21st April—Period of ninety days allowed, expiring on 20th July — Application for copy of judgment made on 4th July — Copy obtained on 11th July—Appeal filed on 12th October—Court did not show indulgence.)
('16) 3 AIR 1916 Lah 407 (407) : 1916 Pun Re No 79 : 35 Ind Cas 233, *Guran Rakha* v. *Bindraban.* (Where the last day of limitation expired on a holiday and the appellant applied for copies on the re-opening of the Court and filed his appeal as soon as he got them, held, that as the appellant had not shown due care and diligence, he was not entitled to any indulgence.)
('25) 12 AIR 1925 Oudh 643 (644) : 90 Ind Cas 115, *Sripat* v. *Hubdar.* (Judgment pronounced on day preceding last working day before vacation — Copies applied for on day Court opened after vacation—*Held* there was sufficient cause for delay and further that requiring copies to be sent by post does not involve forfeiture of indulgence.)

[7] ('19) 6 AIR 1919 Pat 503 (505) : 52 Ind Cas 225.

[8] ('16) 3 AIR 1916 Nag 39 (40) : 37 Ind Cas 503 : 12 Nag L R 171.

> "I think it is necessary that the Courts should apply the law so as not to encourage eleventh hour procedure of the kind followed in this case. . . . . . The law is clear, and S. 5, Indian Limitation Act, 1908, was not provided to encourage negligence, procrastination and laxity. I enunciate nothing new. As far back as in 1880, in *Hukum Chand* v. *J. Bailey*,[9] this Court laid down that inability to get stamps, on the last day allowed by law for instituting a suit, is not one of the conditions under which the time allowed by the limitation law can be extended. I follow the same principle when I rule that an appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time."

See also the undermentioned cases to the same effect.[9a]

A contrary view has, however, been taken in some cases. In *Karali Charan Sarma* v. *Apurba Krishna Bajpai*,[10] Graham, J., observed :

> "If no explanation whatever is forthcoming why the appeal was not filed during the major portion of the period of limitation, an explanation designed merely to explain why it was not filed on the last day before it became time-barred would, as it seems to me, be insufficient."

Mitter, J., expressed a contrary opinion. He observed :

> "It has been argued strenuously for the opposite party that as no explanation has been given as to why the appellant waited for the last possible moment to file the appeal, sufficient cause has not been shewn for extending the period of limitation. I do not think that in the circumstances of the present case his antecedent inaction or negligence should at all be taken into account. The appellant has a right to say that he put the papers of his case in the hands of his advocate within the period of limitation, and his appeal would have been in time but for the slip made by the advocate, and that he is therefore bound to explain only the delay of one day by which the appeal was out of time. The law allows him ninety days to file the appeal, and if he files it on the ninety-first day *he has only to explain how the delay of one day should be accounted for.*"

Subrawardy, J., before whom the case was laid by reason of the difference between Graham and Mitter, JJ., agreed with Mitter, J., and held that the words "within the period" used in the section do not mean "during such period" but mean "within the period which

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9. ('80) Digest of Civil Rulings of the Court of Judicial Commissioner, Central Provinces, Part IV, Ruling No. 9.

9a. ('38) 25 AIR 1938 Nag 156 (159) : ILR (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak*.

('24) 11 AIR 1924 Lah 599 (600) : 75 Ind Cas 1055, *Ata Muhammad* v. *Pir Khan*. (Communication between client and pleader interrupted by heavy rain. It was alleged that this resulted in one day's delay in filing appeal — No due diligence during the period prescribed.)

('30) 17 AIR 1930 Nag 121 (121, 122) : 119 I. C. 679, *Hakimia* v. *J. C. Gammon*. (Revision application four days beyond time—Delay due to sudden attack of *asthma* —Delay was not excused.)

10. ('31) 18 AIR 1931 Cal 298 (299, 301, 302, 303) : 58 Cal 549 : 132 Ind Cas 169.

ends with the last day of the prescribed period." He further observed as follows :

> "It seems to me that the language of S. 5 as it stands, is capable of only one construction, namely, that the right to present an appeal extends up to the very last day, and if on account of some sufficient cause it could not be presented on that day . . . . . the period may be extended . . . . . . "

The view of the Calcutta High Court in the above case was followed by Curgenven, J., in *Natesa Mudali* v. *Vedachala Naicken.*[11] He observed :

> "One cannot therefore insist that a party should file his appeal before the last date of filing it or impute a lack of diligence if he does not do so. Accordingly, it is enough if the petitioner satisfies the Court that he was prevented from filing it on the last day."

The same view was expressed also in the undermentioned case of the Rangoon High Court.[12] It is submitted that this view cannot be supported on principle and is against the view of their Lordships of the Privy Council as expressed in *Ram Narain* v. *Parmeswari Narain.*[13] The attention of the learned Judges in *Karali Charan* v. *Apurba Krishna*[14] does not seem to have been drawn to the necessity of showing reasonable diligence in prosecution of proceeding in addition to the existence of the sufficient cause. They have simply proceeded on the footing that "sufficient cause" means sufficient cause for not filing the appeal on the last day of the prescribed period.

The question whether the party was diligent, antecedent to the happening of the cause for the delay, is also one that has to be determined in the circumstances of each case.[15]

9. Existence of circumstances contemplated by S. 14. — Section 14 provides that in computing the period prescribed for any *suit* or *application*, the time during which the plaintiff or the applicant has been prosecuting in *good faith* and with *due diligence* another civil proceeding in another Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it, shall be excluded. That section is not directly applicable to appeals, but in exercising the discretion under this section the principle of S. 14 has been held to be applicable by analogy to appeals also.[1] In *Kunwar*

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[11] ('31) 1931 Mad W N 1161 (1162).

[12] ('28) 15 AIR 1928 Rang 165 (165) : 6 Rang 571 : 119 Ind Cas 215, *Ma Thein Khin* v. *Ma U Byu.* (Appellant unwell in last portion of limitation and filing his appeal two days later—Two days delay should be excused.)

[13] ('03) 30 Cal 309 (311, 312, 316): 30 Ind App 20 : 8 Sar 431 (PC).

[14] ('31) 18 AIR 1931 Cal 298 (299, 300, 301, 302, 303) : 58 Cal 549 : 132 Ind Cas 169. (Suhrawardy, J., on difference between Graham and Mitter, JJ.)

[15] *See* ('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu* v. *Sultan.* (One working day only between date of judgment and beginning of holidays—Application for copy filed on re-opening day—No want of due diligence.)
[*See also* ('24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Parbhu Dayal* v. *Murli Dhar.*]

Note 9

[1] ('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC), *Rajendra Bahadur* v. *Rajeshwar Bali.* (Suit under S. 111 (3), U. P. Land, Revenue Act, dismissed—Applicant appealing to District Judge within limitation

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Rajendra Bahadur Singh v. *Rai Rajeshwar Bali*,[1a] their Lordships of the Privy Council observed that in applying s. 5 to cases where delay has been caused by taking a wrong proceeding, "the analogy of s. 14 (which applies to suits) is an argument of considerable weight." The existence of circumstances contemplated by s. 14 has consequently been regarded as a ground for excusing the delay caused by the wrong proceeding.[2] For this purpose, the existence of such circumstances has

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acting on mistaken but honest view of his counsel as to valuation—Appeal dismissed on point of valuation and appeal to Chief Court beyond limitation preferred—Principle of S. 14 held should be applied to such a case.)
('34) 35 Pun L R 374 (374), *Khazana Mal-Bhagat Ram* v. *Mangat Ram*. (Appellant first applying for review to lower Court.)
('87) 12 Bom 320 (323) (DB), *Sitaram Paraji* v. *Nimba Hari Shet*.
('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Lala Kanshi Ram*.
('22) 9 AIR 1922 Cal 247 (247, 248) : 68 Ind Cas 575 (DB), *Kumudini Ray* v. *Kamala Kant Sen*.
('11) 11 Ind Cas 814 (815) (All), *Narain Singh* v. *Bikram Singh*. (Section 14 is not made applicable to appeals also only because of wider discretion already conferred on appellate Courts by this section.)
[But see ('13) 20 Ind Cas 513 (514) (Cal), *Nand Bahadur Singh* v. *Deo Nandan Prasad*. (It was remarked that S. 14 does not furnish any analogy in acting under S. 5—This is clearly not correct in view of the Privy Council decisions referred to above.)]

[1a] ('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC).

[2] ('35) 22 AIR 1935 All 92 (93) : 152 Ind Cas 939 (DB), *Sudama* v. *Visheshar*.
('29) 16 AIR 1929 Cal 240 (241) : 119 Ind Cas 383 (DB), *Kamiruddin Mallik* v. *Bishupriya*. (Section 14 however is not exhaustive of all circumstances that may go to constitute sufficient cause within the meaning of this section.)
('14) 1 AIR 1914 Upp Bur 49 (50) : 27 I. C. 967, *Nga Po Kan* v. *Nga Shwe Dat*.
('07) 29 All 638 (640) : 4 All L Jour 515, *Anjora Kunwar* v. *Babu*.
('03) 25 Mad 166 (178) : 11 Mad L Jour 406 (DB), *Kichilappa Naickar* v. *Ramanujam Pillai*.
('90) 13 Mad 269 (271) (DB), *Krishna* v. *Chathappan*.
('88) 10 All 524 (527, 530) : 1888 All W N 218 (DB), *Jaglal* v. *Har Narain Singh*.
('17) 4 AIR 1917 P C 156 (157, 158, 159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Lala Kanshi Ram*. (Approving 1888 Pun Re No. 183 (F B), 5 All 591 and 7 Suth W R 529 (F B) — Prosecution of review application where appeal was the proper course.)
('37) 24 AIR 1937 All 466 (467) : 170 Ind Cas 874 (DB), *Krishna Chandra* v. *Emperor*. (Appeal against conviction under S. 124A, Penal Code, preferred to Sessions Judge instead of High Court—Subsequent appeal to High Court but beyond time—*Held* there was sufficient cause for extension of time under this section.)
('36) 23 AIR 1936 All 366 (366, 367) : 161 Ind Cas 52, *Zahur Hussain* v. *Chura Singh*. (Jurisdiction question difficult—Revision instead of appeal and then appeal in proper Court but out of time—*Held* time could be extended under this section.)
('30) 17 AIR 1930 All 15 (16) : 120 Ind Cas 125 (DB), *Ram Khelawan Singh* v. *Maharajah of Benaras*. (Prosecution of appeal before wrong Court.)
('28) 15 AIR 1928 All 144 (144) : 108 Ind Cas 123, *Probhu Narain Singh* v. *Jai Mangal Singh*. (A I R 1922 All 490 (F B) followed.)
('27) 14 AIR 1927 All 758 (758) : 101 Ind Cas 777, *Ram Lal* v. *Mushtaq Ali*. (A I R 1922 All 490 (F B) followed—Appeal filed in Court of Commissioner instead of in Court of District Judge due to wrong advice given by pleader—Litigant mistaken—Time should be extended.)
('26) 13 AIR 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup Agrahri* v. *Naik Ram*. (High Court in second appeal will not interfere with discretion of lower appellate Court.)
('25) 12 AIR 1925 All 567 (569) : 85 Ind Cas 627, *Ishwar Prasad* v. *Bishunath Prasad Singh*. (Appellants not appealing in time owing to omission on part of trial Court in not mentioning their names in decree—*Held* delay in appealing should be excused.)
('24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Prabhu Dayal* v. *Murli Dhar*.

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been regarded as being "sufficient cause" for the delay. The party will also be ordinarily *deemed to have acted with reasonable diligence,*

('23) 10 AIR 1923 All 364 (365) : 79 Ind Cas 402, *Mt. Akbari Begam* v. *Shaikh Zamin Ali.* (Appeal filed in wrong Court owing to doubtful point of law—Time was extended.)

('17) 4 AIR 1917 All 87 (88) : 37 Ind Cas 818 (DB), *Mahabat Rai* v. *Bharaddwaj Damodar Das.*

('16) 3 AIR 1916 All 296 (297) : 33 I. C. 546, *Maqbul Ahmed* v. *Murla.* (Appeal to Commissioner instead of to Additional Judge — Memorandum returned and then presented to proper Court but beyond limitation—Time was extended.)

('23) 10 AIR 1923 Cal 291 (291): 68 I. C. 200 (DB), *Purna Chandra* v. *Mabub Baksh.*

('31) 18 AIR 1931 Lah 258 (259) : 12 Lah 488 : 130 Ind Cas 526 (DB), *Mihan Chand* v. *Ishar Das.* (Appeal to District Judge—District Judge after considering remand report of subordinate Judge returning memorandum of appeal for presentation to proper Court—Appellant promptly complying with order—Extension was allowed.)

('24) 11 AIR 1924 All 915 (915) : 82 Ind Cas 594, *Chob Singh* v. *Daryai Singh.* (Suit for ejectment dismissed by Assistant Collector — Appeal preferred to Commissioner instead of to District Judge — Memorandum returned and then presented to proper Court—*Held,* circumstances justified extension.)

('27) 14 AIR 1927 All 719 (719) : 101 I. C. 750 : 49 All 555 (DB), *Kishan Lal* v. *Tika.*

('21) 8 AIR 1921 Bom 302 (302, 303) : 45 Bom 607 : 60 Ind Cas 744 (DB), *Dattatraya Sitaram* v. *Secretary of State.* ('In good faith' means 'honestly though negligently'.)

('18) 5 AIR 1918 Bom 228 (229, 230) : 42 Bom 295 : 46 Ind Cas 14 (DB), *Bai Nemathu* v. *Bai Nematullabu.*

('22) 9 AIR 1922 Cal 247 (247, 248) : 68 Ind Cas 575 (DB), *Kumudini Ray* v. *Kamala Kant.*

('18) 5 AIR 1918 Cal 986 (987) : 46 I. C. 116 (DB), *Rupa Thakurani* v. *Kumudnath Karmakar.*

('96) 23 Cal 526 (531, 532) (DB), *Balaram Bhramatar Ray* v. *Sham Sunder Narendra.* (Prosecution of appeal in wrong Court owing to *bona fide* doubt.)

('19) 6 AIR 1919 Oudh 91 (91) : 58 I. C. 995 (DB), *Hewlett* v. *Behari Lal.* (Judgment altered—Revision by opposite party dismissed—Appeal from decree following upon altered judgment—Appeal beyond time but within time if limitation counted from dismissal of revision—Delay held excusable.)

('26) 13 AIR 1926 Cal 378 (379) : 91 Ind Cas 9 (DB), *Jogendra Nath* v. *Bhagabat Das.* (Suit for possession and mesne profits prior to suit valued at less than Rs. 5000—Decree passed for more than Rs. 5000—Appeal lies to High Court and not to District Judge — Delay caused by proceedings in District Court excused.)

('32) 19 AIR 1932 Cal 713 (713, 714) : 138 Ind Cas 848 (DB), *Nilamoni Pal* v. *Dakshinewar Pal.* (Appeal preferred against decree based on modified award under *bona fide* belief that appeal lies — Appeal can be converted into one from order modifying award and extension can be granted.)

('30) 17 AIR 1930 Pat 307 (308) : 129 Ind Cas 660 (DB), *Jiwan Ram* v. *Hazari Lal.* (Objection to attachment dismissed — Suit filed instead of appeal — Suit rejected as being not maintainable—Then appeal filed—Time was extended.)

('97) 21 Bom 552 (555) (DB), *Dadabhai Jamsetji* v. *Maneksha Sorabji.*

('87) 12 Bom 320 (323) (DB), *Sitaram Paraji* v. *Nimba Harishet.* (Mere ignorance of law cannot be recognized as sufficient reason for delay under this section.)

('13) 20 Ind Cas 647 (648) (All) (DB), *Nanhe* v. *Mangat Rai.*

('13) 20 Ind Cas 3 (6, 7) (Lah) (DB), *Mt. Husaina* v. *Mt. Sahib Nur.* (Prosecution of application under Ss. 151 and 152, C. P. C.)

✓ ('28) 15 AIR 1928 Lah 136 (137) : 106 Ind Cas 812 (812), *Maula Baksh* v. *Udham Singh.* (Presentation of appeal in wrong Court—Court taking time in considering that appeal does not lie to that Court — Subsequent presentation to proper Court beyond time— Time was extended.)

('74) 22 Suth W R 79 (79), *Kuller Singh* v. *Jeevan Singh.* (Prosecution of application for review is sufficient cause for delay in filing appeal.)

('71) 15 Suth W R 61 (61) (DB), *Poresh Nath Roy* v. *Gopal Kristo Deb.* (2 Suth W R 36 (FB) followed—Time during which application for review is pending is not to be taken into account within ninety days allowed for appeal.)

('66) 5 Suth W R Act X Rul 44 (44), *Modhoo Soodun Mojoomdar* v. *Brojonath Koond Choudry.* (Case under S. 333, C. P. C. of 1859.)

('80) 1880 Bom P J 345 (345) (DB), *Trimbakraj* v. *General Traffic Manager, G.I.P. Railway.* (*Bona fide* prosecution of review may be a sufficient cause for delay.)

where such circumstances exist, when the whole period between the date of the decree appealed against and the date of presenting the

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('98) 22 Bom 849 (858) (DB), *Bai Ful* v. *Desai Manorbhai.* (Pendency of pauper application is sufficient cause for delay caused by stamping the appeal late.)

('19) 6 AIR 1919 Lah 200 (201) : 1919 Pun Re No. 70 : 50 Ind Cas 645 (DB), *Bharanishankar* v. *Industrial Bank of India Ltd.* (Defendant not objecting to the fixing of valuation of suit below Rs. 5000—Plaintiff was justified in instituting appeal in District Court — Appeal returned for presentation to Chief Court on the ground that the suit valuation was above Rs. 5000 — Time spent in prosecuting intructuous appeal was allowed to be deducted in computing period of limitation for appeal to Chief Court on ground of sufficient cause.)

('88) 1888 Pun Re No. 161, *Ghulam Hussain* v. *Shahbez Khan.* (This section does not require that appellant is to show sufficient cause for not presenting appeal sooner, but for not presenting it within prescribed period.)

('89) 1889 Pun Re No. 184 (FB), *Sardar Pratab Singh* v. *Lala Karam Chand.* (Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court, in ignorance of the provision of law, may constitute a sufficient cause.)

('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaj Narain* v. *Mt. Banoji.* (1888 Pun Re No. 183 (FB) followed — Time occupied in applying for review and conducting proceedings for declaration of majority and time spent in prison may be sufficient cause within this section.)

('08) 1908 Pun Re No. 118 : 1908 Pun W R No. 197, *Sant Singh* v. *Qaim.* (Although S. 14 has no direct application to appeals, the *bona fide* prosecution of an appeal in a Court which from defect of jurisdiction or other like cause is unable to entertain it, is sufficient cause within the meaning of this section.)

('30) 17 AIR 1930 Lah 113 (114) : 115 Ind Cas 467, *Ghulam Qazam* v. *Qutabuddin.* (Application by judgment-debtor under O. 21 R. 2, C. P. C. — *Ex parte* order passed in favour of judgment-debtor—Time spent in prosecuting application for setting aside *ex parte* order should be excluded in appeal from original order.)

('28) 15 AIR 1928 Lah 964 (965) :116 Ind Cas 315, *Fateh Nur* v. *Jiwan.*

('29) 16 AIR 1929 Lah 283 (284) : 120 Ind Cas 179, *Mulkhraj* v. *Gurditta Shah.* (Appellant filing in good faith application for review — Review granted but disallowed in appeal on point of law—Time was extended.)

('29) 16 AIR 1929 Lah 824 (824) : 117 Ind Cas 96, *Dullo Mal* v. *Ganga Ram.* (Prosecuting infructuous application for review is sufficient cause to condone delay in filing appeal.)

('33) 20 AIR 1933 Lah 541 (542) : 14 Lah 206 : 149 Ind Cas 968 (DB), *Ghulam Muhammad* v. *Usman.* (Appeal presented to wrong Court on mistaken but *bona fide* advice by pleader — Time during which appeal remained pending was excluded.)

('83) 5 All 591 (593) : 1883 All W N 142 (DB), *Balwant Singh* v. *Gumani Ram.*

('33) 20 AIR 1933 Oudh 231 (233) : 8 Luck 646 : 150 Ind Cas 533 (DB), *Mahabir Singh* v. *Mt. Radha.* (Time spent by *bona fide* mistake of advocate.)

('34) 21 AIR 1934 Pesh 57 (59) : 152 Ind Cas 323 (DB), *Ahmed Shah* v. *Atta Khan.* (Appeal filed in wrong Court through mistake of counsel—Time was extended.)

('36) 23 AIR 1936 Sind 43 (44) : 30 Sind L R 301 : 162 Ind Cas 257 (DB), *Pevibai* v. *Motumal Kalachand.* (Period taken by appellant in applying for review can be excluded in computing period of limitation for appeal.)

('25) 12 AIR 1925 Lah 534 (534) : 88 Ind Cas 326, *Muhammad* v. *Muhammad Roshan.* (Time spent in well-founded review should be excluded from limitation for appeal.)

('07) 4 All L Jour 1 (2) : 1907 All W N 26, *Indar Lal* v. *Deojit.* (Appellant honestly thinking appeal lay to Commissioner filing it before him—Appeal returned —Presentation before District Judge beyond time—Admission not improper.)

('93) 8 C P L R 121 (123), *Seth Nurbuda Prasad* v. *Nathuram.*

('31) 18 AIR 1931 Sind 3 (4) : 25 Sind L R 242 : 130 Ind Cas 545 (DB), *Pridhanmal* v. *Lalloo.* (Review application with due diligence—Time taken by review was excluded.)

('19) 6 AIR 1919 Mad 1110 (1110) : 45 Ind Cas 489 (DB), *Rayarappa Nambiar* v. *Veetul Kamaran.* (Delay due to representation in wrong Court.)

('34) 21 AIR 1934 Mad 637 (637) : 152 Ind Cas 155, *Sundaragiriraja Iyengar* v. *Balasubramaniya Iyer.* (Practice to file appeal in High Court which ought to be filed in District Court—*Held* delay in filing in District Court should be excused.)

('15) 2 AIR 1915 Oudh 74 (74, 75): 30 Ind Cas 211, *Sheo Pal Singh* v. *Mt. Kripala.*

appeal does not, after excluding the period of the wrong proceeding, exceed the period prescribed by law for presenting the appeal.[3] In *Brij Indar Singh* v. *Kanshi Ram*,[4] their Lordships of the Privy Council cited with approval the following observations of the Full Bench of the Punjab Chief Court in *Karam Baksh* v. *Daulat Ram*[5]:

> "We think further that he ought ordinarily to be deemed to have acted with reasonable diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal.
>
> "We also agree with the High Court of Allahabad in the case of *Balvant Singh* v. *Gumani Ram*,[6] that the circumstances contemplated in S. 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of section 5."

But the existence of the circumstances contemplated by S. 14 involves—

1. that the wrong proceeding has been prosecuted *bona fide* (i.e., with due care and attention) and with reasonable diligence,[6a] and

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('19) 6 AIR 1919 Oudh 185 (185) : 52 Ind Cas 235, *Mahabir Singh* v. *Behari Singh*. (Appeal preferred to wrong Court in good faith and under legal advice—Time spent in prosecuting appeal should be excluded.)
('99) 1899 Pun Re No. 47, *Mt. Intizam Begam* v. *Mt. Waziran*.
('15) 2 AIR 1915 Lah 181 (183): 28 Ind Cas 926 (DB), *Winkley* v. *Wasawa Singh*.
('03) 1903 All W N 32 (33), *Wazir Ali Khan* v. *Zainab*.
[*See* ('16) 3 AIR 1916 Cal 231 (231) : 28 Ind Cas 211 (DB), *Beni Singh* v. *Barham Deo Singh*.
('15) 2 AIR 1915 Lah 269 (270) : 28 Ind Cas 142, *Ganesha Singh* v. *Shankar Lal*.
('24) 11 AIR 1924 Mad 225 (226): 76 I.C. 786, *Lakshumana Iyengar* v. *Narayana Iyengar*. (Want of knowledge of defect in decree—Application for amendment of decree immediately after knowledge — Dismissal of application on technical grounds—*Held* application could be treated as review and delay excused.)]
[*See also* ('36) 23 AIR 1936 All 659 (661) : 164 Ind Cas 1059, *Mt. Jafri Begam* v. *Asghar Ali Khan*. (Court dismissing suit in case where explanation to O. 17 R. 2, C. P. C., applied—Plaintiff filing application under O. 9 R. 9—Application granted — Opposite party going in revision — Result of interference in revision likely that plaintiff would go in appeal against order of trial Court, claiming benefit of this section—High Court should not interfere in revision.)
('25) 12 AIR 1925 Bom 137 (137) : 49 Bom 149 , 85 Ind Cas 191 (DB), *Nariman Rustomji* v. *Hasham Ismayal*. (Time taken up for review in good faith, should be excluded.)
('85) 1885 Bom P J 152 (152) (DB), *Kamalabai* v. *Mohamed Saheb*. (Prosecuting application to set aside *ex parte* decree may be sufficient cause.)]

[3] ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Lala Kanshi Ram*. (Approving 1888 Pun Re No. 183 (FB).)
('67) 7 Suth W R 529 (530) : Beng L R Sup Vol 728 (FB), *Brojendra Coomar Roy Chowhdury In re*.
('24) 11 AIR 1924 Rang 148 (152) : 1 Rang 584 : 77 Ind Cas 385, *Tin Tin Nyo* v. *Maung Ba Saing*. (Following 1888 Pun Re No. 183 (FB).)
('19) 6 AIR 1919 Pat 238 (240): 52 Ind Cas 959 (DB), *Ramcharita* v. *Ram Narain*.
('82) 1882 Pun Re No. 89, *Mt. Ganga* v. *Madho*.

[4] ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

[5] ('88) 1888 Pun Re No. 183 (FB).

[6] ('83) 5 All 591 (593) : 1883 All W N 142 (DB).

[6a] ('26) 13 AIR 1926 Cal 677 (679) : 92 Ind Cas 1031, *Ramdhani Muchi* v. *Khakshar Das Tali*. (Issue of notice is sufficient evidence of reasonableness of filing review application—Prospect of success is no test.)

2. that the Court in which such proceeding is instituted is unable, by reason of *defect of jurisdiction or other cause of like nature*, to entertain it.

Where there are *no reasonable grounds at all* for prosecuting the wrong proceeding, it cannot be said that it was prosecuted in *good faith* (i.e., with due care and attention) and cannot furnish a ground for excusing the delay.[7] See also the undermentioned cases[7a] for other

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('93) 3 Oudh Cas 265 (267), *Salikram* v. *Pratab Narain Singh*. (Suit for arrears of rent — Appeal from District Judge's decree to Board of Revenue instead of to Judicial Commissioner—Mistake *bona fide* and *in good faith* — Presentation of memorandum to proper Court but seventythree days beyond time — Delay was excused under this section.)

('88) 10 All 524 (530) : 1888) All W N 218 (DB), *Jag Lal* v. *Har Narain*.

('88) 10 All 587 (594) : 1888 All W N 258 (DB), *Ramjivan Mal* v. *Chand Mal*.

[7] ('40) 27 A I R 1940 Oudh 310 (312) : 15 Luck 526 : 187 I. C. 83, *Mahomed Ali* v. *Wajid Ali*. (Mere filing of review application is not sufficient cause within the meaning of S. 5—Appellant must show that he had reasonable grounds for review.)

('11) 10 Ind Cas 129 (130) (Lah), *Ganda Singh* v. *Jawala Singh*. (Time spent in review application in lower Court when there were no reasonable grounds for such application cannot be deducted.)

('09) 2 Ind Cas 961 (962) (Cal) (DB), *Haradhan Chattopadhaya* v. *Parankishna*. (Review on ground that applicant was entitled to a finding on question of limitation — This question did not at all arise in case — Application made with no other object than that of gaining time—*Held* application was not *bona fide* one and time for appealing could not be extended.)

('21) 64 Ind Cas 516 (516, 517) (Rang), *Maung Daw Na* v. *Ma Kya*. (Application for review presented sixtyeight days after passing of decree on grounds which were merely grounds of appeal.)

('10) 8 Ind Cas 1156 (1156, 1157) : 1910 Pun Re No. 100 (DB), *Musadi Lal* v. *Badhawa*. (Review on grounds which were merely grounds of appeal.)

('25) 12 A I R 1925 Cal 253 (254) : 80 Ind Cas 786 (DB), *Kailash Chandra* v. *Bejoy Chandra*. (Do.)

('23) 10 A I R 1923 Rang 75 (76) : 74 Ind Cas 39, *Maung Lun* v. *Maung Dun*.

('94) 18 Bom 84 (85) (DB), *Pundlik* v. *Achut*.

('88) 1888 Pun Re No. 183 (F B), *Karam Baksh* v. *Daulat Ram*. (Mere pendency of an application for review is not a sufficient cause—It must be a reasonable and proper application.)

('27) 14 A I R 1927 Bom 221 (222) : 101 Ind Cas 432 (DB), *Seshagiri Narayan* v. *Venkatesh Laxman*. (AIR 1925 Bom 137 and AIR 1917 P C 156 distinguished; 18 Bom 84 and 15 Cal 242 followed.)

(1900-02) 1 Low Bur Rul 313 (315), *Maung Po Lu* v. *Maung Kyin*.

[7a] ('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahi Newaz Khan* v. *Biseswar Baisya*. (Illness in family and negligence.)

('91) 14 Mad 81 (81), *Govinda* v. *Bhandari*. (All grounds of review being merely grounds of appeal.)

('04) 6 Bom L R 373 (374, 375) (DB), *Sakarchand Hathisingh* v. *Manilal Rewadas*. (Review application knowingly filed beyond time without excuse.)

('88) 15 Cal 242 (243, 244) (DB), *Ashanulla* v. *The Collector of Dacca*. (Grounds of review all being grounds of appeal only.)

('16) 3 AIR 1916 Cal 670 (671) : 31 Ind Cas 705 (DB), *Sudhakar* v. *Sadasiv*. (Do.)

('06) 1906 Pun Re No 78, *Ganesha Singh* v. *Arur Singh*. (Application for leave to appeal in *forma pauperis* filed though it was barred by time.)

('18) 5 AIR 1918 Lah 91 (92) : 1918 Pun Re No 107 : 46 I. C. 23 (DB), *Azizuddin* v. *Bhag Mal*. (Grounds of review being same as grounds of appeal.)

('09) 4 Ind Cas 1002 (1003) (Lah) (DB), *Seva Datt* v. *The Collector of Lahore*. (Unstamped memorandum of appeal filed—No good faith—Stamp furnished later—Delay cannot be excused.)

('04) 28 Bom 235 (237) (DB), *Daudbhai* v. *Emnabai*. (Prosecuting appeal in wrong Court while *knowing* that appeal lay in another Court.)

('14) 1 AIR 1914 Upp Bur 49 (50, 51) : 27 Ind Cas 967, *Nga Po Kan* v. *Nga Shwe Dat*. (Delay due to presentation in wrong Court through ignorance.)

('93) 1893 Bom P J 96 (96) (DB), *Anant Appaji* v. *Lakshimibai*. (Prosecution in wrong Court — Appellant getting knowledge of mistake within the period for instances of wrong proceedings taken without due care and attention. Again, where it is clear that the appellant has not been *diligent* in prosecuting the wrong proceeding, the delay will not be excused.[7b]

Where *two* remedies are open to a party and he elects one of them and fails *on the merits*, the time during which it was sought cannot be excused for the purpose of seeking, thereafter, the other remedy.[8] The reason is that in such a case the second condition involved for the application of S. 14 is not satisfied.[9] It is only the delay caused by the *wrong proceeding* (i. e., the period during which it was pending) that can be excused on the analogy of S. 14. Where the period from the date of the decree to the date of the appeal, even after deducting the time spent in the wrong proceeding, *exceeds* the period allowed by law for

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filing appeal but not taking steps to do so until after limitation expires — Not sufficient cause.)

('08) 1908 Pun Re No. 118 : 1908 Pun W R No. 197, *Sant Singh* v. *Qaim*. (Inexcusable negligence or oversight in instituting an appeal in a wrong Court.)

('36) 23 AIR 1936 Lah 672 (673) : 165 Ind Cas 661, *Ladha Ram* v. *Barkat Ali*. (Application under S. 151, C. P. C., is not competent when some other provision of law is available—Delay caused by wrong prosecution of such application cannot be condoned.)

('81) 1881 Pun Re No. 115, *Narain Singh* v. *Muhammad Amir Khan*. (Dismissal of suit for want of jurisdiction—Rejection of second suit in same Court — Appeal from orders of dismissal in both suits—Sufficient cause for delay not shown.)

('93-1900) 1893-1900 Low Bur Rul 515, *U Pyin Nya* v. *Maung Tun*. (Indulgence will not be granted when appellant has not presented his application for review till after the expiry of the period allowed for appeal, appeal having been filed after rejection of application for review.)

('84) 8 Bom 260 (263)(DB), *Ghulam Husein* v. *Sayad Musa Miya*. (Mere pendency of second appeal is not a sufficient cause for delay in applying for review.)

('68) 9 Suth W R 301 (304): 5 Wym 195 (DB), *L. T. Lucas* v. *W. Stephen*. (Do.)

('34) 21 AIR 1934 Lah 349 (351) : 155 Ind Cas 503, *Kashmiri Lal* v. *Chuni Lal*. (Surety for appearance of judgment-debtor — Execution petition dismissed for default of decree-holder and surety discharged — Application for restoration also dismissed — Extension of time spent in prosecuting application for restoration cannot be allowed.)

[7b] ('18) 5 AIR 1918 Lah 91 (92) : 1918 Pun Re No. 107 : 46 Ind Cas 23 (DB), *Azizuddin* v. *Bhag Mal*. (Grounds for review being same as grounds of appeal.)

[8] ('38) 25 AIR 1938 Bom 459 (459, 460) : 178 Ind Cas 307, *Jotiba Limbaji* v. *Ramappa Jotiba*. (Proceedings to set aside *ex parte* decree—Time spent in those proceedings cannot be excluded in computing period of limitation for appeal against *ex parte* decree.)

('32) 19 AIR 1932 Cal 558 (561) : 59 Cal 1057 : 138 Ind Cas 748 (DB), *Rajendra Nath* v. *Kamal Krishna*. (Time spent in prosecuting application to set aside *ex parte* decree under O. 9 R. 13 which failed on merits cannot be deducted from time allowed for appeal.)

('96) 23 Cal 325 (327) (DB), *Ardha Chandra Rai* v. *Matangini Dassi*. (Deduction of time during which applicant was endeavouring to have decree set aside was not allowed.)

('28) 15 AIR 1928 Pat 265 (266, 267): 113 Ind Cas 580 (DB), *Upendra Chandra* v. *Umesh Chandra*. (Pendency of application for amendment did not prevent application for leave to appeal being made and therefore did not furnish sufficient cause.)

('16) 3 AIR 1916 Pat 352 (353) : 34 Ind Cas 44 (DB), *Dwarka Singh* v. *Layakat Ali Khan*. (Review and appeal both lying — Review alone sought — Appeal filed later—Delay not excused.)

('30) 17 AIR 1930 Rang 41 (42) : 124 Ind Cas 266, *Ko Tha Lin Bwin* v. *Ho Hla Kye*. (Time spent in applying to set aside *ex parte* decree and in appealing from the order refusing to set it aside cannot be excused.)

(1865) 2 Suth W R Misc 35 (35): Beng L R Sup Vol 349: Bourke A O C 38, *Nobbo Kissen Singh* v. *Kaminee Dossee*. (Suit instituted instead of appeal.)

[9] ('96) 23 Cal 325 (327) (DB), *Ardha Chandra Rai* v. *Matangini Dassi*.

preferring the appeal, sufficient cause and due diligence must be shown in respect of the period in excess.[10]

See also Note 5 to S. 14 and Note 9 to Art. 152.

10. Negligence of party.—It has been seen in Note 6 that the words "sufficient cause" mean some cause *beyond the control of the party*. A cause arising from the *negligence* of the party cannot be said to be beyond the control of the party and cannot be *sufficient* cause within the meaning of the section.[1] There can be no difference in this respect between a private party and a party which is a body corporate.[2]

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[10] ('88) 10 All 524 (529): 1888 All W N 218 (DB), *Jag Lal* v. *Har Narain Singh*. (The delay occurring between the date on which the appeal is returned by the wrong Court and the date on which it is presented in the proper Court should be explained.)

('80) 1880 Bom P J 345 (345) (DB), *Trimbakaraj* v. *General Traffic Manager, G. I. P. Ry.* (Applicant waiting 7 days after termination of previous proceeding.)

('26) 13 AIR 1926 All 252 (253): 91 Ind Cas 865, *Ram Rup Agrahri* v. *Naik Ram*. (Presenting appeal after a week from dismissal of first appeal—Absence of affidavit explaining delay.)

('29) 16 AIR 1929 Cal 240 (241) : 119 Ind Cas 383 (DB), *Kamiruddin Mullick* v. *Bishupriya Choudhrani*.

('02) 25 Mad 166 (180) : 11 Mad L Jour 406 (DB), *Kichiliappa Naicken* v. *Ramanujam Pillai*. (No diligence subsequent to termination of wrong proceeding.)

('91) 14 Mad 81 (82), *Govinda* v. *Bhandari*. (No diligence after review proceeding was over.)

('26) 13 AIR 1926 Cal 457 (458): 85 Ind Cas 996 (DB), *Krishna Dass Acharjee* v. *Rahimnannessa Bibi*. (Do.)

('84) 7 Mad 584 (586) (DB), *Vasudeva* v. *Chinnasami*. (Presenting application for review on last day for appeal on no reasonable grounds — Delay ought not to be condoned.)

('83) 1883 Pun Re No. 166, *Sahibu* v. *Hira*. (Where there was great delay between the termination of the review proceeding and the presentation of the appeal — Delay was not excused—1882 Pun Re No. 89 followed.)

('88) 10 All 587 (594) : 1888 All W N 258 (DB), *Ramjiwan Mal* v. *Chand Mal*. [*See also* ('11) 10 Ind Cas 129 (130) (Lah), *Ganda Singh* v. *Jawala Singh*. (Review application in lower Court dismissed and appellant not filing appeal in reasonable time thereafter—Delay not excused.)]

Note 10

[1] ('34) 21 AIR 1934 Oudh 131 (131) : 151 Ind Cas 529 (DB), *Ganesh Das Varma* v. *Hari Chand*.

('40) 1940 All W R (C C) 120 (121, 122), *Bhagwan Din* v. *Muru*. (Application to set aside abatement of appeal — Ignorance of death of respondent due to negligence—No sufficient cause.)

('38) 25 AIR 1938 Mad 218 (218, 219) : I L R (1938) Mad 275 : 174 Ind Cas 951 (DB), *Secy. of State* v. *Vinjamuri Kistnamacharyulu*. (Ignorance of death of respondent, in absence of negligence, is sufficient cause.)

('38) 25 AIR 1938 Rang 214 (215, 216) : 177 Ind Cas 364, *Kong Hiplon and Co.* v. *C. A. M. A. L. Firm*. (Appeal filed by counsel on behalf of party—Court doubting genuineness of power of attorney and directing party to attend in person to ascertain if he had signed the power—Party failing to attend in person on ground of personal inconvenience and party's agent offering to sign the power after expiry of limitation for the appeal—*Held* S. 5 cannot be resorted to in such a case.)

('29) 16 AIR 1929 Sind 206 (207) : 24 Sind L R 108 : 118 Ind Cas 212 (DB), *Jhamandas* v. *Bibi Aishan*.

('07) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (DB), *Emperor* v. *Shiva Adar*. (Appeal by Government against acquittal—Delay due to want of clearness in communications between District Magistrate and Government—Delay not excused.)

('23) 10 AIR 1923 Lah 208 (208, 209) : 79 Ind Cas 812, *Mt. Nazko* v. *Mt. Gopal*. (Appeal returned for copy of judgment — Negligence in re-presentation of appeal —Delay not excused.)

('02) 5 Oudh Cas 183 (186), *Hardwar Prasad* v. *Raja Pratab Bahadur Singh*. (Poverty and want of means to file appeal within time — Appellant's difficulties from his own procrastination—Considerable inaction and want of due diligence.)

11. Negligence of party's agent. — The negligence of a party's agent is, in law, the negligence of the party himself and will not furnish a sufficient cause for delay.[1] A party's pleader or pleader's clerk will, for this purpose, stand on the same footing as an agent and consequently his negligence will, on principle, have the same consequences as the negligence of the party himself and will not furnish a

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('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam* v. *Ram Autar Singh.* (Mere failure of appellant to obtain and file copy of judgment, cause for delay in filing proper appeal—Cause beyond control not shown — Time was not extended.)

('23) 10 AIR 1923 Lah 95 (95, 96), *Mt. Rajan* v. *Kurria.* (Appeal returned for copy of judgment—Negligence in re-presentation of appeal — Delay cannot be excused.)

('27) 14 AIR 1927 Lah 118 (118) : 99 Ind Cas 619, *Gujjar Singh* v. *Kahan Singh.* (Omission to implead a person as respondent by carelessness is not sufficient cause.)

('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahnewaz Khan* v. *Biseswar Baisya.* (Delay of two months — Allegation that serious illness in family caused delay—Cause held insufficient for extending period under this section.)

('11) 9 Ind Cas 381 (382) (Lah) (DB), *Ashiq Hussain* v. *Ali Baksh.* (Proper application for copies made after expiry of period for appeal — Appellants guilty of negligence—Time for appeal was not extended.)

('75) 24 Suth W R 105 (106) : 15 Beng L R 272 (FB), *Jagarnath* v. *Shewratan.*

('20) 7 AIR 1920 Lah 224 (224) : 59 Ind Cas 965, *Kanhaya* v. *Nur Muhammad.* (Delay caused by applying for translation of judgment is not sufficient cause.)

('35) 22 AIR 1935 Lah 478 (478) : 155 Ind Cas 610 (DB), *Pir Baksh* v. *Kidar Nath.* (Delay in not bringing legal representative on record within time due to ignorance—*Held*, it was not adequate ground for extension of time.)

('36) 23 AIR 1936 Lah 793 (794) : 165 Ind Cas 154 (DB), *Atma Ram* v. *Harnam Singh.* (Appellate Court informing appellant about wrong person being impleaded and giving time to implead right person — Right person not impleaded within time—No sufficient cause.)

('32) 19 AIR 1932 Oudh 167 (167, 168) : 136 Ind Cas 838, *Sh. Mahommad Raza* v. *Ganga Devi.* (Limitation expiring on 9th December—Appeal filed on 19th December—Appellant contended that he misread 9 in letter of counsel's clerk as 19 —Letter not produced—*Held*, no sufficient cause made out.)

[*See* ('24) 11 AIR 1924 Mad 713 (715) : 80 Ind Cas 397 (DB), *Seshamma* v. *Yeeranki Peda Venkata Rao.*

('40) 27 AIR 1940 Cal 530 (531) : 191 Ind Cas 701, *Hari Pada Mukherjee* v. *Shaila Bala Devi.* (Appeal filed with deficit court-fee — Court by order fixing time for payment of balance — Order communicated neither to party nor to his pleader—Appeal rejected in default of payment — Appellant held not entitled to indulgence under S. 5 inasmuch as it was his or his pleader's business to ascertain date fixed for depositing deficit court-fee.)

('38) 25 AIR 1938 Bom 408 (410) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.* (Ignorance of the legal representatives of a deceased domiciled in a Native State or a foreign place may be a sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay.)]

2. ('30) 123 Ind Cas 83 (84) (Lah), *District Board, Sargodha* v. *Shamas Din.*

Note 11

1. ('24) 11 AIR 1924 All 176 (176): 75 Ind Cas 254, *Mt. Mahtab* v. *Mt. Birhmo.*

('20) 7 AIR 1920 Pat 594 (595):55 I. C. 17 (DB), *Jaleswar Dayal* v. *Ram Hari.*

('19) 6 AIR 1919 Pat 503 (505) : 4 Pat L Jour 381 : 52 Ind Cas 225 (DB), *Jahar Mal* v. *G. M. Pritchard.*

('11) 10 Ind Cas 866 (869) : 7 Nag L R 67, *Parashram* v. *Likhan.* (Carelessness of agent — Party must suffer.)

('10) 7 Ind Cas 391 (392) (Cal), *Tiarini Kumar Dutt* v. *Gopeswar Pal Choudhury.* (Case under O. 22 R. 4 and R. 9 (2), C. P. C.)

Section 5
Note 11

sufficient cause,[2] though if the party suffers from such negligence of his agent, the latter may be liable to the former in damages.[2a] In

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[2] ('38) 25 AIR 1938 Nag 156 (161) : I L R (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak*. (Appellant solely relying upon information carelessly given by pleader's clerk about duration of vacation of Court.)
('29) 16 AIR 1929 Sind 206 (207, 208) : 24 Sind L R 108 : 118 Ind Cas 212 (DB), *Jhamandas* v. *Bibi Aishan*. (Negligence on the part of the pleader's clerk is negligence on the part of the party.)
('15) 2 AIR 1915 All 34 (35) : 37 All 267:28 Ind Cas 265 (DB), *Budhu* v. *Dewan*.
('32) 1932 Mad W N 328 (329), *Poongavana Gramani* v. *Manika Goundan*. (Negligence of vakil's clerk in supplying papers.)
('27) 14 AIR 1927 Pat 232 (232, 233) : 101 Ind Cas 448 (DB), *Gopal Patwa* v. *Digambhar Singh*. (Negligence of pleader's clerk was regarded as negligence of agent which is equivalent to the negligence of the party himself.)
('14) 24 Ind Cas 977 (977) : 7 Sind L R 201, *Alladadshah* v. *Mukhdum Amin Muhammad*. (Negligence of pleader's clerk in not filing appeal.)
('20) 7 AIR 1920 Pat 581 (582) : 55 Ind Cas 271 (DB), *Sheikh Palat* v. *Sarwan Sahu*. (Gross carelessness of pleader in not filing vakalatnama with appeal.)
('18) 5 AIR 1918 Pat 336 (338) : 3 Pat L Jour 484 : 46 I. C. 509 (DB), *Jodhan* v. *Nankhu*. (Appeal filed with insufficient stamp —No vakil acting with reasonable care and intelligence could have imagined that such stamp was sufficient— Vakil must be taken to have acted with wanton negligence — Delay not excused.)
('15) 2 AIR 1915 Low Bur 66 (66):27 Ind Cas 639, *Ma Kya Nya* v. *Mg. Tun Hla*. (Costs and fees sent in name of absent member of advocate's firm—Other member though knowing of receipt of costs and fees failing to file appeal — Appellant's delay in not sending earlier — Delay was not excused.)
('14) 1 AIR 1914 Lah 304 (305) : 23 Ind Cas 86 (DB), *Mahomda* v. *Ladha Singh*. (Appeal filed in wrong Court through gross carelessness of pleader—Re-presentation to proper Court—*Held*, mistake could not be excused.)
('24) 11 AIR 1924 Lah 401 (401) : 71 Ind Cas 736, *Shahadat* v. *Hukam Singh*. (Appeal filed without order appealed against being stamped — Mistake due to carelessness of pleader's clerk.)
('27) 14 AIR 1927 Lah 884 (885) : 102 I. C. 615, *Gursaran Das* v. *District Board Jullundur*. (Appeal filed with deficit court-fee—Mistake due to gross negligence of party's counsel—Deficit made good beyond time—Delay was not excused.)
('92-96) 1892-1896 Upp Bur Rul 450 (450), *S. S. Manikum* v. *Maung Sein Hmon*.
('23) 10 AIR 1923 Mad 482 (483, 484) : 72 I. C. 308, *Sundaram Iyer* v. *Muthuramalinga*. (Copy of decree appealed against not filed along with memorandum of appeal—Delay of fifty-three days in filing the copy afterwards—Delay due to negligence of Dewan of party—Delay was not excused.)
('29) 16 AIR 1929 Sind 32 (33, 34) : 114 Ind Cas 101 (DB), *Mt. Ummakulsum* v. *Ghulam Rasul*. (Memorandum of appeal as originally filed did not include name of one of the defendants as co-respondent—Name brought on record after limitation for filing appeal had expired—Mistake due to inadvertence of legal advisers —Delay was not excused.)
('37) 24 AIR 1937 Nag 97 (98) : I L R (1937) Nag 507 : 170 Ind Cas 118, *Abdeali* v. *Viswanath Singh*. (Legal representatives not brought on record within period allowed by law—No explanation offered for this—No sufficient ground for holding that there has been no negligence or ignorance—Mistake of counsel—Delay was not excused.)
('01) 4 Oudh Cas 303 (313) (DB), *Shameshar Dat* v. *Mahadeo Prasad*. (Not presenting appeal in legal manner—Mistake of pleader—Delay was not excused.)
('31) 18 AIR 1931 Rang 80 (80) : 131 Ind Cas 507, *Maung Po Chin* v. *Po Tha*. (Appeal filed twentysix days beyond time—Gross negligence on part of pleader — In view of particular circumstances of case delay was not excused.)
('25) 91 Ind Cas 425 (426) (Oudh), *Babulal* v. *Rampher Singh*. (Wrong application for copy of decree — Subsequent correct application — This mistake of pleader resulting in filing of appeal beyond time—Delay was not excused.)
[*See* ('40) 27 AIR 1940 Cal 530 (531) : 191 Ind Cas 701, *Hari Pada Mukherjee* v. *Shaila Bala Devi*. (Appeal filed with deficit court-fee — Order for making good deficiency within time fixed—Appeal rejected on default—Extension cannot be granted under S. 5 on ground that order fixing time for payment of deficit court-fee was not communicated either to appellant or to his pleader.)]

[2a] ('15) 2 AIR 1915 All 34 (35): 37 All 267: 28 I. C. 265 (DB), *Budhu* v. *Dewan*.

Poongavana Gramani v. *Manika Goundan*,[3] Jackson, J., observed as follows:

> "I may observe that this is not a question of discipline, where the Court has to be vigilant on behalf of public interests. A delay in presenting a second appeal does not affect the public. It is essentially a question between the parties. A Court acting under section 5 of the Indian Limitation Act takes from one party what it gives to another; for it renders subject to appeal a decree which would otherwise be final.
>
> As between party and party, one side is fully justified in holding the other side responsible for its agent's acts. And, of course, to hold that so long as the principal commits no laches the acts of the agent are immaterial, would be to absolve vakils and vakils' clerks from the obligation to obey rules. From any laches on their part they could take shelter behind the principal's correctitude."

In the cases cited below[4] it was however held that the negligence of the agent is not always the negligence of the party, that if the party was diligent though the agent was negligent, it cannot be said that the party was negligent, but that if the party simply relied upon the agent without anything more, the neglect of the one will be the neglect of the other. It was also held in the undermentioned cases[5] that an honest, though *negligent*, mistake of the pleader is a sufficient cause. It is submitted this view is opposed to principle and is not correct and has been dissented from in other cases.[6]

12. Mistake of fact of party or his agent. — A *bona fide* mistake of fact on the part of the party will be a sufficient cause.[1] The test of *bona fides* is whether it was one committed in spite of due care and attention.[2] A mistake arising from *negligence*,[3] or committed without any real excuse,[4] or which could have been averted by proper enquiry[5] cannot be said to be *bona fide* and cannot be a sufficient cause. But a mistake, which might occur even in the most carefully conducted business, cannot be said to be a negligent mistake.[6]

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[3] ('32) 1932 Mad W N 328 (329, 330).

[4] ('29) 16 AIR 1929 All 351 (351) : 119 I. C. 447, *Lachmi Chand* v. *Unkarmal*. (Judgment on 24th March 1926—Cost for obtaining copy of decree paid to clerk on 25th March 1926—Application for copy on 26th March and copy obtained on 23rd April 1926 — Clerk got mixed up and forgot that he had received copy — Party enquiring all the time about copy and filing appeal as soon as copy was obtained — Delay in filing was excused.)

('19) 6 AIR 1919 Mad 581 (582) : 50 I. C. 518 (DB), *Kadir Mohideen* v. *Abubakkar*. (Negligence of vakil in not paying printing charges in time—But party otherwise diligent—Delay excused.)

[5] ('22) 9 AIR 1922 All 490 (491):44 All 636:68 I.C. 812(FB), *Shib Dayal* v. *Jaganath*.

('25) 12 AIR 1925 Mad 462 (462) : 86 Ind Cas 114 (DB), *Kandasamy Mudaliar* v. *Arunachalla Chetty*. (Delay due to careless arithmetical mistake of vakil.)

('26) 13 AIR 1926 Nag 503 (504) : 96 Ind Cas 857, *Baban* v. *Emperor*. (Honest though *careless* mistake in calculation held sufficient cause.)

[6] ('33) 20 AIR 1933 Oudh 523 (525) : 146 Ind Cas 127 : 9 Luck 193 (FB), *Mithoo Lal* v. *Jamna Prasad*.

('35) 22 AIR 1935 Oudh 108 (109) : 153 Ind Cas 161 (DB), *Bhagwan* v. *Badri*.

('01) 4 Oudh Cas 303 (313), *Shameshar Singh* v. *Mahadeo Prashad Singh*. (The fact that party was diligent is irrelevant if the pleader or agent has acted without due care and attention.)

Note 12

[1] ('31) 18 AIR 1931 Cal 506 (507) : 58 Cal 793 : 133 I. C. 332 (DB), *Corporation of Calcutta* v. *A. C. Pal*. (Appeal after period of limitation — Date of order not known and could not be known—Time was extended.)

('26) 13 AIR 1926 Lah 509 (510) : 92 Ind Cas 319 (DB), *Ranzor Singh* v. *Secy. of State*. (Appellant paying insufficient court-fee due to *bona fide* mistake.)

('16) 3 AIR 1916 Oudh 257 (263) : 32 I. C. 380, *Ghanshyam Das* v. *Mt. Hardei*. (One judgment and two decrees in two suits — Appellant confused by this and applying for copy of one judgment and decree—Mistake found too late when copy was obtained—Delay ought to be excused.)

('11) 9 Ind Cas 607 (607) (Lah), *Mohan Ram* v. *Muhammad Khuda*. (*Bona fide* mistake as to date of completion and delivery of copy of decree held sufficient cause.)

On the principles referred to in Note 11 the mistake of the agent of the party cannot stand on a higher footing than the mistake of the party himself.[7] Thus, the mistake of the agent cannot be a sufficient cause unless it is committed *bona fide*, i. e., unless it is one that has occurred in spite of due care and attention.[8] A mistake of the agent, which might occur even in spite of due care and attention, may be a sufficient cause.[9] Thus, where the pleader's name is omitted by oversight in the *vakalatnama* or in the memorandum of appeal, it has been held to be a sufficient cause.[10] As to further instances, see

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('20) 7 AIR 1920 Lah 508 (509) : 67 Ind Cas 306 (307), *Kartar Singh* v. *Ralla*. (Legal representatives not brought on record within time through *bona fide* mistake in copy of judgment—Time was extended.)

('13) 21 Ind Cas 444 (445) (All), *Habeeb* v. *Naush Ali*. (Party not signing vakalat.)

('38) 25 AIR 1938 Mad 218 (218, 219) : ILR (1938) Mad 275 : 174 I. C. 951 (DB), *Secretary of State* v. *Kistnamacharyulu*. (Ignorance of death of respondent—No negligence in setting aside abatement.)

[2] See Section 2 sub-section (7).

[3] See Note 11.

[4] ('28) 15 AIR 1928 Cal 249 (249) (DB), *Soneswar Das* v. *Kanakram*.

('76) 1 All 250 (252), *Zaibulnissa Bibi* v. *Kulsum Bibi*. (Error in the calculation of the time allowed, held no sufficient cause for delay.)

[5] ('09) 1 Ind Cas 904 (905) : 5 Nag L R 25, *Vithia* v. *Sakhya*. (Incorrect entry by clerk.)

[See however ('26) 13 AIR 1926 Sind 215 (216) : 20 Sind L R 90 : 95 Ind Cas 316 (DB), *Gerimal* v. *Shewaram*.]

[6] ('13) 21 Ind Cas 444 (445) (All), *Habeeb* v. *Naush Ali*. (Memorandum of appeal signed by pleader whose *vakalatnama* was not signed by appellants.)

[*See also* ('88) 1888 All W N 58 (59) (DB), *Jamna* v. *Ibrahim*. (Accidental clerical error.)]

[7] ('25) 12 AIR 1925 Oudh 189 (189) : 82 Ind Cas 484, *Ganesh Dat* v. *Hirde Behari*. (Delay not excused on ground of mistake of clerk—Apparently the mistake was a negligent one.)

[8] ('27) 101 Ind Cas 363 (363) (Rang), *Ma Ngwe Yun* v. *Ma Pu*.

('25) 12 AIR 1925 Oudh 374 (374) : 85 Ind Cas 693, *Mt. Dilan* v. *Ram Bharosey*. (Delay caused by forgetfulness of pleader.)

('19) 6 AIR 1919 Cal 585 (585) : 46 Ind Cas 480 (DB), *Guru Charan Ghose* v. *Kashi Chandra Ghose*. (Foolish mistake of agent in calculation of time.)

('28) 15 AIR 1928 Lah 488 (489) : 110 Ind Cas 374, *Mt. Pana Bibi* v. *Mahla*. (Mistake of counsel's clerk is not sufficient ground for extension of time.)

('17) 4 AIR 1917 Lah 407 (407) : 37 Ind Cas 828 (DB), *Jaidal Mal* v. *Amar Nath*. (Mistake through want of good faith in that the party relied on an unauthorised publication known as "Legal Diary" and preferred an appeal beyond limitation.)

[9] ('13) 21 Ind Cas 444 (445) (All), *Habeeb* v. *Naush Ali*. (Memorandum of appeal signed by pleader whose *vakalatnama* was not signed by appellants.)

('32) 19 AIR 1932 Mad 142 (144) : 135 I. C. 737, *Ramji Das* v. *Kumarakalathi Mudali*. (Challan being mislaid by a *bona fide* mistake of vakil's clerk.)

[10] ('32) 19 AIR 1932 Lah 134 (135) : 134 Ind Cas 114, *Mangal Singh* v. *Babu Singh*. (Counsel presenting appeal — Power of attorney without counsel's name but signed by counsel and appellant — Defect rectified after limitation — *Held* appeal filed within time.)

('21) 8 AIR 1921 All 210 (211) : 43 All 392 : 61 Ind Cas 410, *Shambhu* v. *Badri*.

the undermentioned cases.[11]

There is, however, this difference in effect between a *bona fide* mistake of the party and such mistake of his agent, namely that if the party has acted without due care and attention in relying upon the agent, the mistake of the latter even though *bona fide*, will not be a sufficient cause.[12]

13. Mistake of law of party or his agent. — A mere mistake or ignorance of law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5.[1] But a mistake of law which is

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('30) 17 AIR 1930 All 112 (113) : 121 Ind Cas 546 (DB), *Muhammad Qamar Shah Khan* v. *Mohammad Salamat Ali Khan.*

('27) 14 AIR 1927 All 816 (817) : 102 Ind Cas 255, *Loknath Misir* v. *Sheo Saran Misir.* (Vakalatnama signed by vakil but his name not entered in body.)

('21) 63 Ind Cas 726 (727) (Lah), *Balwant Singh* v. *Sunder Singh.* (Omission to sign memo of appeal.)

('23) 10 AIR 1923 Lah 402 (403) : 84 I. C. 518 (DB), *Mathra Das* v. *Ram Lal.* (Do.)

('27) 14 AIR 1927 Lah 618 (619) : 103 Ind Cas 537, *Ram Lal* v. *Budho Mal.* (Vakalatnama not properly signed.)

('37) 24 AIR 1937 Nag 65 (65) : I L R (1937) Nag 494 : 169 Ind Cas 117, *Ramdeo Tilakchand* v. *Lalu Natha.*

('34) 21 AIR 1934 Pat 290 (292) : 149 Ind Cas 596 (DB), *Mt. Binda Kuer* v. *Lalita Prasad.* (Vakalatnama in two sheets, purporting to be on behalf of four parties —One sheet signed by one and other by other three—Pleader stating that vakalatnama was on behalf of all four—Vakalatnama was held proper at least for extension of period under this section.)

[11] ('20) 7 AIR 1920 All 290 (291) : 59 Ind Cas 937 (DB), *Sheo Mohan* v. *Kali Prasad.* (Mistake in calculation on assumption which was not unreasonable.)

('32) 19 AIR 1932 Mad 142 (143) : 135 Ind Cas 737, *Ramji Das* v. *Kumarakalathi Mudali.* (Challan mislaid by clerk, held, *bona fide* mistake and delay excused.)

('07) 12 Cal W N 25 (27) (DB), *Beshandut Tewari* v. *Nandan Pershad Dube.* (*Bona fide* mistake of pleader in calculation.)

('13) 21 Ind Cas 444 (445) (All), *Habeeb* v. *Naush Ali.* (Mistake which might occur in the most carefully conducted business.)

('30) 17 AIR 1930 Sind 252 (253) : 25 Sind L R 63 : 130 I. C. 554, *Goverdhandas* v. *Mt. Rajhibai.*

('28) 15 AIR 1928 Lah 643 (646) : 108 Ind Cas 619, *Nizam Din* v. *Muhammad Iqbal.* (Mistake of vakil's clerk resulting in filing appeal late by one day—Delay was excused.)

('33) 20 AIR 1933 Lah 1 (2) : 140 Ind Cas 495, *Thakar Singh* v. *Jagat Singh.* (Mistake in not filing decree appealed from.)

('34) 21 AIR 1934 Lah 1011 (1012) : 155 Ind Cas 893, *Kanshi Ram* v. *Municipal Committee, Moga.* (Vakalatnama not containing names of parties—Defect might be condoned and time extended.)

('34) 21 AIR 1934 Lah 444 (445) : 150 I. C. 731, *Dost Muhammad* v. *Sardar Ali.* (Counsel *A* having no authority presenting appeal instead of counsel *B* who was authorised to present the same—*Bona fide* mistake—Time was extended.)

[12] ('33) 20 AIR 1933 Cal 462 (463) : 145 Ind Cas 116 (DB), *Khajeh Habibullah* v. *Abdul Karim.* (Reliance placed on the wrong calculation of a stranger who is neither the pleader nor the pleader's clerk.)

Note 13

[1] ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Kanshi Ram.*

('32) 19 AIR 1932 Cal 171 (176, 177) : 144 Ind Cas 561 (DB), *Secretary of State* v. *Hindustan Co-operative Insurance Society Ltd.* (Party applying for review after dismissal of appeal is not protected by this section.)

('88) 12 Bom 320 (321) (DB), *Sitaram Paraji* v. *Nimba.* (Mistake of law as to deduction of time spent in another litigation in respect of same subject-matter.)

('11) 9 Ind Cas 222 (223) (Lah) (DB), *Mt. Masum Begam* v. *Madan Mohan Lall.* (Copy of decree filed after time— Pardanashin lady not knowing that decree was required to be filed with appeal.)

committed *bona fide*, i.e., in spite of due care and attention, has been regarded as a sufficient cause in this country.[2] In *Brij Indar Singh*

('14) 1 AIR 1914 Lah 123 (124): 1915 Pun Re No. 41 :21 I. C. 951 (DB), *Hadu* v. *Lala*. (In an appeal, application to bring on record the heirs of defendant-respondent made six months after respondent's death due to ignorance of law — Dalay was not excused.)

('25) 12 AIR 1925 Lah 602 (602):87 Ind Cas 952, *Ramji Lal* v. *Lakshmi Chand*. (Application for leave to appeal as pauper filed beyond time due to ignorance of law — Delay was not excused.)

('29) 16 AIR 1929 Nag 74 (75) : 117 Ind Cas 282, *Nandu* v. *Bhuwanoo*. (Statutes of limitation must be strictly construed against claimants.)

[*See also* ('28) 15 AIR 1928 Mad 690 (694) : 110 Ind Cas 837 (DB), *Sutharsana Chariar* v. *Samarapuri Chettiar*. (The expression "sufficient cause" in the context must be regarded as merely indicating that the Court must be satisfied that the delay was an excusable delay.)

('26) 13 AIR 1926 Oudh 206 (206, 207):91 Ind Cas 867 (DB), *Mt. Hasib-un-Nisa* v. *Bishnath*. (Agent misconstruing order of Court —Delay not condoned.)]

[2] ('13) 18 Ind Cas 37 (40, 41) : 1913 Pun Re No. 59 (DB), *Fakir Chand* v. *Municipal Committee of Hazro*.

('37) 24 AIR 1937 Rang 199 (200): 169 Ind Cas 398, *Daw Sein* v. *Chinese Kwan*.

('32) 19 AIR 1932 Cal 589 (597) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan Rai* v. *Mohendra Nath Banerjee*.

('09) 1 Ind Cas 902 (902) (All), *Ganga Sahai* v. *Mt. Rai Kunwar*. (*Bona fide* mistake as to forum of appeal.)

('25) 12 AIR 1925 Cal 684 (684) : 94 Ind Cas 929 (DB), *Krishna Mohan Ghose* v. *Surapati Banerjee*. (*Bona fide* ignorance of law is sufficient cause.)

('12) 15 Ind Cas 140 (141):1912 Pun Re No. 115 (DB), *Dhan Singh* v. *Kahn Singh*. (Appellant misled by the Court framing two decrees instead of drawing up one.)

('23) 73 Ind Cas 788 (790, 791) (Pesh), *Murli Mal* v. *Vaishno Ditta*. (Deficiency in court-fees in partition suit—Mistake deliberate—Extension cannot be granted.)

('86) 13 Cal 266 (267) (DB), *Hurro Chunder Roy* v. *Surna Moyei*. (Wrong impression about forum of appeal was held sufficient cause to grant extension.)

('24) 11 AIR 1924 Rang 148 (149):1 Rang 584: 77 Ind Cas 385 (DB), *Tin Tin Nyo* v. *Maung Ba Saing*.

('36) 23 AIR 1936 Nag 246 (247) : 167 Ind Cas 260, *Gangaprasad Rajaram* v. *Mt. Banaspati*. (This rule is subject to qualifications that there must be no negligence, no inaction and no want of good faith.)

('18) 5 AIR 1918 Mad 703 (704) : 39 Ind Cas 975 (DB), *Soundararaja Iyengar* v. *Srinivasa Chariar*. (Preliminary order not capable of being mistaken for final—Delay in such case, in filing appeal would not be excused.)

('99) 3 Oudh Cas 13 (17) (DB), *Jagan Nath* v. *Rae Madho Parshad*. (Ignorance of law is not sufficient cause where applicant does not inform his pleader that opposite party was dead nor takes any trouble to enquire and ascertain what steps should be taken consequent on the death of the opposite party.)

('91) 1891 Pun Re No. 66, *Mt. Ghauhar* v. *Khan Muhammad*. (Memorandum of appeal received and retained by wrong Court — Mistake by oversight—Presentation to proper Court beyond time—There is sufficient cause for delay.)

('25) 12 AIR 1925 Lah 381 (383) : 6 Lah 233 : 86 Ind Cas 1 (DB), *Raghbir Saran* v. *Mt. Sohan Debi*. (Delay in filing appeal — Appellant doubtful whether order appealed against was order or decree and therefore paying insufficient court-fee—Delay was excused.)

('36) 23 AIR 1936 Lah 168 (170) : 161 Ind Cas 251 (DB), *Hira Lal* v. *Khizar Hayat*. (Decree of lower Court was not clearly worded and its exact meaning was also not beyond doubt—Appellant misled by this, filed appeal in wrong Court — Time was extended.)

[*See* ('89) 1889 Pun Re No. 184 (FB), *Sardar Pratab Singh* v. *Lala Karam Singh*. (Presentation of appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law may constitute a sufficient cause.)

('24) 11 AIR 1924 Lah 41 (42) : 4 Lah 122 : 74 Ind Cas 451 (DB), *Muhammad Hassan-ud-din* v. *Saif Ali*. (Rule, that in addition to copies specified in O. 41, R. 1, C. P. Code., memorandum of appeal should be accompanied by a copy of judgment of Court of first instance, newly published—Delay caused by ignorance of rule is sufficient excuse.)

('23) 10 AIR 1923 Lah 513 (514) : 77 Ind Cas 416, *Muhammad Aslam* v. *Jodh Singh*. (Appeal filed in time — Court-fee paid beyond time but under order of Court—*Held*, mistake was *bona fide* and time could be extended.)

v. *Kanshi Ram*,[3] where the delay was due to a wrong proceeding being taken on a *bona fide* mistake of law, their Lordships of the Privy Council observed as follows :

> "Now if the matter were entirely open, inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal* v. *Chand Mal*,[4] above cited. *But the matter is not open.* To interfere with a rule which, after all, is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere."

On the principles stated in Notes 11 and 12, a mistake of law committed by a party's legal adviser will stand on the same footing as a mistake by the party himself. If the mistake of the lawyer is one that can be condoned under the section and the party has acted on his advice, the party is not prevented from relying upon it for claiming the indulgence under this section. In *Sunderbai* v. *Collector of Belgaum*,[5] their Lordships of the Privy Council observed as follows :

> "The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation. See *Brij Indar Singh* v. *Kanshi Ram*.[6]"

See also the undermentioned cases.[7]

('33) 20 AIR 1933 Lah 264 (265) : 144 Ind Cas 184, *Bhagwan Das* v. *Tikaya Ram*. (Honest belief of appellant regarding adequacy of court-fee while presenting memorandum of appeal—Delay in giving adequate court-fee was condoned.)
(1900) 1900 Pun L R No. 206 (207) (DB), *Pala* v. *Ishar*.
('28) 15 AIR 1928 Mad 404 (406) : 108 Ind Cas 288, *Ramchandran* v. *Sabapathy Mudaliar*. (Per Venkatasubba Rao, J.; following Bramwell, L. J., in *Collins* v. *Vestry of Paddington*, (1880) 5 Q B D 368.)
('90) 13 Mad 269 (270) (DB), *Krishna* v. *Chathappan*.]
See also cases cited in Note 9 which are all cases of mistakes of law.

[3] ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

[4] ('88) 10 All 587 (594, 596) : 1888 All W N 258 (DB).

[5] ('18) 5 AIR 1918 P C 135 (137) : 43 Bom 376 : 46 Ind App 15 : 52 I. C. 897 (PC).

[6] ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

[7] ('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC), *Rajendra Bahadur* v. *Rajeshwar Bali*. (Mistaken advice given by a legal practitioner may, in the circumstances of a particular case, give rise to sufficient cause within the section.)
('27) 14 AIR 1927 All 758 (759) : 101 Ind Cas 777, *Ram Lal* v. *Mustaq Ali*.
('30) 17 AIR 1930 Cal 426 (427) : 126 I.C. 781 (DB), *Jnanada Prosad* v. *G.M. Falkner*.
('07) 29 All 638 (640) : 1907 All W N 219 : 4 A. L. J. 515, *Anjora Kunwar* v. *Babu*.
('06) 28 All 414 (416) : 1906 All W N 67 : 3 A. L. J. 218 (DB), *Kura Mal* v. *Ram Nath*.
('03) 1903 All W N 82 (83) (DB), *Wazir Ali* v. *Zainab*.
('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali* v. *Akhtar Hussain*.
('33) 20 AIR 1933 Lah 541 (541, 542) : 14 Lah 206 : 149 I. C. 968 (DB), *Ghulam Muhammad* v. *Usman*. (Mistaken but *bona fide* advice given by pleader—Acting on this, appellant filing appeal in wrong Court—Appeal returned and re-presented to proper Court—Time extended.)

It is not, however, every wrong advice by the legal adviser that will amount to a sufficient cause[7a] entitling the party to claim the indulgence under this section. Acting upon wrong advice will amount to a "sufficient cause"—

(1) when the advice was itself given *bona fide*, i.e., after the exercise of due care and attention,[7b] and

(2) the party himself has acted with due care and attention in seeking and relying upon such advice.

Thus, where the wrong advice given by the legal adviser is honest and *bona fide*, but it is based on an untrue statement of facts made by the party to the pleader, the party cannot be said to act with due care and attention, and acting upon the advice so given cannot be a sufficient cause.[8] Similarly, where the party consults legal practitioners of inferior standing and little experience and acts upon the advice given by them, he cannot be said to have acted with due care and attention.[9] See also the undermentioned cases.[9a]

In considering when an advice by the legal practitioner may be relied upon as an excuse for extending the time, Brett, L. J., in *Highton* v. *Treherne*,[10] observed as follows :

> "In cases where a suitor has suffered from the negligence, or ignorance or, gross want of legal skill of his legal adviser, he has his remedy against that legal adviser, and meantime the suitor must suffer. But, where there has been a *bona fide* mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited."

This view has been generally followed by the High Courts in India.[10a] Thus, if the mistake proceeds from the culpable negligence of

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[7a] ('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC), *Rajendra Bahadur* v. *Rajeshwar Bali*. (There is no general doctrine which saves parties from the results of wrong advice.)

('32) 19 AIR 1932 Cal 589 (597) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohun Rai* v. *Mohendra Nath Banerjee*.

('02) 5 Oudh Cas 384 (389, 390), *Gajadhar Parshad* v. *Mt. Lachmin*. (Merely acting on wrong advice is not sufficient cause.)

('26) 13 AIR 1926 Nag 162 (163) : 92 I. C. 33, *Sadashiv* v. *Bapu*.

[7b] ('27) 14 AIR 1927 Rang 20 (21) : 4 Rang 265 : 98 Ind Cas 417 (FB), *J. N. Surty* v. *T. S. Chettyar Firm*.

[8] ('19) 6 AIR 1919 Pat 38 (42) : 49 Ind Cas 1000 (DB), *Mt. Bibi Fakirunnissa* v. *Rambhajan Singh*.

[9] ('13) 20 Ind Cas 3 (6, 7) (Lah) (DB), *Mt. Husaina* v. *Mt. Sahib Nur*.

[9a] ('40) 27 AIR 1940 Cal 150 (152) : 187 Ind Cas 416 (DB), *Amulya Krishna* v. *R. P. Co-operative Bank*. (Cross-objection not filed by party within time—Wrong impression of his legal adviser regarding cross-objection would not entitle him to extension of time.)

('26) 13 AIR 1926 Lah 693 (693) : 98 Ind Cas 514 (DB), *Ichhar Singh* v. *Natha*. (Appeal filed one day late through oversight of counsel's clerk—Time extended.)

('33) 20 AIR 1933 Cal 796 (797) : 146 Ind Cas 359 (DB), *Benodini Choudhurani* v. *Jagabandhu Roy*. (Wrong advice as to time for appeal—Appeal filed within such time, though after the correct period of limitation, but without any stamp at all—Delay not excused.)

[10] (1878) 48 L J Ex 167 (168) : 39 L T 411 : 27 W R (Eng.) 245.

[10a] ('38) 67 Cal L Jour 107 (109) (DB), *Phani Bhusan Pal* v. *Sm. Nalinibala*.

('38) 25 AIR 1938 Pat 413 (418) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand Jha*. (Party acting on advice of lawyer who was known to be a careful advocate—Lawyer's advice not unreasonable and lawyer not careless or negligent—Delay should be excused.)

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the legal adviser, it is not a sufficient cause.[11] If it is not *bona fide*, i.e., not one committed in spite of due care and attention[12] or is one which could

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('33) 20 AIR 1933 Oudh 523 (524) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.*

[*See also* ('32) 19 AIR 1932 Cal 589 (589) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan* v. *Mohendra Nath.* (Citing (1878) 48 L J Ex 167 and observing that this furnishes the true rule of guidance.)]

[11] ('38) 67 Cal L Jour 107 (110) (DB), *Phani Bhusan Pal* v. *Sm. Nalinibala.*

('38) 25 AIR 1938 Nag 156 (159) : I L R (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak.*

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.*

('29) 16 AIR 1929 Bom 393 (395) : 122 Ind Cas 64 (DB), *Bijuboo* v. *Rajaballi.* (A I R 1924 Rang 148 and 34 Cal 216, followed.)

('34) 21 AIR 1934 Nag 52 (54) : 144 Ind Cas 41, *Nareshwar* v. *Chabildas.* (Mistake of pleader in failing to notice Full Bench decision of High Court in province where the pleader practised—Extension under this section cannot be granted.)

('30) 17 AIR 1930 Rang 209 (210) : 127 Ind Cas 379, *Hatin* v. *Osi Ullah.* (Advocate himself not looking into question of time for appeal but accepting statement of his clerk that eight days were allowed for obtaining copies—Advocate himself not examining papers to see if statement is correct.)

('33) 20 AIR 1933 Nag 219 (220) : 145 Ind Cas 760 : 29 Nag L R 295, *Ramarao* v. *Santoshrao.* (Pleader whose power to appear had expired with trial Court, presenting appeal in ignorance but not taking steps to find out whether appeal was properly presented though mistake in form brought to his notice—Delaying in the hope that irregularity might escape detection—*Held*, there was no proper cause for delay in filing appeal.)

('26) 13 AIR 1926 Lah 343 (344) : 92 Ind Cas 991, *Puran Chand* v. *Emperor.* (Negligence of party and counsel in not paying deficit court-fee ordered to be paid —Time cannot be extended.)

[**But see** ('28) 15 AIR 1928 Cal 468 (471, 472) : 55 Cal 798 : 111 Ind Cas 708 (DB), *Ambika Ranjan* v. *Manikganj Loan Office.* (It was held that where party acted *bona fide* on advice negligently given, there may be a sufficient cause—It is submitted that this view is not correct.)

('20) 7 AIR 1920 Lah 241 (242) : 1 Lah 508 : 59 Ind Cas 556, *Surta Singh* v. *Emperor.* (Through want of due diligence of counsel, criminal appeal, instead of being filed in Sessions Court, was filed in High Court—Appeal re-presented in Sessions Court after limitation—*Held*, accused should not be deprived of his appeal being heard on merits merely because his counsel had been somewhat careless—Delay excused—Submitted wrong.)]

[12] ('40) 27 AIR 1940 Rang 14 (16) : 1939 Rang L R 639 : 186 Ind Cas 715, *Firm R. M. A. L.* v. *Ko Shan.* (Litigant asking his advocate to file appeal and leaving it entirely to him to take necessary steps—Advocate filing appeal in wrong Court —Litigant cannot claim to have acted in good faith unless lawyer so acted.)

('39) 26 AIR 1939 Oudh 245 (247) : 14 Luck 701 : 183 Ind Cas 436 (DB), *Nazir Hasan Khan* v. *Ganga Din.*

('23) 10 AIR 1923 Lah 612 (614) : 72 Ind Cas 732, *Umrao Baksh* v. *Malik Muhammad Khan.*

('32) 19 AIR 1932 Cal 589 (600) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan* v. *Mohendra Nath.*

('18) 5 AIR 1918 Pat 336 (338) : 46 I. C. 509 (DB), *Jodhan* v. *Nankhu.* (Appeal filed with stamp which no vakil exercising due care and intelligence could have imagined was sufficient—Delay caused in supplying full fee when alone the appeal becomes valid, not excused.)

('24) 11 AIR 1924 Rang 148 (149) : 1 Rang 584 : 77 Ind Cas 385 (DB), *Tin Tin Nyo* v. *Maung Ba Saing.* (Per Pratt, J.)

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal* v. *Jamna Prasad.*

('07) 34 Cal 216 (219, 220): 5 Cal L Jour 380 (DB), *Sarat Chander* v. *Saraswati.*

('26) 93 Ind Cas 876 (877) (Lah), *Labhu Ram* v. *Mohammad Din.* (Mistake of counsel not due to ignorance but to want of due care and attention.)

('18) 5 AIR 1918 Lah 67 (67, 68) : 43 Ind Cas 317 : 1917 Pun Re No. 95 (DB), *Resal Singh* v. *Shadi.* (Revision application filed in place of appeal—On application of party, revision converted into appeal at a time when period for appeal had expired—Mistake not shown to be *bona fide*—Extension of time was not granted.)

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have been avoided by due care and attention,[13] it is not a sufficient cause. If it is due to want of reasonable skill on the part of the legal adviser, it will stand on the same footing as negligence. A normal standard of efficiency is expected of a legal adviser, and where an advice is given which no legal adviser of reasonable skill would be expected to give, it must be considered that the adviser acted negligently; in such a case there is no sufficient cause.[14] An *obvious* mistake cannot be said to be *bona fide.*[15]

('28) 15 AIR 1928 Lah 216 (218) : 9 Lah 76 : 104 Ind Cas 281 (DB), *Secretary of State* v. *Tirath Ram.* (Alteration of law proved to be known to Secretary of State through his law officers—Extension urged on ground that effect of alteration was not fully appreciated—*Held* extension could not be granted.)

('33) 20 AIR 1933 Lah 568 (569) : 144 Ind Cas 627 (DB), *Uttam Chand* v. *Vishan Das.* (Preferring appeal to wrong Court after consulting counsel.)

('36) 23 AIR 1936 Lah 935 (936) : 167 I. C. 756, *Ghulam Muhammad* v. *Barkat Ali.* (Deficient court-fee—Application for extension of time to make up deficiency not made till after about seven months after its discovery—Appeal barred during that time—Extension was not granted.)

('18) 5 AIR 1918 Lah 355 (356) : 45 Ind Cas 542, *Ahmed Hussain* v. *Mt. Shamsulnisa.* (Mistake is not *bona fide* when appeal is presented to Court having no jurisdiction.)

('12) 15 Ind Cas 170 (171) (Lah) (DB), *Mt. Harnam Kaur* v. *Sohan Singh.* (Probate—Appointment of receiver—Appeal to Divisional Court—Subsequent appeal to High Court preferred out of time—Mistake due to carelessness—Time was not extended.)

('38) 25 AIR 1938 Lah 81 (82) : I L R (1938) Lah 379 : 178 Ind Cas 510, *Amrit Lal* v. *Phool Chand.*

[*See also* ('03) 30 Cal 309 (314, 315, 316) : 30 Ind App 20 : 8 Sar 431 (PC), *Ram Narain Joshi* v. *Parmeswari Narain Mahta.*

('11) 11 Ind Cas 812 (813) (Rang), *Salvador* v. *Meyer & Co.* (Mistake of law owing to lack of ordinary diligence.)

('29) 16 AIR 1929 Mad 91 (92) : 112 Ind Cas 307 (DB), *Lakshmikanthamma* v. *Ranganayakulu.* (Insolvency matters discussed in proceeding before District Munsif acting in exercise of original jurisdiction—Vakil's affidavit not saying that he advised that an appeal lay only under S. 75, Provincial Insolvency Act, and not under S. 47, C. P. C. — Appeal filed in sub-Court beyond time as an afterthought—Delay not excused.)]

13. ('09) 1 Ind Cas 904 (905, 906) : 5 Nag L R 25, *Vithia* v. *Sakhya.* (Test is whether the wrong action was taken under an honest though mistaken belief formed with due care and attention.)

('11) 12 Ind Cas 677 (678, 679) (Cal) (DB), *Sundar Koer* v. *Raghunath Sahai.* (Do.)

('24) 11 AIR 1924 Nag 279 (280) : 78 Ind Cas 154 (DB), *Padamraj Fhulchand* v. *Mitsui Bushan Kesha Ltd.* (Ignorance of lawyer as to shortened period of limitation which could have been avoided with due care and attention is not a sufficient cause.)

('28) 110 Ind Cas 533 (534, 535) (Lah) (DB), *Muhammad Amin* v. *Chanan Mal.*

('86) 13 Cal 62 (65, 66) (DB), *Bhopal Chandra Lahiri* v *Solomon.* (Vakil not having read the document is no sufficient cause.)

14. ('38) 67 Cal L. J. 107 (110) (DB), *Phani Bhusan Pal* v. *Sm. Nalinibala Dasi.*

('23) 10 AIR 1923 Pat 140 (141, 142) : 63 Ind Cas 278 (DB), *S. C. Dey* v. *Mt. Rajwanti Kuer.* (Where a mistake is such that it could not have been committed by a practitioner with ordinary experience, delay will not be excused.)

('32) 19 AIR 1932 Cal 171 (176, 177) : 144 Ind Cas 561 (DB), *Secy. of State* v. *Hindustan Co-operative Insurance Society, Ltd.* (Advice which no responsible lawyer could have been expected to give — Wrong proceeding on such advice — Delay was not excused.)

15. ('24) 11 AIR 1924 Rang 148 (149, 153) : 1 Rang 584 : 77 Ind Cas 385 (DB), *Tin Tin Nyo* v. *Maung Ba Saing.* (No care at all was taken to consider forum of appeal.)

('06) 3 Cal L Jour 53n (S N), *Diem Sana* v. *Gunendra Nath.* (Valuation obviously over Rs. 5000 — Appeal preferred to District Court — Case of negligence — No indulgence.)

('07) 34 Cal 216 (220, 221) : 5 Cal L Jour 380 (DB), *Sarat Chandra Bose* v. *Saraswati Debi.*

But where the advice is given after due care and attention,[15a] or proceeds on a mistake which even a practitioner possessing reasonable skill is likely to commit, then the mistaken advice would be a sufficient cause.[16] In *Nagindas* v. *Nilaji*,[17] it was held that the delay caused by

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('29) 16 AIR 1929 Mad 91 (92) : 112 Ind Cas 307 (DB), *Lakshmikanthamma* v. *Renganayakulu*. (Where the mistake is both stupid and unaccountable, the suspicion of ulterior motive can hardly be said to have been displaced.)

[15a] ('40) 27 AIR 1940 Rang 14 (15) : 1939 Rang L R 639 : 186 I. C. 715, *Firm R. M. A. L.* v. *Ko Shan*.
('38) 25 AIR 1938 Pat 413 (415) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand*. (Pleader filing appeal rightly in his view—Anticipation regarding Judge's view on valuation of suit difficult — Lawyer should be deemed to have used due care.)
('13) 20 Ind Cas 3 (6, 7) (Lah) (DB), *Fakhur Ali* v. *Mt. Sahib Nur*. (Senior pleader giving advice after due deliberation — Due diligence also shown — Delay was excused.)
('26) 133 Ind Cas 877 (878) (Lah) (DB), *Parja* v. *Dumanun*. (Mistake in failing to get fresh power of attorney from legal representatives.)
('13) 19 Ind Cas 931 (933) (Cal) (DB), *Rakhal Chandra Ghose* v. *Ashutosh Ghose*. (Mistake in calculating period of limitation.)
('30) 17 AIR 1930 Oudh 49 (50) : 124 Ind Cas 362 (DB), *Chhotey Lal* v. *Mt. Devi Brij Rani*. (Mistaken advice by counsel.)
('06) 10 Oudh Cas 291 (294) (DB), *Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammed Bakar*. (Do.)
('16) 3 AIR 1916 Lah 268 (269) : 32 Ind Cas 640, *Azim Ullah* v. *Gokal Chand*. (Mistaken advice by counsel due to change in law.)
('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gali* v. *Maung Tun Win*.

[16] ('38) 25 AIR 1938 Pat 413 (415): 17 Pat 507: 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand*.
('11) 12 Ind Cas 677 (679) (Cal) (DB), *Sunder Kuer* v. *Raghunath Sahai*.
('23) 10 AIR 1923 Pat 140 (141, 142) : 63 Ind Cas 278 (DB), *S. C. Dey* v. *Mt. Rajwanti Kuer*.
('26) 13 AIR 1926 Cal 688 (689) : 95 I. C. 245 (DB), *Dabendra Nath* v. *Nagendra Nath*. (Conflicting authorities—No want of due diligence in giving wrong advice—Delay excused.)
('12) 16 Ind Cas 425 (426, 427) (Cal) (DB), *Bonomali Gaontia* v. *Padma Lochan Gaontia*. (Mistake not obvious or inexcusable—No negligence.)
('12) 13 Ind Cas 116 (117) (All) (DB), *Abdul Ghani* v. *Abdul Majid*. (Mistake not unnatural under the circumstances—Delay excused.)
('12) 16 Ind Cas 940 (942) (Cal) (DB), *Ranjit Missir* v. *Ramudar Singh*. (Mistake as to forum due to conflict of judicial decisions.)
('09) 1 Ind Cas 687 (688): 12 Oudh Cas 31, *Kishen Dayal* v. *Raja Singh*. (Mistake in spite of due care and attention on doubtful point—*Held*, sufficient cause.)
('22) 9 AIR 1922 All 490 (491) : 44 All 636 : 68 Ind Cas 812 (FB), *Shib Dayal* v. *Jagannath*. (Mistake of pleader in *muffasil* about High Court practice.)
('13) 17 Ind Cas 155 (156, 157) (Cal) (DB), *Prosonno Kumar Debi* v. *Ram Chandra Singha*. (Decree obtained before filing appeal—Decree not filed with appeal owing to accidental mistake.)
('98) 2 Oudh Cas 133 (135), *Lal Bahadur* v. *Mir Bakar Husain*. (Point of law of some difficulty—Pleader's mistaken action supported by some authorities—Extension of period under this section was allowed.)
('07) 1907 Upp Bur Rul 3rd Quarter Lim 1 (2), *Nga Po An* v. *Nga Nyun Bu*. (*Bona fide* mistake of law is sufficient cause where there is no want of diligence or *bona fides* and there was some reason for entertaining the mistaken view of law.)
('33) 20 AIR 1933 Rang 96 (98) : 142 I. C. 185 (DB), *Ma Sein* v. *S. T. R. M. Firm*.
[*See* ('13) 19 Ind Cas 438 (439): 1913 Pun Re No. 85, *Harjas Mal* v. *Mt. Kahni*. (Decree obtained before filing appeal — Decree not filed with appeal owing to accidental mistake.)
('95) 11 Cal 767 (776), *Gopal Chandra Lahri* v. *Solomon*. (*Bona fide* mistake — Party diligent after mistake was discovered—Delay excused.)]

[17] ('24) 11 AIR 1924 Bom 399 (406, 407) : 48 Bom 442 : 80 Ind Cas 862 (DB).
[See however ('25) 12 AIR 1925 Nag 193 (193) : 75 Ind Cas 878, *Gopal Ganesh* v. *Walabdas Santukiram*. (Ignorance of change, of which *sufficient notice* has been given, is not sufficient cause.)]

the wrong advice of the legal adviser not knowing a recent change in the law curtailing the period of limitation was a "sufficient cause" for the delay. It was observed that the English authorities were to the same effect. Where the wrong advice amounts to a sufficient cause, it must further be shown that the appellant or applicant has otherwise been reasonably diligent in prosecuting his proceeding, before the discretion can be exercised in his favour.[18] See also Note 7.

Where extension is claimed on the ground of mistake of the legal adviser, there ought to be proper evidence establishing the fact that there was a mistake and that it was *bona fide*. The legal adviser should file an affidavit to that effect.[19]

14. Amendment of decree. — The amendment of a decree under S. 152 of the Code of Civil Procedure does not give a fresh starting point of time for appeal.[1] But such an amendment may be a "sufficient cause" under this section for not filing the appeal within time,[1a] though every amendment does not necessarily entitle a party to claim an extension of time under this section.[1b] Whether there is a sufficient cause for such extension will depend upon the circumstances of the case.[2] If the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should exercise in the appellant's favour the discretion vested in it under S. 5.[3] There is a difference of opinion as to whether, when the grounds of appeal have no reference to the amendment, the discretion under S. 5 can be exercised in favour of the appellant. On the one hand it has been held in the undermentioned cases[4] that the discretion cannot be exercised ; while it has been held in the cases noted below[5] that even in such cases circumstances may appear which may amount to sufficient cause. Where the appellant is under a *bona fide* mistake that time runs from the date of the amendment and he is not shown to be negligent or guilty of any laches, time may be extended.

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[18] ('24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Prabhu Dayal* v. *Murli Dhar.*
('27) 14 AIR 1927 Cal 829 (829, 830) : 105 Ind Cas 217 (DB), *Promotha Nath* v. *Bhabataran Ganguly.* (Wrong advice held sufficient cause — Diligence shown — Delay was excused.)
[*See* ('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal Ganguli* v. *Dasarathi Mukerji.* (Party acting on wrong advice — Delay was excused on the ground that he had been shown to be diligent.)
('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Ilahi Newaz Khan* v. *Biseswar Baisya.*]

[19] ('18) 5 AIR 1918 Cal 53 (55) : 45 I. C. 725 (DB), *Iswar Chandra* v. *Arjan.*
('18) 5 AIR 1918 Lah 67 (67) : 1917 Pun Re No. 95 : 43 Ind Cas 317 (DB), *Resal Singh* v. *Shadi.*

Note 14

[1] ('06) 3 Cal L Jour 188 (191) (DB), *Brojolal Rai* v. *Tara Prasanna.*
('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra* v. *Gollam Hossein Mollah.*
('29) 16 AIR 1929 Cal 676 (677) : 57 Cal 549 : 122 Ind Cas 634 (DB), *Nagendra Nath* v. *Ambica Charan.*
[But see ('31) 18 AIR 1931 Cal 578 (579) : 133 Ind Cas 571 (DB), *Soudamini Dasi* v. *Nabalak Mia Bhuia.* (Submitted not correct.)]
See also Authors' Commentary on the Civil Procedure Code, 3rd Edn., Section 152 Note 14.

[1a] ('31) 18 AIR 1931 Cal 578 (579) : 133 Ind Cas 571 (DB), *Soudamini Dasi* v. *Nabalak Mia Bhuia.* (Mortgagor allowed to redeem on payment of certain sum —Sum subsequently reduced—Appeal questioning right of redemption preferred within limitation of amended decree but after limitation from original decree—Extension was allowed.)
('29) 16 AIR 1929 Cal 676 (678) : 57 Cal 549 : 122 Ind Cas 634 (DB), *Nagendra Nath* v. *Ambica Charan.*
('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413 : 157 Ind Cas 810 (DB), *Md. Yasin Khan* v. *Mt. Hansa.*
[*See also* ('01) 24 Mad 646 (649) (DB), *Visvanathan Chetty* v. *Ramanathan Chetty.*
('19) 6 AIR 1916 Lah 250 (251) : 51 Ind Cas 712 : 1919 Pun Re No. 64 (DB), *Har Kishan* v. *Lahore Bank, Ltd.* (One party applied for amendment of decree within time allowed for appeal—Another party thereafter preferring appeal — Time for appeal can be extended.)]

[1b] ('06) 3 Cal L Jour 188 (192) (DB), *Brojalal Rai* v. *Tara Prasanna.*

[2] ('06) 3 Cal L Jour 188 (192) (DB), *Brojalal Rai* v. *Tara Prasanna.* (Grounds of appeal directed against decree only in so far as it has been amended — Extension was allowed.)

Where after an appeal is preferred the name of a defendant which had been omitted in the decree is added by way of amendment, and the appellant gets such name substituted in the appeal but after the expiry of the period of limitation, it would be a sufficient cause within the meaning of section 5.[6]

See also Article 156 Note 8.

15. Illness of party.—A mere plea of sickness is not a sufficient cause for excusing the delay in filing an appeal or application,[1] unless the effect of the illness was such as, in the circumstances, will afford

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('21) 8 AIR 1921 All 60 (61) : 43 All 380 : 61 Ind Cas 69 (DB), *Gajadhar Singh* **v.** *Basant Lal.* **(Amendment unconnected with grounds of appeal—Time was not extended.)**

('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal* **v.** *Dasarathi.*

3. ('06) 3 Cal L Jour 188 (192) (DB), *Brojalal Rai Choudhury* v. *Tara Prasanna Bhattacharjee.* (22 Mad 364 and 32 Cal 908 followed.)

('32) 19 A I R 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal* v. *Dasarathi.*

('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra* v. *Gollam Hossain Mollah.*

('19) 6 A I R 1919 Oudh 91 (91) : 58 Ind Cas 995, *Hewlett* v. *Behari Lal.*

('30) 17 A I R 1930 Pat 142 (143) : 117 Ind Cas 187 (DB), *Mt. Gopi Bibi* v. *Chanu Prasad.*

4. ('20) 7 A I R 1920 Pat 622 (624, 625) : 57 Ind Cas 236 (FB), *Golab* v. *Janki Kuer.* (3 Cal L Jour 188 followed.)

('21) 8 A I R 1921 All 60 (61) : 43 All 380 : 61 Ind Cas 69 (DB), *Gajadhar Singh* v. *Basant Lal.* (Do.)

('30) 17 A I R 1930 Oudh 463 (465) : 129 I. C. 171, *Deep Singh* v. *Raghunath Singh.*

5. ('32) 19 A I R 1932 Cal 534 (535) : 59 Cal 1052 : 138 I. C. 754 (DB), *Nandalal* v. *Dasarathi.* (3 Cal L Jour 188 and A I R 1921 All 60 dissented from.)

('16) 3 A I R 1916 Cal 348 (349) : 34 Ind Cas 556 (DB), *Satikanta Banerjee* v. *Ram Chandra Chatterjee.*

('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra* v. *Gollam Hossain Mollah.*

6. ('36) 23 A I R 1936 All 666 (667, 668) : 164 Ind Cas 1066 (DB), *Mt. Kulsoom-un-nissa* v. *Nur Mohammad.*

Note 15

1. (1864) 1 Suth W R (Misc App) 23 (23) (DB), *Mazcom Ali* v. *Panchoo Bibee.*

('22) 9 AIR 1922 Pat 47 (49) : 64 I. C. 55 (DB), *Md. Abdul Kasim* v. *Chaturbhuj.* (Illness of agent of party.)

('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahinewas* v. *Biseswar.* (Illness in party's family.)

('36) 23 AIR 1936 Rang 183 (184) : 14 Rang 155 : 162 Ind Cas 664 (DB), *S. M. Ally* v. *Maung San Nyein.*

[But see ('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaj Narain* **v.** *Mt. Banoji.***]**

Section 5
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reasonable excuse for the delay.[2] The question whether the effect of the sickness is such that it afforded sufficient cause for failure to present the appeal or application within the prescribed period is one of fact to be decided in the circumstances of the particular case.[3] Even where the sickness may be said to be sufficient cause, it is further necessary for the party to show that he was reasonably diligent in prosecuting his appeal till the day when he fell ill. If he negligently waited till the last moment and then found himself ill, the delay will not be excused.[4] In *Ma Thein Khin* v. *Ma U Byu*,[5] the High Court of Rangoon held that antecedent diligence need not be shown and that the illness, without more, will afford a sufficient ground for excusing the delay. In the undermentioned cases,[6] time was extended on the ground of illness, but the question of previous diligence by the party was not adverted to. On the principles discussed in Notes 7 and 8 it is submitted that the view of the Rangoon High Court is not correct.

The illness of a party *after* the expiry of the period of limitation will, in any case, not be a sufficient cause for extending the time under this section.[7]

16. Minority, if sufficient cause. — In respect of *suits* and *applications for execution of decrees*, S. 6 recognises minority as a ground for extension of time. There is no such absolute right to the extension of time on the ground of minority so far as appeals and other applications are concerned.[1] In *Ranee Brijobuttee* v. *Pertaub Singh*,[1a] where an appeal on behalf of certain minors had been dismissed by the Privy Council for non-prosecution and the appellant applied for restoration of the appeal, Lord Justice Knight-Bruce observed as follows :

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[2] ('36) 23 AIR 1936 Rang 183 (184) : 14 Rang 155 : 162 Ind Cas 664 (DB), *S. M. Ally* v. *Maung San Nyein*.
('83) 1883 Pun Re No. 25, *Laxman* v. *Atma*. (Appeal presented out of time — In this case illness of party was held sufficiently good cause.)

[3] ('36) 23 AIR 1936 Rang 183 (184) : 14 Rang 155 : 162 I. C. 664 (DB), *S. M. Ally* v. *Maung San Nyein*. (Dissenting from 2 Upp Bur Rul 451, where it was held that proof of *entire* disability, such as paralysis, is necessary to be proved.)
[*See also* ('15) 2 AIR 1915 Lah 176 (176) : 27 Ind Cas 703, *Kalu* v. *Sowaria*. (Application to re-admit petition for review — Under the circumstances, *held* that illness of petitioner was no ground for extending time.)]

[4] ('30) 17 AIR 1930 Nag 121 (121, 122) : 119 Ind Cas 679, *Hakimiya* v. *J. C. Gammon*. (Steps not taken to file application before applicant was attacked with serious illness—Time not extended.)
('19) 6 AIR 1919 Pat 503 (505) : 52 I. C. 225 (DB), *Jahar Mal* v. *G. M. Pritchard*.
('20) 7 AIR 1920 Pat 594 (594, 595) : 55 Ind Cas 17 (DB), *Jaleswar Dayal Singh* v. *Ram Hari Sahu*. (Illness of party's servant.)

[5] ('28) 15 AIR 1928 Rang 165 (165) : 6 Rang 571 : 119 Ind Cas 215.

[6] ('34) 21 AIR 1934 All 367 (368): 56 All 591: (DB), *Gouri Shankar* v. *Kashi Nath*.
('23) 10 AIR 1923 All 536 (537) : 76 I. C. 375 (DB), *Deo Indar Singh* v. *Khushi Ram*.

[7] ('34) 21 AIR 1934 Lah 464 (465) : 148 I. C. 818, *Qumri Charan* v. *Din Dayal*.

Note 16

✓[1] ('18) 5 AIR 1918 Oudh 163 (165, 166) : 46 Ind Cas 68 (70) (DB), *Narendra Bahadur Singh* v. *Oudh Commercial Bank of Fyzabad*.
See also Section 6 Note 13.

[1a] (1860) 8 Moo Ind App 160 (161, 162) : 3 Suth W R P C 36 : 13 Moo P C 465 : 1 Suther 408 : 1 Sar 740 (PC).

Section 5
Note 16

> " The delay, in various ways, has been so considerable that . . . it is probable, to say the least, that if Baboonan's personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their Lordships, however, cannot but give some degree of consideration to the circumstance that there are *infants* concerned whose interests were confided to him. Now, their Lordships do not mean to go to the length of saying, that where infants are concerned any degree of delay may be considered justifiable, or excusable, or such as may be passed over ; as there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology, or excuse of infancy, and considering the manner in which the interests of minors are involved ; and the state in which the part of India from whence the case comes was, in and after the year 1857, they are of opinion, that on certain terms this application may be acceded to."

The principle of this decision would seem to apply to the excuse of delay in filing appeals and applications on behalf of minors. There is, however, a difference of opinion on the point. In *Babu Ganesh* v. *Sitaram*,[2] it was held that where infants are concerned they ought not, when they can be protected consistently with fairness to other people, to be prejudicially affected by the negligence or omission of their adult relations. In *Kursondas Dharmsey* v. *Bai Gangabai*,[3] where the guardians of the minors *acted with propriety* in consulting pleaders and not filing the appeal on their advice, it was held that there was no sufficient cause for extending time. In *Prabh Dial* v. *Isher Devi*,[4] it was observed that a minor is in no better position than his guardian would be if he were the appellant and that the minor has his remedy against the guardian for loss suffered through his neglect. In *Umrao Begum* v. *Rahmat Ilahi*,[4a] it was held that minority is a factor to be taken into account when considering circumstances which justify the application of this section. It was further observed that applications for the extension of time under the section should be more liberally construed in favour of minors than other litigants. In *Cursandas Nathu* v. *Ladkavahoo*,[5] where the guardian's failure to appeal was due to his having a strong personal motive for not appealing which was opposed to the interests of the minor, it was held that it was a sufficient cause for extending time. In the undermentioned case,[6] where a decree-holder died pending execution proceedings and his legal representatives were minors who could not obtain execution without a succession certificate being obtained and such certificate was obtained after three years, it was held that the circumstances amounted to sufficient cause for extending

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[2] ('16) 3 AIR 1916 Bom 153 (154) : 41 Bom 15 : 36 Ind Cas 439 (DB). (8 Moo Ind App 160 and 30 Bom 329 referred to.)
[*See also* ('90) 12 All 461 (480) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan Ullah*. ('25) 12 AIR 1925 Sind 60 (62) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad* v. *Hassomal*.]

[3] ('06) 30 Bom 329 (331, 332) : 7 Bom L R 965 (DB).

[4] ('06) 1906 Pun L R No. 164, p. 544 (545). (Laches of guardian — Delay cannot be excused.)

[4a] ('39) 26 AIR 1939 Lah 439 (445) : I L R (1939) Lah 433 : 186 I. C. 77 (DB).

[5] ('96) 20 Bom 104 (108, 109) (DB).

[6] ('24) 11 AIR 1924 Oudh 83 (84): 26 Oudh Cas 244 : 73 Ind Cas 215, *S. Akhtar Husain* v. *Qudrat Ali*.

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time for the application to be impleaded as the legal representatives. See also the undermentioned cases[7] in which time was extended.

17. **Fraud.** — Where the appeal was not presented owing to the deliberate fraud of the vakil's clerk in running away with the money and the pleader could not be said to be negligent and the party implicitly trusted him, it was held that it was a sufficient cause for extending the time for filing the appeal under this section.[1] Where an appeal filed in a representative suit was returned for some corrections but was fraudulently not re-presented by the appellants, and the persons represented applied that they should be allowed to prosecute the appeal, it was held that the application must be regarded as a fresh appeal, and that the delay should be excused.[2]

A mere threat, however, used against the applicant is not a sufficient cause for the delay in filing the application.[3]

18. **Poverty or want of funds.** — The poverty of a party or his want of funds is not a 'sufficient cause' within the meaning of this section. In *Moshaullah* v. *Ahmedullah*,[1] their Lordships of the Calcutta High Court observed :

> "The grounds assigned by the appellant for special indulgence under S. 5 of the Limitation Act were then stated to be that he had not sufficient funds to proceed in the regular manner within the time prescribed by law, and it is now objected that this is not a sufficient cause. We think that the objection is fatal. If such ground be accepted as sufficient cause for a special order of this description, there would be no limit to the period for extending the usual term of limitation to presenting an appeal."

And this view has been followed in a number of cases.[2]

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[7] ('16) 3 AIR 1916 Cal 670 (671, 672) : 31 Ind Cas 705 (706) (DB), *Sudhakar Raut* v. *Sadasiv Jhatap Singh.* (Appellants minors residing in out-of-way village were allowed to file appeal beyond limitation.)
('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaja Narain* v. *Mt. Banoji.* (Time occupied in applying for review and conducting proceedings for declaration of majority and time spent in prison held sufficient cause to file appeal beyond time.)

Note 17

[1] ('34) 21 AIR 1934 Lah 986 (987) : 155 Ind Cas 135 (DB), *Allah Wadhaya* v. *Haji Md. Ramzan Amiruddin.*

[2] ('28) 15 AIR 1928 Mad 456 (458) : 108 Ind Cas 298 (DB), *Kumaraswami* v. *Lakshmana Goundan.*

[3] ('15) 2 AIR 1915 Mad 132 (133) : 26 Ind Cas 472, *Kandasamy* v. *Murugappa.*

Note 18

[1] ('86) 13 Cal 78 (79) (DB).

[2] ('09) 1 Ind Cas 73 (75) (Mad) (DB), *Krishnasamy Panikundar* v. *Ramasamy Chettiar.* (Confirmed on appeal to Privy Council : A I R 1917 P C 179.)
('14) 22 Ind Cas 884 (885) : 7 Low Bur Rul 90 (DB), *Annamalai* v. *O. M. M. R. M. Chetty Firm.*
('02) 5 Oudh Cas 183 (186), *Hardwar Parshad* v. *Raja Partab Bahadur Singh.*
('87) 9 All 655 (659) : 1887 All W N 185 (DB), *Husaini Begam* v. *Collector of Muzaffarnagar.* (Appeal under Cl. 10 of Letters Patent.)
('90) 12 All 461 (491, 492) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan Ullah Khan.*
('19) 6 AIR 1919 Lah 252 (253) : 49 Ind Cas 871, *Mt. Amtul Quadir* v. *Muhammad Yusuf.*
('89) 3 C P L R 125 (125), *Chamoo Sao* v. *Mt. Ooji Kalarin.* (Poverty even though accompanied with circumstance that the appellant is a widow would not be sufficient cause.)

19. Subsequent decisions altering law. — The fact that subsequent to a decision given against a party, the High Court or the Privy Council has given another decision which has the effect of modifying the law or practice is not a sufficient ground for extending the time for filing an application for review of the judgment.[1] "It is neither consistent with the law nor reason that questions, which have been long ago finally decided by competent tribunals, are to be re-opened at any period of time however remote, in consequence of a decision either in this Court or in the Privy Council, which is supposed to modify the law or practice which prevailed at the time of such decisions."[2] In *Shamacharan Chuckerbutty* v. *Bindabun Chunder Roy*,[3] Sir Barnes Peacock in delivering the judgment of a Full Bench of the Calcutta High Court observed as follows :

> "Now, let us see what would be the consequence of holding that the new decision or the new exposition of the law by the Full Bench was a sufficient excuse for not having applied for the review of judgment within the period of ninety days. If it was a sufficient excuse for not having applied within the period of ninety days, it would be a sufficient excuse for applying to review every judgment which has been given on resumption suits within the last fifty years, and consequently almost all the titles which depend upon decrees in resumption suits would be altogether upset; because if we hold that there were sufficient grounds to apply for a review of the judgment, in consequence of that decision, we must also hold that there would be sufficient ground for applying for the review of every judgment of the same character which has been passed within the last fifty years. No title, therefore, would be safe which depends upon a decree in a resumption suit."

Still less would such ground be sufficient for excusing the delay in filing an appeal against the judgment.[4]

20. Imprisonment of party. — The imprisonment of a party may constitute a sufficient cause for excusing delay in filing an appeal or application.[1] But the mere fact that the party was in jail without anything more is not necessarily a sufficient cause for extending the time.[2] In the undermentioned case[3] it was held that in the case of

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Note 19

1. ('68) 10 Suth W R 26 (26) (DB), *Pran Kishen Bhuttachrjee* v. *Bukshee Cazee.*
('70) 13 Suth W R 120 (120) (DB), *Roy Goodur Suhaye* v. *Achebur Lall.* (Reversal by Court of appeal of any decree or order in another case is no ground for admitting review after prescribed period.)
('72) 17 Suth W R 163 (163), *Bolakee Lall* v. *Monjee Lall.*
('72) 18 Suth W R 317 (318) : 9 Beng L R 187 (DB), *Punchanun* v. *Gooroodoss.*
('73) 19 Suth W R 189 (190), *Jadub Ram Deb* v. *Ram Lochun Mudduck.*
('71) 1871 Pun Re No. 51, *Hurree Singh* v. *Mukha.* (But when application has been granted on good cause shown then exposition of law laid down since date of judgment sought to be reviewed may properly govern case.)

2. ('66) 6 Suth W R 167 (168) (DB), *Onoop Chunder Paul* v. *Ekhowree Singh.*

3. ('68) 9 Suth W R 181 (185) : Beng L R Sup Vol 892 (FB).

4. ('68) 10 Suth W R 178 (179) : 2 Beng L R A C 184*n* (DB), *Mowree Bewa* v. *Soorundarnath Roy.*

Note 20

1. ('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaj Narain* v. *Mt. Banoji.*

2. ('15) 2 AIR 1915 All 240 (240, 241) : 29 I.C. 975 (976) (DB), *Janki* v. *Parmeshwar.* (Defendant in jail when *ex parte* decree passed — Application under O. 9 R. 13, C.P.C., made after five years when released—Munsif granted application—*Held* application barred by time and proceedings irregular and order without jurisdiction.)
('01) 4 Oudh Cas 303 (312) (DB), *Shameshwar Dat Singh* v. *Mahadeo Pershad.* (As Act makes no distinction between prisoners and other persons.)

3. ('91) 1891 All W N 10 (10) (DB), *Queen-Empress* v. *Bhoni Ram.* (Provisions of Act are to be applied with as much strictness to criminal as they are to civil cases.)

criminal offences it is not a sufficient cause for the convict to say that he did not know he had a right of appeal or that he thought his relations would prefer an appeal.

21. Non-availability of court-fee stamps. — If a party is prevented from filing his appeal within time by difficulties encountered in procuring the necessary court-fee stamps, he may rely upon the difficulties as constituting "sufficient cause" for the delay.[1] But, as has been seen already in Note 8, the party must have been reasonably diligent in order to claim the indulgence under this section. If he was reasonably diligent, the delay will be excused,[2] otherwise not.[3] Where an appeal was filed in time with stamps of the value of Rs. 3 which was the fee required by law but instead of a single stamp of Rs. 3 two stamps of Rs. 2 and Re. 1 were affixed and it was shown that at the time of filing the appeal no single court-fee label of Rs. 3 was procurable, it was held that time should be extended.[4]

22. Mistake of Court or of its officers — Explanation. — Under the Act of 1877, there was a specific section, S. 5A, providing for the matter dealt with in the explanation, with this difference that its provisions were mandatory,[1] while the present explanation gives a discretion to the Court to excuse the delay in such cases. The principle on which this explanation is based is that an act of the Court or of its officers shall prejudice no man, the maxim being, *Actus curiæ neminem gravabit.* Where the appellant is misled by a doubtful point of practice, or by a change of practice, the delay generally amounts to sufficient cause.[2] Similarly, where the party is misled or prevented from filing

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Note 21

[1] ('17) 4 AIR 1917 Pat 701 (701) : 1 Pat L Jour 163 : 37 I. C. 211, *Kesho Prasad Singh* v. *Harbans Raut.*
[*See* ('17) 4 AIR 1917 Pat 26 (27) : 42 I. C. 675 (DB), *Ram Saray* v. *Lakshmi Narain.*]

[2] ('17) 4 AIR 1917 Pat 701 (701) : 37 Ind Cas 211, *Kesho Prasad* v. *Harbans.*

[3] ('17) 4 AIR 1917 Pat 26 (27) : 42 Ind Cas 675 (DB), *Ram Sahay* v. *Lakshmi Narain.* (Appellant deliberately paying insufficient court-fee—He cannot get time to make good deficiency.)

[4] ('87) 1887 All W N 212 (212) (DB), *Bansi Lal* v. *Raghunath Sahai.*

Note 22

[1] ('96) 20 Bom 736 (743) (DB), *Shrimant Sagaji Rao* v. *S. Smith.*

[2] ('16) 3 AIR 1916 Pat 267 (268): 35 I. C. 868 (FB), *Ram Asray* v. *Sheonandan.*
('25) 12 AIR 1925 Pat 765 (770) : 4 Pat 448 : 93 Ind Cas 129 (DB), *Tofa Lal Das* v. *Moinuddin Mirza.* (One plaintiff dying during suit—Plaintiff misled by Court's order and hence not applying to bring proper legal representatives on record—*Held* there was sufficient cause.)
('21) 8 AIR 1921 Pat 175 (176) : 62 Ind Cas 649 (FB), *Jotindranath* v. *Lodna Colliery Co. Ltd.* (Overruled on another point in A I R 1936 Pat 45 (FB).)
('17) 4 AIR 1917 Pat 239 (239) : 39 Ind Cas 542 (DB), *Gulab Chand* v. *Abbas Ali.* (Delay in presenting appeal on account of conflicting decisions of High Court — *Held* sufficient cause.)
('19) 6 AIR 1919 Pat 238 (239, 240) : 52 Ind Cas 959 (DB), *Ramcharita Sahu* v. *Rama Narain Sahu.* (Appeal against *ex parte* order under O. 21, R. 90, C. P. C. — Delay due to prosecution of application under O. 9, R. 9 — Previous practice that O. 9 was held applicable to execution — Appellant misled by practice—*Held* sufficient cause.)
('27) 14 AIR 1927 Cal 718 (720) : 104 Ind Cas 456 (DB), *Rajani Kanta* v. *Bistoo Moni Dassi.* (Decision of High Court giving differing opinions of two Judges about limitations—Appellant probably misled—Time should be extended.)

an appeal within the time by a mistaken order of Court,[3] or by the omission to give timely notice of the time and place at which the vacation Judge proposed to hold his sitting,[3a] it will be a sufficient cause. Where the delay is attributed to the copyist department and not to the party himself, it may be a sufficient cause.[4] Where, under

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('12) 15 Ind Cas 59 (62): 39 Cal 766 (DB), *Harish Chandra* v. *The Chandpur Co. Ltd.* (Misled by Full Bench judgment of the High Court.)

('20) 7 AIR 1920 Cal 304 (305): 58 Ind Cas 408 (DB), *Nibaran Chandra* v. *Martin & Co.* (Attorney misled by practice of Court.)

('25) 12 AIR 1925 Mad 725 (726) : 48 Mad 631 : 88 Ind Cas 443 (DB), *Bhimasena Rao* v. *Venugopal Mudali.* (Misguidance by rules of Court.)

('27) 14 AIR 1927 Nag 247 (248) : 102 Ind Cas 123, *Mukand Rao* v. *Ragho Mali.* (Party misled by judgment of High Court in computing period of limitation.)

('07) 10 Oudh Cas 201 (203, 204) (DB), *Shambhu Ratan* v. *Sheo Balak.*

('90) 1890 All W N 122 (123) (DB), *Bakhshi Ram Narain Lal* v. *Bakhshi Avadh Narain Lal.* (Time given by High Court for giving deficit in court-fee paid within time but beyond limitation being misled by Court's order granting time.)

[3] ('12) 14 Ind Cas 244 (244) (Lah), *Imam Din* v. *Banshi Ram.* (Appeal filed without copy of decree — Appellant directed to file copy on next date—Copy filed on that date after expiry of period of limitation—*Held* there was sufficient cause for extension of period under this section.)

('23) 10 AIR 1923 Oudh 238 (239): 26 Oudh Cas 56: 74 Ind Cas 253, *Beni Madho Lala* v. *Shamsad Ali Syed.* (Civil Court returning plaint to be presented to Revenue Court—Revenue Court returning the same to be presented to Civil Court — Civil Court on re-presentation holding that suit was barred by *res judicata* — Party then appealing after time against the first order returning plaint — *Held* delay was due to Court's order which the party was only obeying — Due diligence also shown — Therefore delay excused.)

('23) 10 AIR 1923 Oudh 93 (95): 26 Oudh Cas 24: 74 Ind Cas 214 (DB), *Bhagwati Prasad* v. *Achhaibar Singh.* (Application for leave to appeal to Privy Council — Wrong dismissal of application for review after granting review — Time taken must be deducted in computing period of limitation for appeal from original order.)

('30) 17 AIR 1930 Rang 182 (183): 127 Ind Cas 167, *U Po Thet* v. *Hauk Pet.* (Copy of decree not obtained as no decree was on record — Appeal filed without decree stating circumstances — Appellate Court dispensing with the copy of the decree—Later on copy filed but after time — Appellants can claim that they were misled by order of Court.)

('24) 11 AIR 1924 Nag 271 (275) : 20 Nag L R 131 : 78 Ind Cas 996, *Pandu* v. *Rajeswar.* (Court's neglect to do its duty.)

('24) 11 AIR 1924 Lah 692 (693) : 75 Ind Cas 903, *Kidar Nath* v. *Wazir Chand.* (Misled by wrong entry of dead man's name in decree.)

('37) 24 AIR 1937 All 82 (89, 90) : 167 Ind Cas 405, *Abrar Husain* v. *Ahmed Raza.* (Per Sulaiman, C. J., and Niamatullah, J.; Smith, J., Contra—Misled by frame of decree.)

('14) 1 AIR 1914 Mad 418 (420) : 22 I. C. 919 (DB), *Numberumal* v. *Krishnajee.*

('14) 1 AIR 1914 Oudh 332 (333): 24 Ind Cas 113, *Som Nath* v. *Ram Bilas.* (Delay due mostly to decree being incorrect.)

('30) 17 AIR 1930 Rang 235 (235) : 126 Ind Cas 641, *Maung Po Hlaing* v. *Ma Phee.* (Appeal filed without copy of decree — Mistake not brought to notice of appellant and subsequently appeal dismissed as time-barred — *Held* there was sufficient cause for extension.)

('30) 17 AIR 1930 Rang 67 (68) : 126 Ind Cas 543, *U Po Thaw* v. *Ma Thit.* (Appellant was misled by the date actually entered on the decree, which was different from date of judgment.)

[*See* ('26) 13 AIR 1926 Lah 509 (510) : 92 Ind Cas 319 (DB), *Ranzor Singh* v. *Secy. of State.* (Appellant misled by error of Court and therefore paying insufficient court-fee.)

[3a] ('21) 61 Ind Cas 714 (715) (Cal) (DB), *Sona Sheikh* v. *Naib Ali Sheikh.* (Criminal appeal which had to be presented in person.)

[4] ('39) 26 AIR 1939 Lah 492 (492) : ILR (1940) Lah 447 : 185 Ind Cas 877 (DB), *Salig Ram* v. *Charan Dass.*

('38) 25 AIR 1938 Nag 287 (288) : ILR (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai* v. *Indra Bahadur Singh.*

the law, the Court was bound to inform the parties of the date of delivery of judgment, the delay caused by the failure to give such information will be a sufficient cause,[5] but, where no such notice need be given, a party cannot ask for extension of time by reason of the failure to give such information.[6]

Though a party may claim an extension of time on the ground of being misled by an order of the Court, or by the act or negligence of its officers, it will be necessary for him to show that he acted with due care and caution. Where the advocate of the party merely relied upon the words of a clerk that no application for copy would be received until the decree was prepared, it was held that the advocate did not act with due care and caution in placing such reliance upon the words of the clerk, and that it was not a sufficient cause.[7] Similarly, where

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('36) 23 A I R 1936 Lah 670 (672) : 161 Ind Cas 215 (DB), *Abdul Ghani* v. *Maula Baksh.* (Delay due to action of copying department in not following the rules prescribed.)
('36) 23 AIR 1936 Lah 132 (132) : 161 Ind Cas 457, *Ghulam Rasul* v. *Ali Bhakhsh.*
('14) 1 A I R 1914 Oudh 146 (147) : 25 Ind Cas 26, *Daljit* v. *Ram Ratan.* (Grant of incorrect copies by mistake is good ground for extension.)
('36) 23 AIR 1936 Lah 693 (694) : 165 I. C. 516, *Mani Singh* v. *Anand Parkash.*
('36) 23 A I R 1936 Lah 550 (550) : 163 Ind Cas 223, *Piare Lal* v. *Karta Ram.* (Dilatory methods of copying department.)
('36) 23 A I R 1936 Lah 200 (201) : 159 Ind Cas 178, *Bura Mal* v. *Ram Chand.* (Delay in copying department due to wrong practice — Copying department is not agent of applicant — Delay in filing appeal due to delay in copying department — There is sufficient cause.)
('26) 13 AIR 1926 Lah 458 (458) : 7 Lah 447 : 94 Ind Cas 959 (DB), *Mt. Bhuri* v. *Mt. Askhari.* (Copy of trial Court's judgment applied for within time but not filed in time with memo of appeal owing to inordinate delay in its preparation — Time was extended.)
('26) 13 A I R 1926 Lah 84 (84) : 91 Ind Cas 6, *Madan Singh* v. *Puran Singh.* (Applicant not informed when copy of decree would be ready — Applicant an ignorant villager—Delay in producing copy excused.)
('31) 18 AIR 1931 Oudh 314 (315) : 132 Ind Cas 777 : 6 Luck 578, *Rahim Bux* v. *Maiku.* (Application for copy of judgment and decree dismissed for insufficient fee and deficiency in folios — Applicant receiving no such information owing to Court practice—Appeal time-barred—Such delay should be condoned.)
('99) 3 Cal W N 55 (56) (DB), *Dulali Bewa* v. *Saroda Kinker Pandit.* (Information not given by copying office as required by rules—Delay caused thereby.)
('12) 13 Ind Cas 943 (943) (All) (DB), *Balmukand* v. *Kundan Lal.* (Delay due to copying department delaying to send the copy by post.)
('12) 13 Ind Cas 850 (851) (Lah), *Sarkhara* v. *Nawab.* (Omission of copying department to inform party of date when copy would be ready.)

[5] ('17) 4 AIR 1917 L. B. 90 (90) : 38 I. C. 575, *Ma Hla Dun* v. *Maung Shwe Ya.*
('15) 2 AIR 1915 L. B. 108 (109) : 27 I. C. 784, *Ma Me Thin* v. *Maung San Lun.*
('19) 6 AIR 1919 Lah 102 (103) : 51 Ind Cas 239 : 1919 Pun Re No. 27 (DB), *Lalli* v. *Sain Ditta.* (Judgment reserved and subsequently delivered on 2nd July — Absence of intimation of delivery of judgment as required by O. 41 R. 30, C. P. C. —On 13th October appellant's pleader discovered fact of delivery of judgment — Thereafter acting promptly appeal was filed on 26th November—*Held*, there was sufficient cause.)

[6] ('03) 1903 Pun Re No. 22 : 1903 Pun L R No. 91, *C.* v. *C.* (Plea that delay be excused on the ground that neither the appellant nor his counsel was given any notice of the date when judgment was to be pronounced — *Held* that appellant had not made out any sufficient cause.)

[7] ('29) 16 AIR 1929 Rang 116 (116, 117) : 7 Rang 18 : 117 Ind Cas 251, *Maung Po Kyaw* v. *Ma Lay.*
('98) 1 Oudh Cas 47 (48), *Ghafur Baksh* v. *Tilochan.* (Appellant misled by a subordinate official who failed to follow a judgment of the High Court, cannot claim benefit of Section 5.)

the practice of the Court is clear, a party cannot claim that he was misled by the practice of another High Court.[8]

See also the undermentioned cases.[9]

23. Discovery of fresh evidence. — In *Indrarajbhau* v. *Sitaram*,[1] it was observed :

> " There is no warrant for supposing that this sufficient cause mentioned in S. 5 of the Limitation Act may not include the late discovery of the new evidence on which the application for review was granted. I will not go so far as to say that where there are good grounds for granting review on the discovery of new evidence, those grounds will always be also sufficient for admitting the application after the period of limitation, provided that there has been no delay in making the application after the discovery. But I do hold that the grounds for granting review on account of the discovery of fresh evidence may, in certain cases, be a ground for also extending time under S. 5 of the Limitation Act."

See also the undermentioned case.[2]

24. Party misled by declaration as to holidays.— Where a particular day was gazetted as a public holiday and subsequently another day was substituted in its place, and the appellant was misled thereby, it was held that there was sufficient cause for extending the period for presenting the appeal.[1]

25. Party being a woman or a pardanashin lady.— The fact that the appellant is a woman or a widow and not in good circumstances is not a sufficient cause for not presenting the appeal

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[*See also* ('35) 22 AIR 1935 Nag 109 (110) : 155 Ind Cas 588, *Balwant Rao* v. *Balmukand*. (Where delay in filing appeal is due to the supply of wrong information to the copyist department, time cannot be deducted as of right. He must satisfy the Court that the wrong information was given under circumstances for which he was not responsible and if satisfied, Court will extend time under Section 5.)]

8. ('20) 7 AIR 1920 Pat 267 (270) : 57 Ind Cas 312 (DB). *Mahadeo* v. *Gajadhar*. (Practice that where there are two appeals although they are decided by one judgment there are two decrees and you cannot by one petition seek leave to appeal to His Majesty in Council from two decrees.)

9. ('33) 20 AIR 1933 Lah 938 (939) : 147 I. C. 13 (DB), *Wazira*. v. *Mt. Nandan*. (Decree not properly drawn up — Appeal accompanied by judgment and such decree—Proper decree filed later—Appeal is not barred.)

('28) 15 AIR 1928 Lah 737 (738) : 112 Ind Cas 455, *Johaga* v. *Bir Chand*. (Value of court-fee incorrectly given in copy of judgment—Appellant consequently failing to pay proper court-fee in time—Extension of time was granted.)

('32) 19 AIR 1932 Lah 183 (185) : 135 Ind Cas 221, *Kanshi Ram* v. *Rama Mal*. (Time during which memorandum of appeal remained in appellate Court through mistake of Court, was excluded in calculating period of limitation.)

('08) 1908 Pun W R No. 71, *Mela Mal* v. *Natha Singh*. (Box kept for depositing appeals misleading parties into the belief that presentation in person is not necessary—It is sufficient cause.)

('90) 1890 Pun Re No. 101, *Sukh Diyal* v. *Jey Singh*. (Do.)

Note 23

1. ('21) 8 AIR 1921 Nag 174 (176) : 78 Ind Cas 527.

2. ('18) 5 AIR 1918 Cal 888 (889) : 35 Ind Cas 651 (DB), *Chandrakanta* v. *Lakshan Chandra*. (Discovery of fresh evidence which was the ground of review was held to be sufficient cause.)

Note 24

1. ('18) 5 AIR 1918 Lah 396 (397) : 42 Ind Cas 343:1917 Pun Re No. 77 (DB), *Nand Singh* v. *Gulli*.

within time.[1] The fact that the appellant is a pardanashin lady, may, no doubt, in some cases, furnish grounds for exercising the discretionary power contained in the section,[2] but the ground can be available only where this fact has prevented the party from presenting the appeal herself or from retaining counsel to do so. The mere fact that the appellant is a *pardanashin* lady is, by itself, not a sufficient cause.[3]

26. Party being Government or body corporate. — In the undermentioned case[1] where it was held that the Act makes no distinction between Government and a private individual, but that nevertheless, in considering an application under S. 5 a distinction must be made, it was observed as follows :

> "A private person has only himself to consider and must be presumed to be familiar with every aspect of his case. Government has to consider the public interest and cannot be expected to know the fact of each individual case. They require time for inquiry and consideration before taking action and must consult the local officers, to whom they cannot delegate their powers. It follows that a time which may be ample for a private litigant may be none too great for Government. . . . . . We think, then, that though any delay is evidence of laches in the case of a private individual, the same cannot be said of Government."

The fact that a party is a *body corporate* cannot make any difference in the requirement of due diligence under this section (see Note 10). But, as in the case of the Government, a delay which may be evidence of laches in the case of a private individual may not be so in the case of a body corporate.

27. Importance of matter. — The fact that the matter is important or that the value of the subject-matter of the litigation is considerable cannot have any weight in the consideration of the question whether the discretion vested under this section should be exercised in favour of the appellant.[1]

28. Being engaged in important litigation. — The fact that the party had been engaged in important litigation and could not file his appeal or application earlier is not a sufficient cause for extending time.[1]

Note 25

[1] ('90) 3 C P L R 125 (125), *Chamoo* v. *Mt. Ooji Kalarin.*

[2] ('86) 9 All 11 (18, 19) : 1886 All W N 245 (DB), *Husaini Begum* v. *The Collector of Muzaffarnagar.*

[3] ('33) 20 AIR 1933 Cal 796 (797):146 Ind Cas 359 (DB), *Benodini* v. *Jagabandhu.* (Memorandum of appeal filed without stamp and out of time by twentyone days—Time was not extended even though litigant was a *pardanashin* lady.)
('87) 9 All 655 (659) : 1887 All W N 185 (FB), *Husaini Begum* v. *The Collector of Muzaffarnagar.*

Note 26

[1] ('29) 16 AIR 1929 Sind 211 (211) : 125 Ind Cas 43 (DB), *Secretary of State* v. *Gurmukhdas.*
[**See however** ('07) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (DB), *Emperor* v. *Shiva Adar.* (Appeal by Government against acquittal — Delay due to want of clearness in District Magistrate's letter to Government — Delay not excused.)]

Note 27

[1] ('13) 20 Ind Cas 513 (514) (Cal) (DB), *Dand Bahadur* v. *Deo Nandan.*
('86) 1886 Pun Re No. 92, *Gharib* v. *Pohlomal.* (Goodness of cause.)

Note 28

[1] ('72) 4 N W P H C R 74 (76) (DB), *George* v. *Messrs. Hamilton Brown & Co.*

Section 5
Notes 29–30

29. Application for leave to appeal in forma pauperis. — It was provided in S. 582A of the Civil Procedure Code, 1882, that in cases of *appeals and applications for review* the Court could, where the proceeding had not been stamped properly, extend the time for furnishing the necessary stamp. That provision did not apply to applications for leave to appeal in *forma pauperis*. In such cases, where the appellate Court refused such leave, but granted time to pay the necessary court-fee and such court-fee was paid within the time so allowed, it was held that the Court could extend the time under S. 5 of the Limitation Act.[1] Section 149 of the present Civil Procedure Code corresponds to section 582A of the old Code, but applies to *all* proceedings. Consequently, it is not necessary to apply S. 5 to cases such as those stated above.[2]

Where an appeal is filed with deficient court-fee and on the appeal being returned the party applies that he should be permitted to appeal as a pauper and it is then beyond the time prescribed, the time may be extended if there is sufficient cause for the delay. Thus, where a party was advised that a stamp of Rs. 2 was sufficient for the appeal and he filed the appeal with such stamp, but subsequently the appeal was returned calling upon him to pay a larger amount of court-fee, and the appellant thereupon applied for permission to apply as a pauper, it was held that there was sufficient cause under this section for extending the time.[3]

See also Note 6 to Article 170 and Note 12 to Section 3.

30. Application in revision treated as appeal.—Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, provided the same is filed within the time prescribed for filing the appeal,[1] and provided the

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Note 29

1. ('99) 26 Cal 925 (928, 929, 930) (DB), *Durga Charan Naskar* v. *Dookhiram Naskar*. (Appeal as pauper — Appellant subsequently getting property and paying court-fee — Delay is due to sufficient cause.)
('04) 26 All 329 (331) : 1904 All W N 24 (DB), *Girwarlal* v. *Lakshminarain*.
('97) 22 Bom 849 (861), *Bai Ful* v. *Desai Bhavanidas*.
('12) 13 Ind Cas 73 (73) (Lah) (DB), *Shadikhan* v. *Mt. Umdan Begum*. (Appeal in *forma pauperis* — Subsequent acquisition of property — Appellant held not a pauper — Court-fee paid within time fixed —Delay should be excused.)
('04) 1904 Pun Re No. 84, *Buta* v. *Parmanand*. (Appeal in *forma pauperis* — Permission refused but time granted to file appeal on proper stamp —Stamp paid in time allowed but after limitation for appeal — *Held*, there was a proper case for exercise of Court's discretion under Section 5.)
[*See also* ('10) 7 Ind Cas 944 (944) : 34 Bom 589 (D B), *Chintaman* v. *Ramchandra*. (If application for leave to appeal in *forma pauperis* be treated as falling under S. 5, it would be an appeal and Court could excuse delay.)]

2. ('16) 3 AIR 1916 Lah 6 (6):36 Ind Cas 84:1916 Pun Re No. 74 (DB), *Bhagwan Das* v. *Mt. Balwanti*. (Application to appeal as pauper rejected after limitation — Full court-fee paid — Time extended.)

3. ('28) 15 AIR 1928 All 499 (500): 111 I. C. 655 (DB), *Ramcharan* v. *Bansidar*.

Note 30

1. ('32) 19 AIR 1932 Bom 77 (78): 135 I. C. 812, *Abdul Gafur* v. *Md. Mukaram*.
('34) 21 AIR 1934 Pat 281 (282) : 150 Ind Cas 703, *Mt. Prabhawati Kuer* v. *Phulmani Bibi*. (Suit dismissed as against one defendant—Objection by such defendant to attachment by decree-holder rejected—Revision does not lie—But revision can be converted into appeal.)

proper court-fee is paid.[2] In a case where the time for filing the appeal has expired on the date when the revision is converted into an appeal, the Court has discretion under this section to excuse the delay, if any, in the presentation of appeal.[3] But where the party has acted negligently and without due care and caution, the delay will not be excused.[4]

31. Two appeals against same decree—One decree copy filed.—Where two appeals were filed against the same order but only one copy of the order was filed, and a second copy was furnished on requisition by the Court but after the period of limitation expired, the High Court of Patna excused the delay in the circumstances of that case.[1] In similar circumstances the High Court of Madras[2] observed as follows:

> "An appellate Court would ordinarily, no doubt, do well to exercise the discretion vested in it by law to excuse the delay in the presentation of an appeal, if copies of the lower Court's judgment were made available somehow for the use of the Court and of the respondent at a reasonable time before the date fixed for the hearing of the appeal, though no copy was filed with the appeal memorandum provided that a connected appeal had been filed in time."

See also the undermentioned cases.[3]

32. Failure of Court of Wards to file proceeding, if sufficient cause. — Where a decree against a ward under the superintendence of the Court of Wards was not appealed against by the Court of Wards, and after the release of the estate from the superintendence of the Court of Wards the ward applied for leave to appeal to the Privy Council but after the expiry of the period prescribed, it was held that there was no sufficient cause to extend the time.[1] The Oudh Chief Court observed as follows:

('11) 10 Ind Cas 542 (543) (Cal) (DB), *Tarabati* v. *Gagdeo Narain.*
('15) 2 AIR 1915 Cal 268 (271) : 27 I. C. 294 (DB), *Arjundas* v. *Gunendra Nath.*
('84) 7 Mad 555 (556) (DB), *Venkatamma* v. *Chengalrayappa.* (Revision application against order directing cancellation of certificate granted to collect debts of deceased person was treated as appeal.)
('27) 14 AIR 1927 All 120 (120, 121) : 98 Ind Cas 993 : 49 All 178, *Sahdeo Singh* v. *Melhu Singh.* (Case filed as second appeal—Judge admitting it as revision—At the bearing it can be treated again as appeal even by the admitting Judge.)
('19) 6 AIR 1919 Mad 358 (358) : 50 Ind Cas 931, *Matharasappa* v. *Muthu.*

[2] ('10) 7 Ind Cas 481 (483) (Cal) (DB), *Golap Khan* v. *Bhola Nath Marick.*
('99) 23 Mad 101 (104) : 9 Mad L Jour 350 (DB), *Sridharan* v. *Puramathan.*

[3] ('20) 7 AIR 1920 Lah 450 (451) (DB), *Mohamud* v. *Jawahar.*
('18) 5 AIR 1918 Lah 67 (68) : 43 Ind Cas 317 : 1917 Pun Re No. 95 (DB), *Rasul Singh* v. *Shadi.*

[4] ('22) 9 AIR 1922 Lah 233 (234) : 2 Lah 1 (DB), *Umed Ali* v. *Municipal Committee.* (Revision converted into appeal—*Held* there was no sufficient cause for extending time.)

Note 31

[1] ('32) 19 AIR 1932 Pat 349 (349): 12 Pat 36: 141 Ind Cas 37 (DB), *Domi Lal* v. *Bijoy Prasad.*

[2] ('15) 2 AIR 1915 Mad 493 (494) : 25 Ind Cas 28 (DB), *Avudai* v. *Ganapathy.* (Delay was not, however, excused, as there was no substance in the appeal.)

[3] ('24) 11 AIR 1924 Lah 731 (731) : 82 Ind Cas 609, *Khan Muhammad* v. *Mt. Nur Jahan.* (Filing copy of order referred to as part of judgment after time—Delay may be excused if judgment is filed in time.)
('22) 9 AIR 1922 Lah 93 (93), *Lakshmi Das* v. *Ishar Das.* (Do.)

Note 32

[1] ('18) 5 AIR 1918 Oudh 163 (166) : 46 Ind Cas 68 (DB), *Narendra* v. *Oudh Commercial Bank.*

"The conclusion at which we arrive is that, inasmuch as the Court of Wards had the authority to apply for leave to appeal on the applicant's behalf, as it was their duty to consider whether such an appeal was for the benefit of their ward, as the Court of Wards abstained from applying for leave to appeal, and as in addition, and this is the most important point, the legal personality of the applicant must be considered as absorbed in the personality of the Court of Wards during the period that his property remained under their superintendence, it cannot be said that the applicant had sufficient cause for not making the application within the period. We thus do not consider that the provisions of S. 5 of Act IX of 1908 can be utilised on behalf of the applicant."

33. Delay in filing copy of first Court's judgment in second appeal, or the copy of the judgment in review. — Where a review application is filed, it is not necessary that a copy of the judgment reviewed should be filed along with the application. But where under the practice of the Court such a copy should be filed, and is filed subsequently on requisition by Court, the delay, if any, may be excused under S. 5.[1] Where in calculating the time for a second appeal the time requisite for obtaining a copy of the judgment *appealed against* only is excluded, but under the rules of the High Court the memorandum of appeal should be accompanied by a copy of the first Court's judgment also, and a delay is caused in obtaining the first Court's judgment, the delay may be excused under this section if the party can be said to have acted *bona fide*.[2] But delay caused by obtaining copy of a judgment which is not required to be filed, but which is obtained merely for purposes of consultation, cannot be excused.[3]

34. Unforeseen circumstances causing delay.—An unforeseen circumstance which causes delay may be a "sufficient cause." And if the party has been reasonably diligent in the prosecution of his appeal, the discretion should be exercised in his favour. Where the appeal as filed lay to the Commissioner, but the subsequent filing of the cross-objection raised questions which made the appeal to the

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Note 33

1. ('35) 22 AIR 1935 Pat 486 (487, 488) : 157 Ind Cas 965, *Mahabir* v. *Baldeo.*

2. ('28) 15 AIR 1928 All 416 (416) : 115 Ind Cas 880, *Banke Lal* v. *Bhola Nath.*
('36) 23 AIR 1936 Lah 1007 (1008) : 169 Ind Cas 176, *Mt. Ghulam Aishan Bibi* v. *Md. Sharif.*
('25) 12 AIR 1925 Rang 344 (344, 345) : 3 Rang 310 : 90 Ind Cas 910 (DB), *Maung Po Aung* v. *U Bya.* (Delay was however not excused on other grounds.)
('12) 16 Ind Cas 488 (488, 489) (Lah) (DB), *Bibi Putli* v. *Jawala Devi.*
('27) 14 AIR 1927 Lah 92 (92) : 94 Ind Cas 629 (DB), *Amba Prasad* v. *Jwala Dat.* (Delay due to mistake of pleader.)
('26) 13 AIR 1926 Lah 458 (458) : 94 Ind Cas 959 (960) : 7 Lah 447 (DB), *Mt. Bhuri* v. *Mt. Asghari Begam.* (Copy of trial Court's judgment applied within time but not filed in time with memo of appeal owing to inordinate delay in its preparation—Time was extended.)
('19) 6 AIR 1919 Lah 42 (43) : 53 Ind Cas 137 : 1 Lah 83, *Bhan Singh* v. *Gokal Chand.* (Attaching of copy of first Court's judgment with appeal was not a rule of Court but was merely a practice which was observed and insisted upon—Delay was excused under this section.)
[But see ('34) 21 AIR 1934 Lah 464 (465) : 148 Ind Cas 818, *Qumri Charan* v. *Din Dayal.* (Copy of trial Court's judgment obtained before expiry of limitation—Time in obtaining it cannot be deducted in calculating limitation.)]

3. ('25) 12 AIR 1925 Rang 361 (362) : 92 Ind Cas 786, *Chan Eliam* v. *Neo Thein Theong.*

Commissioner incompetent and at that time the period of limitation for appealing to the District Judge had expired, it was held that the time should be extended.[1] Where, however, the party has not been diligent, the happening of an unforeseen circumstance at the last moment will not be a ground to exercise the discretion in his favour. See Note 8.

35. **Other cases of delay.** — See the undermentioned cases.[1]

Note 34

[1] ('23) 10 AIR 1923 All 170 (171) : 77 I. C. 955, *Bhagwan Das* v. *Mohabbat Shah.*

Note 35

[1] ('41) 28 AIR 1941 Pat 108 (109) : 190 Ind Cas 671, *Gajadhar Bhagat* v. *Moti Chand.* (Appeal memo filed on last date of limitation with deficit court-fee rejected without calling upon appellant to make up deficiency—Application under O. 41 R. 19, C. P. C., also rejected—Fresh memo of appeal with application under S. 5 filed on Court's advice also rejected—Rejection of memo is invalid—Appellant held entitled to benefit of S. 5.)

('39) 26 AIR 1939 Mad 293 (293) : 189 Ind Cas 320, *Venkatarayulu* v. *Venkata Rattamma Naidu.* (Application for copy of the order on 10th August 1922—Memorandum asking decree to be drafted and copy of it to be furnished filed on 3rd September 1922—Delay in asking copy of decree held could not be excused.)

('38) 25 AIR 1938 Lah 836 (837) : 181 Ind Cas 248 (DB), *Hakim Rai* v. *Ganga Ram.* (Agreement between parties to end litigation and accept High Court's decree as final—One party resiling and filing application for leave to appeal—Application for leave filed by other party some days out of time—*Held* there was sufficient cause for extending time.)

('20) 7 AIR 1920 Cal 207 (208) : 56 Ind Cas 551 (DB), *Abdul Sheikh* v. *Muhamed Ayab.* (Application for review of judgment of Small Cause Court—Requirements of S. 17 of Provincial Small Cause Courts Act must be complied with—Application on last date without deposit or security—Time granted to make deposit—Application held not properly made within time—Time not extended as there was no sufficient cause.)

('07) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (DB), *Emperor* v. *Shiva.* (Appeal by Government against acquittal—Delay due to want of clearness in communications between the District Magistrate and Government—Delay not excused.)

('90) 14 Bom 365 (369) (DB), *Thucker Vussonji* v. *Canji Purbhut.* [(i) Two different suits but involving a common question—Decrees in both suits based on the same view as to this question—One of the decrees reversed in appeal—This is no ground for excusing delay in filing appeal against the other decree. (ii) Executors of wills are not entitled, as such, to any special consideration in regard to the excusing of delay under S. 5.]

('37) 24 AIR 1937 Lah 691 (692) : 171 Ind Cas 812, *Barkat Ali* v. *Municipal Committee, Gujrat.* (Copy not given owing to negligence of copying department—Appeal filed after copy given on fresh application—Time held could be extended.)

('14) 1 AIR 1914 Sind 83 (84) : 8 Sind L R 235 : 28 Ind Cas 82 (DB), *Karachi Trading Co.* v. *Firm Tejbhandas Jethanand.* (Uncertified copy of decree wrongly dated—Appellant's pleader, hence, misled as to date of decree—Appeal, consequently filed out of time—*Held* there was no *sufficient cause* within meaning of this section.)

('27) 14 AIR 1927 Lah 734 (734) : 100 Ind Cas 19, *Pir Baksh* v. *Channan Din.* (Accidental loss of copy of judgment on the day the appeal was to be filed—Delay caused thereby—This was sufficient cause.)

('28) 15 AIR 1928 Lah 263 (264) : 112 Ind Cas 797 (DB), *Narsingh Das* v. *Secretary of State.* (In this case filing of a copy of award was allowed at the time of hearing argument—Time was extended under the peculiar circumstance of the case—*Compare* AIR 1928 Lah 216.)

('17) 4 AIR 1917 Lah 13 (14) : 42 Ind Cas 54 (DB), *Mt. Nikki* v. *Gujar Mal.* (Review—Cross-review—Time for, should be extended.)

('16) 3 AIR 1916 Mad 869 (871) : 31 Ind Cas 38 (DB), *Kyroon Bee* v. *Administrator General of Madras.* (The fact that two of the applicants were quarrelling between themselves is not sufficient cause to excuse delay under S. 5 read with O. 22 R. 9, C. P. C.)

('83) 1883 Pun Re No. 145, *Mt. Dyakour* v. *Mt. Amraokour.* (Time taken for translating judgment.)

Section 5
Note 36

36. Admission ex parte — Right of other person to re-open it.—Where an appeal or application filed beyond time is admitted *ex parte* after excusing delay, without notice to the opposite party, the latter is entitled, at the hearing, to object to the admission and the Court can re-open the question and decide whether there is sufficient cause for admitting the appeal or application beyond time.[1] The leading case on the point is *Krishnasami* v. *Ramasami*,[2] where their Lordships of the Privy Council observed as follows :

> " It has been argued that the admission of the appeal by Sankaran Nair, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to re-consider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasamy Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that, though unqualified in expression, it should be open to re-consideration at the instance of the party prejudicially affected ; and this view is sanctioned by the practice of the Courts in India."

It was held in the undermentioned case[3] that where an appeal is admitted *ex parte*, the respondent cannot wait till the *hearing*, but must apply by motion as early as possible to set aside the order. This

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Note 36

[1] ('17) 4 AIR 1917 P C 179 (180) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC), *Krishnasami Panikondar* v. *Ramasami Chettiar*.
('29) 16 AIR 1929 All 31 (32) : 111 Ind Cas 816, *Ramcharan Lal* v. *Ghafoor*.
('18) 5 AIR 1918 Cal 53 (54) : 45 Ind Cas 725 (DB), *Iswar Chandra* v. *Arjan*. (Party making *ex parte* application for extension must call attention of Court to matters for and against order extending time for filing appeal.)
('14) 1 AIR 1914 Bom 111 (111) : 38 Bom 613 : 25 I. C. 369 (DB), *Raoji Keshav* v. *Krishnarao Anandarao*.
('27) 14 AIR 1927 Bom 445 (446) : 103 I. C. 109 (DB), *Nuruddin* v. *Emperor*.
('01) 1901 Pun L R No. 159, p. 606 (608), *Mt. Murad Bibi* v. *Manohar Lal*.
('15) 2 AIR 1915 Mad 534 (534) : 25 Ind Cas 746 (DB), *Malli Reddi* v. *Peddakka*.
('20) 7 AIR 1920 Mad 320 (320) : 60 I C 212 (DB), *Krishnaswamy* v. *Veerappa*. (*Ex parte* order excusing delay in re-presenting pauper appeal.)
('23) 10 AIR 1923 Mad 482 (483, 484): 72 Ind Cas 308, *Sundaram Iyer* v. *Muthuramalinga Sethupathi*.
('36) 23 AIR 1936 Mad 600 (602) : 165 Ind Cas 471, *Rajammal* v. *Parthasarathy*.
('36) 23 AIR 1936 Oudh 9 (11) : 158 Ind Cas 19, *Gaya Charan* v. *Jagannath*. (Court condoning delay and admitting appeal *ex parte* — Transferee Court on objection at hearing dismissing appeal as barred.)
('75-77) 1 All 34 (37) (FB), *Dubey Sahai* v. *Ganeshi*. (Appeal admitted *ex parte* by single Judge—Division Bench hearing appeal dismissing appeal as barred.)
('81) 1881 All W N 88 (88) (DB), *Mitter Sen* v. *Barekullah*.
('87) 9 All 11 (15, 16, 19): 1886 All W N 245 (DB), *Hussaini Begam* v. *Collector of Muzaffarnagar*.
('86) 9 Mad 450 (451) (DB), *Venkatarayadu* v. *Nagadu*.
('86) 13 Cal 78 (79) (DB), *Moshaullah* v. *Ahmedullah*.
('90) 14 Bom 594 (596, 597), *Mulna Amad* v. *Krishnaji Ganesh*.
('13) 20 Ind Cas 513 (515) (Cal), *Dand Bahadur Singh* v. *Deo Narain Prosad*.
('12) 16 Ind Cas 407 (408) : 40 Cal 259 (DB), *Bhismadeo Das* v. *Sita Nath Roy*. (Admission of appeal by District Judge on *ex parte* statement by appellant—Transfer of appeal to Sub-Judge—Sub-Judge, on hearing, can dismiss appeal as barred.)
('22) 9 AIR 1922 Pat 47 (48) : 64 Ind Cas 55 (DB), *Md. Abdul Kasim* v. *Chaturbhuj Sahai*. (Appeal admitted subject to objection—Procedure is irregular.)
('83) 12 Cal L Rep 541 (545) (DB), *Nobin Chunder Roy* v. *Brojendro Kumar Roy*.

[2] ('17) 4 AIR 1917 P C 179 (180, 181) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC).

[3] ('23) 10 AIR 1923 Mad 82 (82): 70 I. C. 827, *Murugappa Naicker* v. *Thayammal*.

view was however dissented from in a later case of the High Court of Madras[4] as being opposed to the decision of the Privy Council in *Krishnasami's case*.[2] But where *at the hearing* of the appeal the respondent did not object to the *ex parte* admission, the High Court will refuse to interfere in revision.[5]

As regards the practice itself of admitting such appeals or applications *ex parte*, their Lordships said in *Krishnasami's case*[2] :

> " But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships, therefore, desire to impress on the Courts in India the urgent expediency of adopting, in place of this practice, a procedure which will secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

This last view was reiterated in the cases noted below.[6]

When an appeal or application is presented beyond the prescribed period of limitation, it has been held by the Privy Council that the proper order which a Judge should endorse upon it would be "presented for admission on the (date when the memorandum of appeal or application was handed into the office of his Court). Let notice go to the respondents (date of the order)."[7]

A Court is bound to consider whether there was sufficient cause for extending the period of time. Where a review is admitted without such determination, the order passed is not only irregular but possibly without jurisdiction. The entire proceedings must be set aside.[8]

It was held in the undermentioned case[9] that where an appeal filed after period of limitation was admitted by the District Judge *ex parte*, and then the appeal was transferred to the Subordinate Judge for disposal, the latter had no power to re-open the question of sufficient cause at the hearing. This view has not been followed in other cases.[10]

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[4] ('36) 23 AIR 1936 Mad 600 (602) : 165 I. C. 471, *Rajammal* v. *Parthasarathy*.

[5] ('25) 12 AIR 1925 Oudh 148 (148): 80 Ind Cas 617, *Bharat* v. *Basant*.
[*See also* ('20) 7 AIR 1920 Cal 574 (574) : 50 Ind Cas 374 (DB), *Telendrajit* v. *Gunendrajit*. (Appeal admitted subject to objection at hearing — In absence of objection by respondent Court cannot go behind the order admitting the appeal.)]

[6] ('18) 5 AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15 : 52 Ind Cas 897 (P C), *Sunderbai* v. *Collector of Belgaum*.
('30) 17 AIR 1930 All 815 (816) : 128 Ind Cas 753, *Nathu Ram* v. *Ganga Bux*. (Failure to do so is not only irregular but without jurisdiction.)
('19) 6 AIR 1919 Cal 585 (585):46 I.C. 480(DB),*Guru Charan* v. *Kashi Chandra*.
('20) 7 AIR 1920 Cal 574 (575) : 50 Ind Cas 374 (DB), *Telendrajit Raj Kumar* v. *Gunendrajit*.
('20) 7 AIR 1920 Pat 280 (281): 54 I. C. 36, *Chaturbhuj Sahay* v. *Muhammad Habib*.
('25) 12 AIR 1925 Cal 175 (175, 176): 79 I. C. 924 (DB), *Elahinewaz* v. *Biseswar*.
('32) 19 AIR 1932 Cal 482 (484, 485): 59 Cal 388 : 138 Ind Cas 643 (DB), *Jnandasundari Shaha* v. *Madhabchandra Mala*.

[7] ('18) 5 AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15 : 52 Ind Cas 897 (P C), *Sunderbai* v. *Collector of Belgaum*.

[8] ('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam* v. *Ram Autar Singh*.
('30) 17 AIR 1930 All 815 (816) : 128 Ind Cas 753, *Nathu Ram* v. *Ganga Bux*. (A I R 1915 All 240 followed.)

[9] ('80) 5 Cal 1 (2): 3 Shom L R 81 (DB), *Jhotee Sahoo* v. *Omesh Chunder Sircar*.

[10] ('98) 2 Cal W N 461 (463) (DB), *Manick Dukandar* v. *Naibulla Sircar*.

37. Burden of proof. — In *Krishnaswami* v. *Ramasami*,[1] their Lordships of the Privy Council observed as follows :

> "It is the duty of the litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in S. 5 of the Indian Limitation Act, *the burden rests on him of adducing distinct proof of the sufficient cause on which he relies.*"

See also the undermentioned cases.[2]

In the cases cited below[3] it was held that every day's delay must be properly explained. The mere fact that the delay is of *one* day only is not a sufficient explanation. The delay of one day is as fatal as a delay of fifty days.[4]

38. Exercise of discretion, when binding on appeal. — The appellate Court will not interfere with the discretion exercised by the lower Court in admitting or rejecting the application for *excusing* delay unless it appears that it has not been exercised at all or has not been exercised on judicial principles.[1] Where the lower Court held that

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('90) 14 Bom 594 (596) (DB), *Mulna Amad* v. *Krishnaji Ganesh.*
('98) 21 Mad 228 (230) : 7 Mad L Jour 188 (DB), *Krishna Bhatta* v. *Subraya.*
('97) 1897 All W N 15 (16), *Wahid Nur Khan* v. *Haqdad Khan.*

Note 37

[1] ('17) 4 AIR 1917 P C 179 (181) : 41 Mad 412 : 45 I. A. 25 : 43 I. C. 493 (P C).

[2] ('38) 25 AIR 1938 Nag 156 (161) : ILR (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao* v. *Trimbak.* (A I R 1917 P C 179 followed.)
('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam* v. *Ram Autar Singh.*
('19) 6 AIR 1919 Cal 585 (585) : 46 I. C. 480 (DB), *Gurucharan* v. *Kashi Chandra.*
('32) 19 AIR 1932 Cal 589 (596) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan* v. *Mohendra Nath.*
('33) 20 AIR 1933 Lah 681 (682) : 146 Ind Cas 45 : 14 Lah 656 (DB), *Kanhya Lal* v. *Baldeo Das.* (Appeal filed beyond time — Appellant has to show sufficient cause for delay.)
('36) 23 AIR 1936 Sind 169 (170) : 30 Sind L R 242 : 165 Ind Cas 91 (DB), *Tejmal Bhagwandas* v. *Murad.*
('31) 18 AIR 1931 Sind 58 (58, 59) : 24 Sind L R 415 : 132 Ind Cas 473 (DB), *Manghoomal* v. *Bibi Sardar Khatun.*

[3] ('01) 25 Mad 166 (180) : 11 Mad L Jour 406 (DB), *Kichilappa Naicker* v. *Ramanujam Pillai.*
('09) 1 I. C. 73 (76) (Mad) (DB), *Krishnasami Panikondar* v. *Ramasami Chettiar.*

[4] ('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tola Ram* v. *Jaffer Khan.*

Note 38

[1] ('38) 25 AIR 1938 Bom 408 (410) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida* v. *Ramchandra Santuram.* (Even if another Judge in the lower Court may have taken a different view.)
('38) 25 AIR 1938 Pat 413 (417) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand.* (If the lower Court misdirects itself on a point of law and refuses to extend the time upon the findings of fact which it arrives at, it will be set aside by the superior Court.)
('36) 23 AIR 1936 Sind 169 (171) : 30 Sind L R 242 : 165 Ind Cas 91 (DB), *Tejumal Bhawandas* v. *Murad.*
('29) 16 AIR 1929 Nag 8 (10) : 114 Ind Cas 612, *Shrikisan* v. *Secretary of State.* (Exercise of discretion in a judicially unsound manner without proper materials to support its decision.)
('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale* v. *Maung Tun Win.*
('17) 4 AIR 1917 Low Bur 90 (90, 91) : 38 Ind Cas 575, *Ma Hla Dun* v. *Maung Shwe Ya.*

('04) 26 All 329 (331) : 1904 All W N 24 (DB), *Girwarlal* v. *Lakshmi Narain.* (Lower appellate Court acting upon a ruling of the High Court in which the question of application of S. 5 was not considered at all and not considering the section itself.)

(1900) 3 Oudh Cas 37 (41), *Kanhaya Lal* v. *Bashir Ahmad.* (Court concluding that applicant had sufficient cause on ground not urged by him.)

('82) 8 Cal 251 (253) : 11 Cal L R 177 (DB), *Chunder Doss* v. *Boshoon Lall Sookul.* (It is competent for the High Court on second appeal to look into the grounds upon which the Court below has admitted an appeal after the time prescribed by the Limitation Act.)

('16) 3 AIR 1916 All 296 (297) : 33 Ind Cas 546, *Maqbul Ahmed* v. *Murla.*

('23) 10 AIR 1923 All 455 (456) : 45 All 432 : 74 Ind Cas 1039 (DB), *Ahmed Hussain* v. *Muhammad Fasih-ulla.*

('26) 13 AIR 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup* v. *Naik Ram.*

('29) 16 AIR 1929 All 31 (32) : 111 Ind Cas 816, *Ram Charan* v. *Ghafoor.*

('30) 17 AIR 1930 All 131 (132) : 123 Ind Cas 824, *Chatur* v. *Baijnath.*

('28) 15 AIR 1928 Bom 64 (65) : 52 Bom 164 : 108 Ind Cas 26 (DB), *Daga Devji Patil* v. *Emperor.*

('26) 92 Ind Cas 724 (725) (Mad), *Komarasami* v. *Sundar Mudaliar.*

('04) 26 All 327 (328, 329) : 1904 All W N 23 (DB), *Hamid Ali* v. *Gayadin.*

('02) 25 All 71 (73) : 1902 All W N 203 (DB), *Tulsa Kunwar* v. *Gajraj Singh.*

('67) 7 Suth W R 337 (337), *Raj Coomar Roy* v. *Shaikh Mahomed Wais.*

('67) 7 Suth W R 296 (297), *Roghoonath Singh* v. *Roy Mohan Lal Mitter.*

('66) 6 Suth W R 100 (100) (DB), *Rakhal Doss Mookerjee* v. *Ranee Shurno Moyee.* (Case under Section 377 of the Civil Procedure Code, 1859.)

('07) 31 Bom 33 (36) : 8 Bom L R 858 (DB), *Bhimrao Ramrao* v. *Ayyappa Yellappa.*

('82) 6 Bom 304 (307, 309) (DB), *Ranchodji* v. *Lallu.*

('30) 17 AIR 1930 Lah 749 (749) : 126 Ind Cas 442, *Nihal Chand* v. *Jai Dayal.*

('12) 14 Ind Cas 59 (60) (All) (DB), *Bikram Singh* v. *Narain.*

('16) 3 AIR 1916 Pat 317 (318) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal* v. *Mehdi Hussain.*

('96) 11 C P L R 3 (4), *Gopal Modi Bania* v. *Mt. Ganga Bania.*

('17) 4 AIR 1917 Lah 463 (464) : 36 Ind Cas 614 : 1916 Pun Re No. 92, *Hardhan* v. *Ram Chand.*

('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali* v. *Akhtar Hussain.* (Court in second appeal should interfere only in exceptional cases.)

('16) 3 AIR 1916 Lah 146 (148) : 35 Ind Cas 67 : 1916 Pun Re No. 88, *Asa Ram* v. *Budhu Mal.*

('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Municipal Committee, Chiniot* v. *Bashi Ram.*

('26) 13 AIR 1926 Lah 542 (543) : 95 Ind Cas 565 (DB), *Bur Singh* v. *Firm Jodha Ram Hannu Ram.*

('37) 24 AIR 1937 Lah 767 (769) : 174 Ind Cas 927, *Mangal Ram* v. *Sat Deo.*

('85) 1885 Pun Re No. 106, *Joti Pershad* v. *Chunnilal.*

('17) 4 AIR 1917 P C 179 (181) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC), *Krishnasami Panikondar* v. *Ramasami Chettiar.*

('31) 18 AIR 1931 All 28 (28): 130 Ind Cas 840 (DB), *Rama Shankar* v. *Janki.*

('33) 20 AIR 1933 All 294 (295): 144 I. C. 133 (DB), *Badri Prasad* v. *Amjid Ali.*

('02) 25 Mad 166 (180, 181, 182) : 11 Mad L Jour 406 (DB), *Kichilappa Naicker* v. *Ramanujam.* (Mere difference in view as to mode in which discretion conferred by section ought to have been exercised is in itself no ground for interference.)

('85) 1885 Bom P J 152 (152) (DB), *Kamalabai* v. *Mahomed Sahib.* (Total disregard of ground for extension.)

('73) 10 Bom H C R 397 (398), *Surbhai Dayalji* v. *Raghunathji.* (Time extended without any material.)

('99) 23 Bom 513 (518) (DB), *Parvati* v. *Ganpati Rokdaji.*

('85) 9 Bom 452 (454), *Raghunath Gopal* v. *Nilu Nathaji.* (Reasons not given for refusing to excuse delay.)

('35) 153 Ind Cas 259 (259) (Lah), *Khazana Mal-Bhagat Ram* v. *Mangat Ram.*

('30) 123 Ind Cas 83 (83, 84) (Lah), *District Board, Sargodha* v. *Shamas Din.*

('19) 6 AIR 1919 Pat 503 (505) : 4 Pat L Jour 381 : 52 Ind Cas 225 (DB), *Jahar Mal* v. *G. M. Pritchard.*

('22) 9 AIR 1922 Pat 47 (48) : 64 Ind Cas 55 : 6 Pat L Jour 444 (DB), *Md. Abdul Kasim* v. *Chaturbhuj Sahai.* (No discretion exercised at all.)

('26) 13 AIR 1926 Cal 677 (679) : 92 Ind Cas 1031, *Ramdhani Muchi* v. *Khakshardas Tati.*

there was no general rule applicable for exercise of discretion under this section, when in fact general rules of guidance in such matters had been laid down in various decisions of the High Court, the Privy Council interfered with the order of the Court and set it aside.[2] Similarly, when the Court does not apply its mind to consider the explanation for the delay,[3] or has acted illegally in admitting the application,[4] or the discretion is exercised in an arbitrary or fanciful manner, or upon a ground which is not material, the appellate Court will interfere.[5] It has been held in the undermentioned case[6] that the question whether the facts and circumstances constitute sufficient cause is one of law and not of fact and can be raised in second appeal.

39. Order under section 5, if open to revision.— An order refusing, in the exercise of its discretion, to excuse delay in presentation of an appeal is not open to revision even for the purposes of showing that the appeal was not really time-barred.[1] When an order has been passed by the lower Court in exercise of its discretion allowing or

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(1900-02) 1 Low Bur Rul 313 (315), *Maung Po Lu* v. *Maung Kyin.*
('76) 1 All 250 (251) (DB), *Zaibulnissa Bibi* v. *Kulsum Bibi.* (No cause, whatsoever, assigned for not presenting appeal within time—Still Court excused delay—Appellate Court reversed order of lower Court and rejected appeal as filed beyond time.)
('87) 9 All 244 (246) : 1887 All W N 29 (DB), *Fatima Begam* v. *Hansi.*
('26) 13 AIR 1926 Lah 445 (446) : 94 I. C. 396 (DB), *Bachint Singh* v. *Harnam.*
('36) 23 AIR 1936 Lah 742 (743) : 166 I. C. 698, *Ladha Mal-Bishen Das* v. *Nadar.*
('76) 1876 Pun Re No. 114, *Hyat* v. *Rahimuddin.*
('86) 1886 Pun Re No. 92, *Gharib* v. *Pohlomal.*
[*See* ('26) 13 AIR 1926 All 111 (112) : 89 Ind Cas 956, *Megh Baran Singh* v. *Rama Das.*]

[2] ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh* v. *Lala Kanshi Ram.*
[*See also* ('21) 62 Ind Cas 957 (958) (Cal) (DB), *Sm. Thakamani Dasi* v. *Pitambar Bhuiya.*
('23) 10 AIR 1923 All 455 (456) : 45 All 432 : 74 Ind Cas 1039 (DB), *Ahmed Husain* v. *Muhammad Fasihullah.* (AIR 1917 P C 156 followed.)]

[3] ('14) 1 AIR 1914 All 521 (523) : 25 Ind Cas 30, *Dewan* v. *Buddhu.* (Only explanation for delay being that papers were returned by counsel to whom they were made over after time for appeal had expired—*Held*, explanation insufficient.)
('15) 2 AIR 1915 All 240 (241) : 29 I. C. 975 (DB), *Janki Prasad* v. *Parameshwar Din.* (Defendant in jail when *ex parte* decree passed — Application under O. 9, R. 13, C. P. C., made after five years when released—Munsif granted application —*Held*, application barred and proceedings irregular and without jurisdiction.)
('18) 5 AIR 1918 Lah 396 (397) : 42 I. C. 343 : 1917 Pun Re No. 77 (DB), *Nand Singh* v. *Gulli.* (Particular day gazetted as public holiday and subsequently another day substituted in its place and appellant misled thereby — Lower Court failing to consider this reason for delay — Question of delay was considered and excused in appeal.)
('30) 17 AIR 1930 Lah 1068 (1069) : 122 Ind Cas 575, *Muhammad Iqbal* v. *Labha Mal.* (No proper thought given by the lower Court to the cause of presenting appeal out of time—High Court interfered with discretion and extended time.)
('33) 20 AIR 1933 Lah 260 (261) : 145 Ind Cas 153, *Dhara Singh* v. *Abdullah.* (Failing to consider plea of extension of time is material irregularity.)

[4] ('89) 12 All 57 (60) : 1889 All W N 197 (DB), *Munro* v. *The Cawnpore Municipal Board.*

[5] See cases in foot-note (1).

[6] ('32) 19 AIR 1932 Lah 183 (185) : 135 Ind Cas 221, *Kanshi Ram Munshi Ram* v. *Raman Mal Govind Ram.*

Note 39

[1] ('14) 1 AIR 1914 Mad 149 (149) : 24 Ind Cas 872, *Thandayuthapani* v. *Chinnathal.*

refusing an application to extend time, it cannot be interfered with in revision.[2] But where the Court has come to its conclusion on no evidence and has omitted to consider whether there was sufficient cause for delay in presentation, it acts with material irregularity in the exercise of its jurisdiction and the High Court will interfere.[3] So also where the Court rejects the appeal as beyond time without investigating the matter as to the allegation of illness set up by the appellant as the reason why the appeal had not been preferred within time, i.e., without regard to S. 5 at all, it is a wrong and illegal exercise of jurisdiction and the High Court will interfere in revision.[4]

It is not the practice of the Patna High Court to interfere in revision in the exercise of discretion by the lower Court under S. 5 even when the exercise of that discretion is founded on a mistaken view of the law.[5]

40. Question of exercising discretion, when arises.—The question of extending time under this section arises only when the appeal or application in respect of which the delay is to be excused is filed. The parties are not entitled to invite the Court to decide the question of limitation before they actually file their proceeding.[1] Similarly, the question will not arise until the period of limitation has actually expired,[2] or until the computation of time has been made.[3] Where a motion to present an appeal in *forma pauperis* was rejected on the ground of limitation and thereafter an application for extending

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2. ('34) 35 Pun L R 374 (374), *Khazana Mal Bhagat Ram* v. *Mangat Ram.* (Lower appellate Court considering on merits that the review petition which the appellant had first made to the trial Court was not justified on the grounds on which it was based and refusing to excuse delay in filing the appeal—No sufficient ground for interference in revision.)
('36) 23 AIR 1936 Pesh 97 (99) : 162 Ind Cas 416, *Bundhelkhand M. & C. Agency* v. *Peoples Bank of Northern India Ltd., Lahore.*
('22) 9 AIR 1922 Mad 193 (193):68 I.C. 910, *Perumal Moopan* v. *Venkatachariar.*
('69) 11 Suth W R 56 (57):2 Beng L R A C 181 (DB), *Aujoonnissa Bibee* v. *Surjo Kant Acharjee.* (Revision under Cl. 15 of the Charter.)
('30) 17 AIR 1930 Cal 426(427, 428): 126 Ind Cas 781 (DB), *Jnanada* v. *Falkner.*
('84) 7 Mad 584 (586) (DB), *Vasu Deva* v. *Chinnasami.*
('14) 1 AIR 1914 Mad 149 (149) : 24 I.C. 872, *Thandayuthapani* v. *Chinnathal.*
('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139 : 26 I.C. 819, *Raghu* v. *Madhgia.*
('70) 13 Suth W R 439(440):5 Beng LR 316 (DB), *Asrafannissa Begam* v. *Enayet Hossein.* (Revision under Cl. 15 of the Charter.)
('25) 12 AIR 1925 Oudh 148 (148) : 80 Ind Cas 617, *Bharat* v. *Basant.*

3. ('38) 25 AIR 1938 Pat 413 (417) : 17 Pat 507 : 177 I.C. 564 (DB), *Nrisingha Charan Nandy* v. *Trigunand.*
('14) 1 AIR 1914 Upp Bur 49 (51) : 27 I.C. 967, *Nga Po Kan* v. *Nga Shwe Dat.*
('23) 10 AIR 1923 Mad 503 (504) : 72 I.C. 137, *Gopalasamy* v. *Ramachandra.*
('25) 12 AIR 1925 Mad 494 (496) : 86 I.C. 905, *Subbaraya* v. *Govindaswami.*

4. ('88) 1888 All W N 126 (126), *Narain Dai* v. *Shamli Prasad.*
[*See also* ('85) 7 All 345 (352, 353) : 1885 All W N 73 (DB), *Har Prasad* v. *Jafar Ali.*]

5. ('37) 24 AIR 1937 Pat 528(530):171 I.C. 700, *Thakur Singh* v. *Dinanath Sah.*

Note 40

1. ('26) 13 AIR 1926 All 555 (557) : 95 Ind Cas 959 (DB), *Ram Sughar Rai* v. *Dharam Raj Singh.*

2. ('34) 21 AIR 1934 Nag 145 (146) : 30 Nag L R 294 : 149 Ind Cas 956, *Model Mills Ltd.* v. *Hiralal Ram Gopal.*

3. ('90) 12 All 461 (491) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan-ullah Khan.*

Section 5
Notes 40–43

time under section 5 was presented, it was held that as there was no application for leave to appeal pending, the application under S. 5 could not lie.[4]

41. Order under section 5 must give reasons. — A Court passing an order on an application for extending time under S. 5 must give its reasons for the conclusion, so as to enable an Appellate Court to see whether it has properly arrived at its conclusions.[1] In the undermentioned case,[2] where the lower Court had accepted a copy of the decree after the expiry of the prescribed period, being satisfied on an affidavit by the party as to the delay in filing it, it was held that the Court must be taken to have exercised its discretion under this section and excused the delay.

42. Valuation of application under section 5. — Under the Allahabad High Court Rules, an application under S. 5 should be specifically valued and if such valuation is less than Rs. 200, a single Judge can hear the application.[1]

43. Formal application, if necessary.—Where the appellant did not implead certain persons not mentioned in the decree as parties, but on the decree being subsequently amended by the addition of new persons the appellant got them added in the appeal, but after the expiry of the limitation from the date of the original decree, and the appeal was dismissed by the District Judge on the ground that no formal application under S. 5 was made for excusing the delay, it was held by the High Court of Allahabad that the District Judge should not have dismissed the appeal.[1] In the undermentioned case[2] it was held that where a petition was filed out of time, it must show on the face of it the reason for the delay and there must further be an *express* prayer for condonation of the delay under S. 5.

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[4] ('33) 20 AIR 1933 All 308 (309): 144 I. C. 79, *Mt. Shahzadi Begam* v. *Alakh.*

Note 41

[1] ('29) 16 AIR 1929 All 101 (101): 112 Ind Cas 246, *Gaya Prasad* v. *Ram Sarup.*
('83) 1883 Pun Re No. 4, *Sardarni Raj* v. *Nahal.* (Appeal presented after time—Reason for allowing extension on ground of sufficient cause should be recorded.)
('72-92) 1872-92 Low Bur Rul 500 (501), *Maung Kyauk Lon* v. *Maung Shwe.*
('26) 13 AIR 1926 Cal 1105 (1106) : 98 I. C. 748 (DB), *Adarpriya* v. *Ramprotap.*
('20) 7 AIR 1920 Pat 280 (281) : 54 I. C. 36, *Chaturbhuj* v. *Muhammad Habib.*
[*See* ('32) 19 AIR 1932 Cal 482 (484) : 59 Cal 388 : 138 Ind Cas 643 (DB), *Jnanadasundari Shaha* v. *Madhabchandra Mala.*]

[2] ('97) 1897 All W N 15 (16), *Wahid Nur Khan* v. *Haqdad Khan.*

Note 42

[1] ('36) 23 AIR 1936 All 139 (140) : 160 Ind Cas 876 (D B), *Durga* v. *Lakhpat Rai.* (Office cannot assume that valuation of application cannot exceed valuation of appeal.)

Note 43

[1] ('36) 23 AIR 1936 All 666 (667, 668) : 164 Ind Cas 1066 (DB), *Mt. Kulsoomunnissa* v. *Noor Mohammad.*
[See however ('38) 25 AIR 1938 Nag 233 (235): 176 Ind Cas 33, *Chetanlal Purshottam* v. *G. S. Gupta.* (Power of High Court to apply S. 5 to appeal in lower appellate Court — It is doubtful if High Court has such power in absence of an application in lower appellate Court.)]

[2] ('26) 13 AIR 1926 Pat 73 (75) : 4 Pat 766:92 Ind Cas 179, *Laurentius Ekka* v. *Dukhi Koeri.*

Section 5
Notes 44–47

44. Order under section 5, if "judgment" within the meaning of the Letters Patent. — Where the Court allows the appeal or application to be filed beyond time, as a matter of concession or indulgence, it is not really deciding the rights of the parties nor adjudicating upon their rights and liabilities. It is therefore not a 'judgment' within the meaning of the Letters Patent.[1] But it has been held by a Full Bench of the Bombay High Court that an order passed by a Division Court rejecting an application to excuse the delay in presenting an application for leave to appeal to the Privy Council is a 'judgment' within the meaning of clause 15 of the Letters Patent.[2]

45. Order under section 5, whether one "passed on appeal." — An order dismissing an appeal as barred after refusing an application to extend time under S. 5 is an order "passed on appeal" within S. 109 (a) of the Civil Procedure Code.[1] An order *extending* the time under S. 5 and admitting the appeal is not a "final order" within the meaning of S. 109 of the Civil Procedure Code.[2] An order admitting an appeal by excusing delay is not adjudicating an 'appeal'.[3]

An order dismissing an appeal as too late is a decree open to appeal.[4]

46. Section 5 and Madras High Court Original Side Rules, Rule 356. — A single Judge of the High Court sitting in the admission Court is competent to excuse delay in the presentation of an appeal under S. 5, whether the appeal is against a decree passed on the Original Side or is from the decree of a mofussil Court.[1]

47. Appeal on behalf of or against dead person.—Where an appeal was filed on behalf of a dead person and subsequently his legal representatives applied to continue the appeal, the Court treated

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Note 44

1. ('35) 22 AIR 1935 All 620 (624):57 All 983:157 Ind Cas 347 (FB), *Mt. Shahzadi Begam* v. *Alakh Nath.* (Clause 10 of Letters Patent, Allahabad.)

('29) 16 AIR 1929 Cal 214 (216):56 Cal 135:114 Ind Cas 88 (FB), *Brojo Gopal Ray* v. *Amar Chandra.* (Clause 15 of Letters Patent, Calcutta.)

('36) 23 AIR 1936 Mad 387 (388) : 59 Mad 656 : 161 Ind Cas 416 (DB), *Ananthanarayana Iyer* v. *Rarichan.* (Orders excusing delay and admitting appeal — As orders did not end any proceeding no appeal lies therefrom.)

2. ('24) 11 AIR 1924 Bom 399 (403): 48 Bom 442 : 80 Ind Cas 862 (SB), *Nagindas Motilal* v. *Nilaji Moroba.*

Note 45

1. ('21) 8 AIR 1921 Cal 415 (415, 416): 62 I. C. 216 (DB), *Pramoth Nath* v. *W. A. Lee.*

('12) 16 Ind Cas 486 (486) (Mad) (DB), *Krishnasami* v. *Ramasami.* (Assumed.)

('26) 13 AIR 1926 Pat 102 (102) : 90 Ind Cas 723 (DB), *Pereira* v. *East Indian Railway.*

[But see ('08) 32 Bom 108 (109, 110) : 9 Bom L R 566 (DB), *Karsandas Dharamsey* v. *Gangabai.* (Case under the old Code of Civil Procedure — Such an order is not one "passed on appeal" within S. 595 of the Code of 1882.)

('36) 23 AIR 1936 Oudh 110 (112) : 11 Luck 599 : 159 Ind Cas 483 (DB), *Mt. Karim Jehan Begam* v. *Girdhari Lal.*]

2. ('26) 13 AIR 1926 Pat 102 (102) : 90 I. C. 723 (DB), *Pereira* v. *E. I. Railway.*

3. ('13) 21 Ind Cas 96 (98) (Mad) (DB), *Ruthna Gramany* v. *Veerabudra Iyer.*

4. ('85) 9 Bom 452 (453) (DB), *Raghunath Gopal* v. *Nilu Nathaji.*

Note 46

1. ('13) 21 Ind Cas 96 (98) (DB) (Mad), *Ruthna Gramany* v. *Veerabudra Iyer.*

the application as an appeal by the representatives themselves and excused the delay under this section.[1] Where an appeal is filed against a dead person under a *bona fide* mistake and if the time expires before the representatives are brought on record, the time may be extended under section 5.[2]

6.* *(1)* Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the

Legal disability.

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* **Act of 1877 : S. 7.**

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

Legal Disability.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

Double and successive disabilities.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Disability of representative.

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Illustrations.

(a) The right to sue for the hire of a boat accrues to *A* during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

* * * * * * *

(c) A right to sue accrues to *Z* during his minority. After the accruer, but while *Z* is still a minor, he becomes insane. Time runs against *Z* from the date when his insanity and minority cease.

(d) A right to sue accrues to *X* during his minority. *X* dies before attaining majority and is succeeded by *Y*, his minor son. Time runs against *Y* from the date of his attaining majority.

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Act of 1871 : S. 7.

7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot,

Legal disability.

he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When this disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Illustrations.

(a) The right to sue for the hire of a boat accrues to *A* during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

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Note 47

[1] ('08) 18 Mad L Jour 461 (461) (DB), *Subbarayudu* v. *Lingayya.*

[2] ('36) 23 AIR 1936 Pesh 192 (193) : 165 I. C. 201, *Mubarak Shah* v. *Acharaj Ram.*

period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections *(1)* and *(2)* shall apply.

Illustrations.

(a) The right to sue for the hire of a boat accrues to *A* during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(b) A right to sue accrues to *Z* during his minority. After the accruer, but while *Z* is still a minor, he becomes insane. Time runs against *Z* from the date when his insanity and minority cease.

(c) A right to sue accrues to *X* during his minority. *X* dies before attaining majority, and is succeeded by *Y*, his minor son. Time runs against *Y* from the date of his attaining majority.

Act of 1859 : Ss. 11 and 12.

Computation of period of limitation in case of legal disability.

11. If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

What persons to be deemed to be under legal disability.

12. The following persons shall be deemed to be under legal disability within the meaning of the last preceding section — Married women in cases to be decided by English law, minors, idiots, and lunatics.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Relative scope of sections 6 and 17.
4. Retrospective effect of section.
5. "Person." See Notes 6 to 8.
6. Whether section applies to incorporated body.
7. Whether section applies to an unincorporated body or to a number of persons collectively.
8. "Person entitled to institute a suit or make an application."
9. "Suit," meaning of. See S. 2, clause 10.
10. "Disability." See Notes 3, 23, 24, 27 and 28.
11. Disability and incapacity. See Note 3.
12. "Reckoned."
13. Proceedings to which section applies.
14. Section applies only to the person entitled to sue or apply for execution at the commencement of limitation.
15. Disability must exist at the time from which period of limitation is to be reckoned.
16. Suit by after-born member of Hindu joint family to set aside alienation of joint family property.
17. Suit by Hindu reversioner to set aside alienation or adoption by widow.
18. Suit by reversioner under Punjab Customary Law to set aside alienation of ancestral property by collateral.
19. Suit by reversioner or adopted son succeeding to an estate after a Hindu widow.
20. Applicability of the section to periods fixed by special or local Acts.
21. Applicability of the section to period of twelve years fixed by Section 48, Civil Procedure Code.
22. Period fixed by Court cannot be extended under this section.
23. Disabilities to which section applies.
24. Minor.
25. Section, whether applies to child in womb.
26. Whether minority negatives knowledge.

26a. Whether there can be adverse possession against a minor or other person under disability. See Note 24 under Articles 142 and 144.

27. "Insane."
28. "Idiot."
29. Onus of proof and evidence as to disability.
30. Suit on behalf of Hindu idol.
31. "Within the same period after the disability has ceased."
32. Section does not prevent running of limitation against person under disability.
33. Privilege under section is not confined to proceedings instituted after the cessation of disability.
34. Acquisition of prescriptive title against person under disability.
35. Effect of existence of guardian for person under disability.
36. Estate of minor under management of Court of Wards.
37. Appointment of administrator to estate of person under disability. See Note 3.
38. Estate of minor in hands of executor.
39. Appointment of receiver to estate of person under disability.
40. Whether extension of time under the section can be claimed by assignee from person under disability.
41. Whether period extended under this section is "period prescribed" for suit or application.
42. Clause (3): Death of person under disability.
43. "Legal representative."
44. Clause (4): Minority or other disability of legal representative.

Other Topics (miscellaneous)

Accrual of cause of action. See Notes 14 and 15.

Acknowledgment when creditor is minor. See Notes 14 and 15.

Age — Determination of. See Notes 24 and 25.

Computation of period. See Note 31.

Disability—Whether confers exemption apart from statute. See Note 20.

Litigant should plead disability. See Note 29.

Mental weakness on account of injuries is not insanity. See Note 27.

Privilege under section is personal. See Notes 2, 16, 32 and 40.

Restitution application—Section applicable. See Note 13.

Section does not apply to appeals. See Note 13.

Section not applicable to persons collectively. See Notes 7 and 8.

Sections 6 to 8—Supplementary to each other and not mutually exclusive. See Note 2.

Section 8, an exception to Ss. 6 and 7. See Note 2.

Suit during disability not barred. See Note 3.

1. Legislative changes. — This section corresponds to S. 7 in the Acts of 1877 and 1871 and to Ss. 11 and 12 in the Act of 1859. The changes made in the section in the various Acts may be reviewed under the following heads :

1. *Who are to be treated as persons under legal disability :*

   Under the Act of 1859 (S. 12), married women, in cases to be decided under the English law, were also persons under legal disability in addition to minors, lunatics and idiots. Married women were removed from the category of persons under disability in the later Acts. (See Note 23.)

2. *Point of time at which disability should exist :*

   Under the present section and the corresponding section (S. 7) of the Act of 1877, the point of time at which the disability should exist is the time from which the period of limitation is to be reckoned. But, under the Acts of 1859 and 1871, it was the time when the right to sue accrued. (See Note 15.)

3. *Proceedings to which section applies :*

   The Acts of 1859 and 1871 applied only to *suits*. The Act of 1877 applied to suits as well as applications. But the present section applies to suits and applications for *execution*. (See Note 13.)

4. *Applicability to suits for pre-emption :*

   The Acts of 1859 and 1871 applied to suits for pre-emption as well as to other suits. Such suits were excluded from the operation of the section in the later Acts. (See Note 13 and section 8.)

5. *Death before cessation of disability :*

   The provision as to the death of the person under disability before the cessation of his disability did not occur in the Act of 1859.

6. *Simultaneous and successive disabilities :*

   The provisions as to these did not occur in the Act of 1859. The Act of 1871 introduced the provision as to *simultaneous* disabilities. It was the Act of 1877 that first provided for *successive* disabilities as well.

7. *Disability of legal representative in case of death of person under disability before the cessation of disability :*

   The Acts of 1859 and 1871 did not contain any provision as to this. In fact, the Act of 1859 did not provide for the contingency of a person dying before cessation of his disability. (See Note 44.)

8. *Definition of minority :*

The Act of 1871 contained a definition of minority. It said that a minor was a person who had not completed his eighteenth year. This definition was omitted in the later Acts. (See Note 24.)

9. *Extended period, whether applicable to suit by legal representative of person under disability :*

Under the Act of 1859, it was provided that in case of the disability of the person entitled to sue, he *or his representative* might sue within the extended period. In the later Acts, this privilege is confined to the person under disability. (See Note 40.)

2. Scope of the section.—The scheme of the Act is that, as a *general* rule, suits and other proceedings instituted after the lapse of the period prescribed by the first schedule should be barred. But, this general rule is subject to the exception that, under certain special circumstances, which have been defined in the body of the Act, a suit or other proceeding though instituted after the lapse of the period so prescribed should not be time-barred.[1] The provisions of the Act, which are, thus, exceptions to the general rule and enable proceedings to be instituted after the lapse of the period prescribed by the first schedule, may be classified as follows :

(1) Where the prescribed period of limitation is not affected but the delay in the institution of the proceeding is condoned. (S. 4.)

(2) Where the prescribed period of limitation is not affected but the Court is given the *discretion* to excuse the delay in the institution of the proceeding. (S. 5.)

(3) Where the period of limitation is *extended*, i.e., an additional period is given to the litigant. (Ss. 6, 7, 19, 20 and 23.)

(4) Where an absolute exemption from the law of limitation is given. (S. 10.)

(5) Where a certain period is directed to be excluded in computing the period of limitation. (Ss. 12 to 16.)

(6) Where the starting point of limitation is postponed. (Ss. 17, 18 and 24.)

(7) Where the running of limitation is *suspended* for a certain period. (S. 9, Proviso.)

This section is one of the provisions which *extend* the period of limitation laid down by the first schedule. (See Notes 31 to 33.)

The ground on which the extension is given is the *disability* of the person entitled to sue or apply. But the section does not contain the entire law on the subject. It enumerates the kinds of disabilities on account of which limitation will be extended. But, the *circumstances*, under which and the *extent* to which, limitation will be extended on such ground are dealt with not only in this section but

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Section 6 — Note 2

[1] See Section 3.

also in Ss. 7 and 8. Thus, the three sections together constitute one unit and are supplementary to each other and not mutually exclusive.[2]

The scheme of the sections is this. Section 6 lays down the *general* rule in accordance with which the question of limitation must be determined in cases where the person entitled to sue or apply is under a disability. Section 7 provides a special rule for *some* of these cases and, consequently, if a case falls within the provisions of S. 7, the question of limitation must be determined in accordance with them and not in accordance with S. 6.[3] Section 8 serves as an exception to both sections 6 and 7 in two respects :

(1) It exempts suits for pre-emption from the operation of both the sections.

(2) It provides that sections 6 and 7 cannot operate so as to extend the ordinary period of limitation applicable to a case for more than three years from the cessation of disability or the death of the person affected thereby.

The conditions for the applicability of S. 6 are as follows :

(1) The person entitled to sue or apply must be under a disability.

(2) The disability must be of a person entitled to sue or apply *at the time from which limitation is to be reckoned.* (See Note 14.)

(3) The disability must exist *at the time from which the period of limitation is to be reckoned.* (See Note 15.)

(4) The disability must be of the kind specified in the section, viz., minority, insanity or idiocy. (See Note 23.)

(5) The proceeding in question must be a suit[4] or an application for the execution of a decree. (See Note 13.)

(6) The period of limitation for the proceeding must be fixed by the first schedule. (See Notes 20 to 22.)

The privilege under the section is not confined to proceedings instituted *after* the cessation of disability. (See Note 33.) It extends also to proceedings instituted on behalf of the person under disability during the continuance of the disability. But, the privilege is *personal* and does not apply to an assignee from the person under disability. (See Note 40.) As to whether minority is a general principle of exemption from limitation, apart from this section, see Note 20.

3. Relative scope of Sections 6 and 17.—This section refers to cases where a person is under a *disability* to sue, while S. 17 refers to cases where there is no person in existence *capable of suing.* Where a cause of action *accrues in favour of a person* but he is, at the time of such accrual, a minor, or insane or an idiot, there is a *disability* to sue. Where a right to sue accrues to the *estate* of a deceased person, but there is no person who is entitled to institute a suit in respect of such right to sue, it is a case of there being no person *capable of suing.* In such cases, limitation *does not begin to run at all* until there is a person who is capable of suing.[1] This is the principle on which S. 17 is based.

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[2] ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 I. C. 990 (DB), *Rati Ram* v. *Nadar.*

[3] ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram* v. *Nadar.* (Proceeding barred under S. 7 even as against person under disability on the ground that a discharge could have been given without his concurrence—It cannot be contended that under S. 6 the person under disability is entitled to extension of time so far as he is concerned.)

[4] Suits for pre-emption are exempt from the application of the Section—See S. 8.

Illustrations.

1. *A* owes *B* money under a bond. The money is payable on 10th January 1935. *B* dies in December 1934 leaving as his legal representative *C* who, however, is an alien enemy residing in foreign territory at the time the right to sue accrues. Under S. 83 of the Civil Procedure Code, *C* cannot institute a suit in the British Indian Courts and is, thus, *incapable of suing.* Where, however, the incapacity is removed, as for instance, by *C* coming and residing in British India with the permission of the Governor-General in Council, limitation will begin to run under S. 17 from the date when the incapacity is removed.

2. *A* owes money to *B* under a bond under which the money is payable in January 1935. *B* dies intestate in December 1934 and is governed for the purposes of succession by the provisions of sub-s. (1) of S. 212 of the Succession Act, 1925. Under that section, "no right to any part of the property of a person can be established in a Court of Justice unless letters of administration have first been granted by a Court of competent jurisdiction." Unless, therefore, such letters have first been granted to the estate of *B*, there will be no legal representative capable of suing on the debt. Limitation will, under S. 17, begin to run only when such letters are granted to any person.

It follows from the above that a *disability* to sue is, in law, a very different thing from an *incapacity* to sue.[1a] In the former case, the starting point of limitation is not postponed but an *extended period* is given on personal grounds. In the latter case, the starting point of limitation is itself *postponed,* until there is a person in existence capable of suing. It is, therefore, clear that a person under *disability* cannot, on that ground alone, be considered as being *incapable* of instituting a suit within the meaning of S. 17, though it is possible to conceive of a case where a person is incapable of suing and is also under a disability, as where a legal representative is an alien enemy, as well as a minor.

In *Rivett-Carnac* v. *Goculdas,*[2] the High Court of Bombay, however, expressed the view that a minor legal representative of a deceased person must, by virtue of his minority, be considered a person *incapable* of instituting a suit. The facts of the case were as follows : A partner in a firm, who was a Hindu, died intestate leaving a minor heir. Four years later, letters of administration to the estate of the deceased were granted to the Administrator-General of Bombay. Within three years thereafter, the latter filed a suit against the other partners of the deceased for an account of the profits of the partnership and for the share of the deceased in such profits. It was contended that under Art. 106 of the Limitation Act, the suit was time-barred as it was brought more than three years from the date of the dissolution of the partnership, which took place on the death of the partner for whose estate letters of administration had been granted. The contention

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Note 3

[1] **Halsbury's Laws of England, Vol. 19, pages 53 and 56.**

[1a] **('41) 28 AIR 1941 Mad 449 (466) (FB),** ***Venkateswara Sarma*** **v.** ***Venkatesa Ayyar.*** **(See the observations of Abdur Rahman, J., at page 466.)**

[2] **('96) 20 Bom 15 (40, 41, 42, 44) (DB).**

was overruled and it was held that as the minor was not capable of suing within the meaning of S. 17, time must be computed under that section from the date on which the letters of administration were granted to the Administrator-General, inasmuch as only then, there came into existence a legal representative capable of instituting a suit. The case went up on appeal to the Privy Council, *Bhagwandas* v. *Rivett-Carnac*.[3] Their Lordships of the Privy Council confirmed the decision of the High Court that the suit was not barred by limitation, on the ground that the Administrator-General must be *deemed to be suing on behalf of the minor heir.* No reference was made to S. 17 or to the views of the High Court on the interpretation of that section. If the suit was *on behalf of the minor*, there was clearly no question of its being barred during his minority. The reasoning on which the Privy Council judgment is based is really inconsistent with the reasoning of the High Court, although the actual decision was confirmed.

It was, however, held in the undermentioned case[4] of the Calcutta High Court by Mr. Justice Sale sitting as a single Judge, that in view of the confirmation of the decision of the High Court by the Privy Council in the case referred to above, their Lordships must be deemed to have upheld the view of the High Court that a minor is a person who is incapable of instituting a suit within the meaning of S. 17. It is submitted that, in view of the discussion above, this decision cannot be accepted as correct. The effect of holding that a person under disability is necessarily a person incapable of instituting a suit within the meaning of S. 17, will be to nullify the provisions of S. 6 and S. 8 and of making limitation begin to run only from the date when the disability ceases. The decision is also inconsistent with several cases, where suits were brought on a cause of action which had accrued to the estate of deceased persons, who had died intestate, leaving minor heirs and in which the question of limitation was determined purely by reference to Ss. 6 and 7 and not to section 17.[5]

4. Retrospective effect of section. — The corresponding section of the Act of 1877 (S. 7) applied to *all* applications, whereas the present section applies only to applications *for execution.* Hence where a right to make an application (other than an application for execution) had arisen prior to the coming into force of the new Act, and had not become time-barred under the provisions of the old Act due to the operation of S. 7 of that Act, the question would arise as to the retrospective effect of the amendment of the section in the

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3. ('99) 23 Bom 544 (549, 550) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (P C).

4. ('05) 9 Cal W N 537 (541, 542), *Mohil Lal Dutt* v. *Raj Narain Dutt.*

5. ('02) 25 Mad 26 (36, 40) (DB), *Ahinsa Bibi* v. *Abdur Kader Saheb.* (Suit for account of dissolved partnership by heirs of deceased partner—Section 7 applied.)

('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 564 (DB); *Barachutty* v. *Kunhi Pathumma.* (Do.)

('19) 6 AIR 1919 Bom 78 (78, 79) : 51 Ind Cas 79 : 43 Bom 487 (DB), *Ghulam Gous Mia Khot* v. *Shriram Pandurang.* (Mortgage by deceased—Suit for redemption by his legal representatives—Section 7 applied.)

('29) 16 AIR 1929 All 142 (143, 144) : 116 Ind Cas 481 (DB), *Mohammad Zahur Ahsan* v. *Mt. Maimuna.* (Wife of Mahomedan pre-deceasing her husband—Suit by sons for share of her dower debt—*Held* S. 7 did not apply.)

new Act. In other words, the question would be whether limitation for the application should be calculated according to the amended section or according to the old section. The calculation of limitation according to the amended section, in such cases, may lead to either of two results —

(a) It may cut short the period within which the application can be brought.

(b) It may make the application time-barred.

In the first case, the effect of the amendment would not be to destroy any vested right, the principle being that there is no vested right in a period of limitation. Hence, under the principle discussed in the Preamble Note 15, the period of limitation should be calculated only in accordance with the amended section in such cases.[1]

In the second class of cases, the effect of the amended section, if such section is applied, would be to destroy a right which is in existence and enforceable on the date of the coming into force of the new Act. But to such cases, the principle that where the Legislature has indicated its intention that the Act should be retrospective the Act should be construed retrospectively, will apply.

In the case of the Limitation Act of 1908, there are at least two indications showing that the Act is intended to operate retrospectively. The first is that though the Act is passed on the 7th August 1908, its commencement is postponed to the 1st January 1909, thus giving ample notice to those who would be affected by the changes made by it, to seek their remedies under the old law.[1a] The other indication is that, by S. 30 (now repealed), the Act provided a special period of two years from the commencement of the Act in the case of suits for which a shorter period has been fixed under the new Act than under the old one.

Hence, even in the case of applications that would be time-barred on the date of the coming into force of the new Act, if the provisions of such Act were applied, it is only such provisions that should be applied and not the provisions of the old Act.[2] In this view, the undermentioned decision[3] is, it is submitted, not correct.

Where an Act is passed, which removes from the applicability of this section, any class of suits in respect of which, up to the time of the coming into force of such Act, the beneficial provisions of this section would be applicable, the question would arise as to the applicability

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Note 4

[1] ('30) 17 A I R 1930 Cal 34 (35, 36, 37) : 56 Cal 1117 : 122 Ind Cas 201 (DB), *Khondkar Mahomed Saleh* v. *Chandra Kumar Mukerji.*

[1a] ('10) 8 Ind Cas 543 (544) : 35 Mad 678 (DB), *Chidambaram Chetty* v. *Karuppan Chetty.* (Following 5 Ind Cas 420.)

[2] ('10) 8 Ind Cas 543 (543, 544) : 35 Mad 678 (DB), *Chidambaram Chetty* v. *Karuppan Chetty.* (Application to set aside *ex parte* decree.)
('17) 4 AIR 1917 Lah 144 (146, 147) : 1916 Pun Re No. 101 : 37 Ind Cas 292 (DB), *Manohar Lal* v. *Mt. Sadiqa Begam.* (Do.)
('18) 5 A I R 1918 Oudh 379 (385) : 48 Ind Cas 39 (DB), *Kaniz Mehdi Begam* v. *Rasul Beg.* (Application to set aside execution sale.)

[3] ('11) 11 Ind Cas 401 (402, 403) (Cal) (DB), *Fazil Karim* v. *Ananda Mohan Ray.* (Application to set aside execution sale.)

of the new Act to cases where the right to sue has already accrued before the coming into force of the new Act. In such cases also, if the application of the new Act does not altogether destroy the right of suit that is available on the date of the coming into force of the Act, the provisions of the Act must be applied, though their effect will be to curtail the period of limitation that would have applied otherwise. But if the effect of applying the new Act is to *destroy* the right existing on the date of the coming into force of the new Act, by making it time-barred, then it must be held that the new Act does not apply on the principle that statutes should not be construed retrospectively so as to affect or destroy vested rights.[4] But even vested rights can be extinguished by an Act of the Legislature and if the intention of the Legislature is clear, that rights existing under the old law should be put an end to, on the coming into force of a new law, effect must be given to such intention.[5]

Where a right has already become barred by limitation under the existing law, the coming into force, subsequently, of an enactment, which provides a longer period of limitation for similar cases, cannot revive the barred right. Thus, where a right accruing to a minor becomes time-barred under a law, which makes no provision for extension of limitation in the case of minors, the coming into force, later on, of a statute, which confers such extended period in the case of minors, will not revive the barred right.[6]

5. "Person."— See Notes 6 to 8.

6. Whether section applies to incorporated body.—This section provides for cases in which a "person" entitled to sue or apply for execution is under a disability at the commencement of limitation. The word "person" is defined in the General Clauses Act, S. 3, Cl. 39, as including a body of individuals whether incorporated or not. But, as the definitions in the section are applicable only when there is nothing repugnant in the subject or context to their adoption, the above definition will not apply to the construction of this section if the subject or context makes the application of the definition inappropriate.

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[4] ('16) 3 A I R 1916 Mad 912 (913, 914, 916) : 30 Ind Cas 94 : 39 Mad 645 (DB), *Rajah of Pittapur* v. *Venkata Subba Row.* (Letters Patent Appeal from A I R 1915 Mad 1211 — Right to sue for rent not affected by provisions of Madras Act, I of 1908, making disability provisions of Limitation Act not applicable to such suits—Seshagiri Iyer, J., *contra.*)

[5] ('11) 11 Ind Cas 912 (914) : 7 Nag L R 125, *Shankargir* v. *Ramachandra.* (C. P. Tenancy Act of 1898, S. 94 (3) providing that S. 7 of Limitation Act should not apply to suits for rent—Suits for rent accrued due prior to coming into force of the Act, whether affected by provisions — *Held* that they were affected — The general scope and purview of the Act must be taken into consideration if the statute is retrospective — *Held* in this case that the intention to make the Act retrospective was clear — Moreover, the right to sue for rent accrued under the Contract Act and not the Tenancy Act and so the provisions of the General Clauses Act, S. 6, cl. (c), are no bar to holding that the provision is retrospective —With reference to cl. (e) of the said section, the intention to make the provision retrospective is clear.)

See Preamble Note 15.

[6] ('74) 22 Suth W R 17 (21) : 13 Beng L R 445 (DB), *Thakur Kopilnauth Sahi Deo* v. *The Government.* (*Held* that the right to bring the suit having been extinguished by S. 9 of Act XXV of 1857 was not revived by repeal of the Act.)

In this view, the section clearly will not apply to an *incorporated body* of individuals. The reason is this. An incorporated body has a *distinct* existence in the eye of the law apart from the persons who constitute the body.[1] The disabilities dealt with by the section are disabilities affecting the *persons who are entitled to sue or apply* (Note 12). The section, therefore, cannot apply to an incorporated body unless the disabilities referred to in the section can be conceived of as affecting such body, apart from the members constituting the body. But, the disabilities dealt with in the section are in their nature such that they can affect only actual human beings and not fictitious entities, which have no existence except in the eye of the law,[2] like incorporated bodies. Hence, the section will not apply to cases where the right to sue or apply for execution is vested in an incorporated body *as distinct* from the individuals who are its members, although such individuals may themselves be affected by the disabilities mentioned in the section.

7. Whether section applies to an unincorporated body or to a number of persons collectively. — It has been seen in Note 6 that notwithstanding the definition of the word "person" in section 3, clause 39 of the General Clauses Act as including a body of individuals whether incorporated or not, this section does not apply to an *incorporated* body. The reason for this view is that an incorporated body is a fictitious entity having no existence except in the eye of the law[1] and the disabilities mentioned in this section cannot apply to such entity.

But, the above consideration will not apply to an *unincorporated* collection of individuals. The reason is that such individuals do not, like an incorporated body, constitute collectively a fictitious legal entity which has an existence in the eye of the law. An unincorporated body of persons simply means a number of persons taken together. When such a body is spoken of as having rights and liabilities, the reference is simply to the fact that a number of persons are entitled to certain common rights or are subject to certain common liabilities. An unincorporated body, thus, stands for *actual human beings*. Hence, the ground on which it must be held that the section does not apply to an incorporated body, viz., that such body is only a *legal* person and not an *actual* person, cannot apply in the case of an unincorporated body.

But, notwithstanding the above distinction between an incorporated and an unincorporated body, it is clear that the section cannot apply to a number of persons *collectively*. It can only apply to persons separately and individually. The reason is that *collectively* a number of persons cannot be said to be "a minor or insane or an idiot" in the sense that they are affected by the *identical* (as distinguished from

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Note 6

[1] **See Salmond's Jurisprudence, 8th Edition, page 340.**

[2] **See Salmond's Jurisprudence, 8th Edition, pages 336-337.**

Note 7

[1] **See Salmond's Jurisprudence, 8th Edition, pages 336-337.**

similar) minority or insanity or idiocy. Further, if, of these persons entitled to sue, one is a minor, another insane and the third an idiot, it cannot be said that *collectively* they are under any one or more of the disabilities mentioned in the section.

Further, the section provides that the suit or application may be instituted after the cessation of the disability. Where a number of persons are under the same kind of disability or each of them is under a different kind of disability, except in very rare cases (as for instance, in the case of twins who are minors), the disability of each of these persons will terminate at a different time. Hence, except in very rare cases, it will be impossible to say that the disability of such persons, *as a body*, comes to an end at any one time. Therefore, the question would be, from what point of time the extra period of limitation allowed under this section is to be calculated in such cases. It would be very difficult to answer this question satisfactorily.

In the undermentioned case,[2] however, the view has been expressed by Bhashyam Aiyengar, J., that in such cases, the time when the last of the persons under disability ceases to be under disability, should be taken as the time when the disability of the persons entitled to sue comes to an end. It is submitted that in view of the discussion above, this view is not correct and a similar argument with reference to another provision of the Limitation Act was rejected by the Madras High Court itself in the undermentioned case.[3] In that case the argument was with reference to Art. 44, which provides a period of three years' limitation for a suit by a ward on attaining majority to set aside an alienation of property by his guardian, the starting point of limitation being specified as the time at which the ward attains majority. There were two wards who constituted a joint Hindu family and their property had been alienated by their mother acting as their guardian. The elder brother failed to sue within three years from the date of his attaining majority. A suit was brought afterwards but before the expiry of three years from the attainment of majority by the younger ward. It was contended that the suit was time-barred. In reply to this, it was argued that under the article it was the date on which the younger ward attained majority that must be taken as the date on which the "ward" attained majority in the case, as the right to sue to set aside the alienation was vested in both the wards. But the argument was repelled. As pointed out in that case, it is difficult to see how a date on which one person attains majority can be treated as the date on which another person also attains majority when such other person really attains majority on some other date.

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[2] ('02) 25 Mad 26 (37) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.* (According to the learned Judge, the latter part of S. 7 applies to cases where all the persons entitled to sue or apply are under a disability — But for this provision, he says, time will begin to run under S. 6, not from the time when one of them ceases to be under disability and becomes capable of giving a discharge without the concurrence of the others, but only from the time when the last of such persons has ceased to be under disability.)

[3] ('15) 2 AIR 1915 Mad 1201 (1201, 1202, 1203) : 21 Ind Cas 410 (411) : 38 Mad 118 (DB), *Doraisamy* v. *Nondisami.*

8. "Person entitled to institute a suit or make an application." — Section 7 of the Act of 1877, corresponding to this section, applied to cases where "a person entitled to institute a suit or make an application" was under disability at the time from which the period of limitation was to be reckoned. Section 8 of the Act, corresponding to the present S. 7, applied to certain cases where one of "several joint creditors or claimants" was under a disability. The latter section was, however, held inapplicable to certain cases such as applications for execution by execution creditors,[1] and suits where one only of the plaintiffs was under a disability and the others could not give a valid discharge without his concurrence.[2] In such cases the applicability of S. 7 came to be considered and the question had to be decided on an interpretation of the words "person entitled to institute a suit or make an application." According to the High Court of Madras, these words meant, where several persons were jointly entitled to make an application or to sue on a single cause of action, *all* such persons and not any single one of them, so that, it was held that unless all such persons were under disability at the time from which the period of limitation was to be reckoned, the section was inapplicable.[3] These decisions followed the English case of *Perry* v. *Jackson*,[4] which was a case bearing on the interpretation of the proviso to S. 7 of 21 Jac 1, c. 16 corresponding to the present section but with this difference that it expressly referred to "person or persons." According to the High Court of Madras, the word "person" included "persons" by virtue of Cl. 39

Note 8

[1] ('02) 25 Mad 431 (441): 12 Mad L Jour 166 (FB), *Periasami* v. *Krishna Ayyan.*
('90) 13 Mad 236 (239, 240) (DB), *Seshan* v. *Rajagopala.* (*Held*, S. 8, Limitation Act, 1877, applied only to those cases in which the act of the adult joint creditor was *per se* a valid discharge.)
(1900) 22 All 199 (203, 204): 1900 All W N 8 (FB), *Zamir Hasan* v. *Sunder.* (Do.)
('96) 20 Bom 383 (385) (DB), *Govindram* v. *Tatia.* (Do.)
('04) 1 All L Jour 408*n* (408*n*) (DB), *Liladhar* v. *Chaturbhuj.* (Assumed.)
('04) 27 All 67 (68) : 1904 All W N 163 : 1 All L Jour 407, *Jiwan Ram* v. *Ram Sarup Ram.* (Do.)
('01) 28 Cal 465 (468, 469, 470) : 5 Cal W N 767 (DB), *Surja Kumar Dutt* v. *Arunchander Roy.*
('87) 14 Cal 50 (54): 11 Ind Jur 143 (DB), *Anando Kishore* v. *Anando Kishore.*

[2] ('93) 16 Mad 436 (438, 439): 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bapayya.* (One of several persons jointly entitled to sue being minor — Others not able to give discharge— Latter part of S. 8 of Act of 1877 does not apply.)
('02) 25 Mad 26 (36, 38) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*

[3] ('02) 25 Mad 26 (36) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*
('02) 25 Mad 431 (435, 444, 445, 446): 12 M.L.J. 166 (FB), *Periasamy* v. *Krishna.*
('90) 13 Mad 236 (240, 241) (DB), *Seshan* v. *Rajagopala.*
('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bapayya.*
('05) 28 Mad 359 (360) (DB), *Paru* v. *Raman Menon.* (Application for substitution of legal representatives.)
('05) 28 Mad 479 (484, 485) : 15 Mad L Jour 363 (DB), *Johnson* v. *Madras Railway Company.* (Suit for compensation under Act XIII of 1855 for death of relative caused by railway accident.)
('95) 18 Mad 38 (39, 40) (DB), *Moidin Kutty* v. *Beevi Kutty Ummah.*
('13) 19 Ind Cas 12 (15): 36 Mad 544 (FB), *Annapurnamma* v. *Akkayya.*
[*See* ('94) 4 Mad L Jour 50 (50, 51) (Journal) (Critical Note on (1893) 16 Mad 436.)
('94) 17 Mad 189 (192, 193): 4 Mad L Jour 79 (DB), *Narayana* v. *Damodaran.*]

[4] (1792) 4 Term Rep 516 (519) : 2 R R 452 : 100 E R 1150.

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of S. 3 of the General Clauses Act, 1897, and that the principle of the decision in *Perry* v. *Jackson*[4] would therefore apply in interpreting S. 7 of the Act of 1877.[5] The other High Courts differed on this point and adopted the view that even where several persons were entitled to sue or apply jointly, any one of them must be held to be a person entitled to institute a suit or make an application within the meaning of S. 7, and that consequently in cases not governed by S. 8, S. 7 would be applicable where such person was under a disability at the time from which the period of limitation was to be reckoned.[6]

It was also held by the High Court of Madras that the word "entitled" in S. 7 meant "entitled as *of right*" and that it did not include a right to apply with the permission of the Court, as in the case of an application for execution under O. 21 R. 15 of the Civil Procedure Code.[7] The other High Courts did not follow this view.[8]

See also S. 7 Note 6.

The abovementioned conflict of views does not appear to be of any importance now in view of the present wording of Ss. 6 and 7. The latter section now provides for *all* cases where one of several persons jointly entitled to institute a suit or make an application is under a disability and there is no room for the applicability of section 6. The reason is, as has been seen in Note 2, that where a case falls within S. 7, it must be determined with reference to that section and not with reference to this.

It has, however, been held by the High Court of Calcutta, in a case arising under the present Act, that S. 6 contemplates cases where there is only one person entitled to sue or apply, and he is under disability, or where *all* the persons entitled to sue or apply are under a disability.[9] The observation was really *obiter* inasmuch as it was held that S. 7 applied to the case. It is submitted that the observation is not correct. As has been seen in Note 7 above, an unincorporated body of individuals *collectively* cannot be a minor or insane or an idiot.

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[5] ('02) 25 Mad 431 (444, 445) : 12 Mad L Jour 166 (FB), *Periasamy* v. *Krishna Ayyan.* (28 Cal 465 dissented from.)

[6] ('01) 28 Cal 465 (468, 469, 470) : 5 Cal W N 767 (DB), *Surja Kumar Dutt* v. *Arunchander Roy.*
('07) 7 Cal L Jour 308 (309) (DB), *Sheikh Jamir* v. *Srimati Lal Bibi.*
('87) 14 Cal 50 (54) : 11 Ind Jur 143 (DB), *Anando Kishore* v. *Anando Kishore.*
('06) 9 Oudh Cas 269 (270) (DB), *Nawab Ibn Husain Khan* v. *Munir Ahmed.*
('96) 20 Bom 383 (384, 385) (DB), *Govindram* v. *Tatia.*
('04) 6 Bom L R 647 (648) (DB), *Ganpat* v. *Seshagiri.*
(1900) 3 Oudh Cas 316 (319, 320) (DB), *Lachmi Narain* v. *Ram Prasad.* (Review application.)
(1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sundar.*
('04) 1 All L Jour 408*n* (408*n*) (DB), *Liladhar* v. *Chaturbhuj.*
('05) 27 All 67 (68) : 1904 All W N 163 : 1 All L Jour 407 (DB), *Jiwan Ram* v. *Ram Sarup.*
('98) 2 Cal W N cvi (cvi, cvii) (DB), *Manmotho* v. *Monahur.* (Application for substitution as legal representatives of deceased person.)
('96) 23 Cal 374 (388) (DB), *Norendra Nath* v. *Bhupendra Narain.*
('93) 20 Cal 714 (716) (DB), *Lolit Mohun Misser* v. *Janoki Nath Roy.*
[But see ('09) 31 All 156 (159) : 1 Ind Cas 824 (825) (DB), *Ganga Dayal* v. *Mani Ram.* (25 Mad 431 followed.)]

[7] ('02) 25 Mad 431 (436, 446): 12 Mad L Jour 166 (FB), *Periaswamy* v. *Krishna.*

[8] (1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sundar.*
('07) 7 Cal L Jour 308 (309) (DB), *Sheikh Jamir* v. *Srimati Lal Bibi.*
('04) 1 All L Jour 408*n* (408*n*) (DB), *Liladhar* v. *Chaturbhuj.*
('05) 27 All 67 (68) : 1 All L Jour 407 : 1904 All W N 163 (DB), *Jiwan Ram* v. *Ram Sarup Ram.*
('01) 28 Cal 465 (468, 469, 470) : 5 Cal W N 767 (DB), *Surja Kumar Dutt* v. *Arunchander Roy.*
('96) 20 Bom 383 (385) (DB), *Govindram* v. *Tatia.*
('04) 6 Bom L R 647 (648) (DB), *Ganpat* v. *Seshagiri.*

The section applies only to cases in which a person, who is entitled in his *own right* to institute a suit or make an application, is under a disability.[10] It does not apply where such person is not under any disability, even though the suit or the application is for the benefit of another person who is under disability.[11] On the other hand, where such person is under a disability, the section does not become inapplicable merely because the suit would be for the benefit of a person not under disability.[12]

9. "Suit," meaning of. — See Section 2 clause (10).

10. "Disability." — See Notes 3, 23, 24, 27 and 28.

11. Disability and incapacity. — See Note 3 above.

12. "Reckoned." — The word "reckon" would seem to have the same meaning as the word "compute"[1] used in other sections, e.g., sections 5 and 17.

13. Proceedings to which section applies. — The section only applies to suits[1] (other than suits for pre-emption : see S. 8) and applications for the execution of decrees.[2] It does not apply to any

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9. ('35) 22 AIR 1935 Cal 631 (631) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossain* v. *Abdul Rahman.*

10. ('05) 28 Mad 479 (485) : 15 Mad L Jour 363 (DB), *Johnson* v. *Madras Railway Company.*

11. See Notes 35 and 38.
[*See also* ('41) 28 AIR 1941 P C 6 (9): 67 Ind App 416 : 193 Ind Cas 225 : I L R (1941) Bom 202 (PC), *General A. F. and L. Assurance Corpn.* v. *Janmahomed.* (Letters of administration granted to *A* in respect of estate in which *B* was beneficially interested — Administration bond executed by *A* in favour of officer of Court — Suit on bond—The fact that *B* was a minor at the time when the bond was broken i.e., the time from which limitation runs, does not make S. 6 applicable.)]

12. See Note 30.

Note 12

1. Concise Oxford Dictionary.

Note 13

1. *See* ('05) 28 Mad 479 (486) : 15 Mad L Jour 363 (DB), *Johnson* v. *Madras Railway Company.* (Sections 6 to 8 apply to suits under Article 21 — Suits for compensation under Fatal Accidents Act, XIII of 1855.)

2. ('18) 5 AIR 1918 Oudh 379 (385) : 48 Ind Cas 39 (DB), *Kaniz Mehdi Begam* v. *Rasul Beg.*
('24) 11 AIR 1924 Oudh 31 (31) : 26 Oudh Cas 206 : 80 Ind Cas 775, *Akhtar Hussain* v. *Qudrat Ali.* (An application for the continuance or revival of a previous execution proceeding struck off or suspended for no act or default of the decree-holder is substantially an application for the execution of a decree within the meaning of S. 6 of the Limitation Act.)
[But see ('12) 15 Ind Cas 366 (367) : 6 Low Bur Rul 52 (DB), *Ma Sein Hnyin* v. *Lutchman Chetty.* (By virtue of S. 6 (1) of the Limitation Act, an application by a minor to be substituted as legal representative of a deceased party is valid if made during the period of minority—Submitted decision is not correct.)]
See also Section 5 Note 16.

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other proceeding. Thus, it does not apply to appeals,[3] or to the following proceedings :

(1) Application for final decree in mortgage suit.[4]
(2) Application for personal decree against mortgagor under O. 34 R. 6, Civil Procedure Code.[5]
(3) Application for restoration of suit or appeal dismissed for default.[6]
(4) Application to set aside *ex parte* decree.[7]
(5) Application for setting aside execution sale.[8]
(6) Application for bringing on record legal representatives.[9]
(7) Application for leave to appeal.[10]

But an application for restitution is an application for execution of a decree within the meaning of this section and the provisions of the section apply to such applications.[11]

An application to file an award is not a suit though it may be required to be numbered and registered as a plaint. Hence, the section does not apply to such an application.[12] However, now see S. 37 of the Arbitration Act, 1940.

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[3] ('90) 12 All 461 (480, 486) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan Ullah Khan*.
('96) 1896 All W N 128 (128) (DB), *In the matter of Brij Mohan Lal*.
('02) 12 Mad L Jour 385 (386) (DB), *Ramamurthy Iyer* v. *Subramaniya Iyer*.
('09) 4 Ind Cas 1002 (1003) (Lah) (DB), *Seva Datt Pershad* v. *Collector of Lahore*. (Section 7 of the old Act does not apply to application for pauper appeal made in name of minor by his next friend.)
('95) 18 Mad 484 (485, 486) (DB), *Thurai Rajah* v. *Jainilabdeen Rowthan*. (Applition for admission of appeal to Privy Council.)
[*See also* ('10) 7 Ind Cas 944 (944) : 34 Bom 589 (DB), *Chintaman Vyankat Rao* v. *Ramchandra Vyankat Rao*. (Section 7 of the Act of 1877 will not apply to an application to appeal in *forma pauperis* if it be treated as an appeal.)]

[4] ('41) 28 AIR 1941 Bom 203 (203) (DB), *Govindnaik* v. *Basawannewa*.
('33) 20 AIR 1933 All Cal 508 (508, 509) : 144 Ind Cas 768 (DB), *Pulin Chandra Sen* v. *Muzaffar Ahmad*.
('18) 5 AIR 1918 All 76 (77) : 40 All 203 : 43 Ind Cas 870 (DB), *Naizamuddin Shah* v. *Bohra Bhim Sen*.
('18) 5 AIR 1918 Nag 63 (63, 64) : 15 Nag L R 36 : 48 Ind Cas 934, *Vinayak Rao* v. *Baijanath*. (Section 6 of the Limitation Act is not applicable to an application to make a decree absolute which is governed by Article 181.)

[5] ('30) 17 AIR 1930 Cal 34 (35) : 122 Ind Cas 201 : 56 Cal 1117 (DB), *Khondkar Mahomed Saleh* v. *Chandra Kumar Mukerjee*.

[6] ('21) 8 AIR 1921 Bom 20 (20) : 45 Bom 648 : 60 I. C. 919 (DB), *Sonubai* v. *Shivaji Rao*. (Application for the re-admission of an appeal under O. 41 R. 19, C. P. C.)
See also Article 168 Note 8.

[7] ('17) 4 AIR 1917 Lah 144 (146) : 1916 Pun Re No. 101 : 37 Ind Cas 292 (DB), *Manohar Lal* v. *Mt. Sadiqa Begam*.
('10) 8 Ind Cas 543 (543, 544) : 35 Mad 678 (DB), *Chidambaram* v. *Karuppan*.
('21) 8 AIR 1921 Pat 69 (71, 72) : 5 Pat L Jour 460 : 57 Ind Cas 333 (DB), *Harihar Prasad Singh* v. *Edul Singh*.
See also Article 164 Note 9.

[8] (35) 22 AIR 1935 Pat 450 (450) : 159 Ind Cas 253 (DB), *Bholanath* v. *Mt. Sayedatunnissa Begum*.
See also Article 166 Note 17.

[9] ('17) 4 AIR 1917 Low Bur 132 (133) : 35 Ind Cas 438, *Ma Min Thin* v. *Maung Po Win*. (Application under O. 22 R. 2, C. P. C., to bring on record legal representatives of deceased appellant.)
('97) 1897 All W N 42 (42) (DB), *Lachmi* v. *Raghu*. (Application by guardian of minor appellant to bring on record representatives of deceased respondent.)
See also Article 176 Note 6 and Article 177 Note 7.

[10] ('18) 5 AIR 1918 Oudh 163 (165, 166) : 46 Ind Cas 68 (DB), *Narendra Bahadur Singh* v. *Oudh Commercial Bank of Fyzabad*.
See also Article 179 Note 4.

[11] ('17) 4 AIR 1917 Bom 210 (211) : 41 Bom 625 : 41 Ind Cas 238 (DB), *Kurgodigauda Lingangauda* v. *Ningangauda Ningangauda*. (Section 6 is an enabling section and should be construed liberally.)

The corresponding provisions in the Acts of 1859 and 1871 applied only to *suits*. Hence, it was held under those Acts that persons applying for the execution of decrees were not entitled to any extension of time on account of their minority or other disability.[13] These decisions are no longer law in view of the express provisions of the section.

The corresponding provisions of the Acts of 1859 and 1871 applied also to suits for *pre-emption*. The present section does not apply to such suits. (See S. 8.)

The corresponding section in the Act of 1877 governed *all* applications and not merely applications for the *execution* of decrees,[14] while this section, as already said, does not apply to any application other than one for the execution of a decree.

14. Section applies only to the person entitled to sue or apply for execution at the commencement of limitation.

—It is only the person who has a right to sue or make an application for execution at the time from which the period of limitation is to be reckoned, that can take advantage of the section. In other words, the section applies only to a person who is entitled to sue or apply for execution at the commencement of limitation. It does not apply to a person who is not entitled to sue or apply at the commencement of limitation but becomes entitled to do so *subsequently*.[1]

('26) 13 AIR 1926 Oudh 199 (199, 200) : 92 Ind Cas 24 : 1 Luck 40 (DB), *Sant Sahai* v. *Chhutai Kurmi*.

12. ('23) 10 AIR 1923 Rang 226 (226) : 1 Rang 256 : 76 Ind Cas 493 (DB), *Ma Thein Tin* v. *Maung Ba Than*.

('36) 23 AIR 1936 Pat 161(162):14 Pat 855: 161 I. C. 691 (DB), *Panchi* v. *Gena*. See also Article 178 Note 5.

13. ('67) 8 Suth W R 137 (137) (DB), *Tarucknath* v. *Poorno Chunder*.

('78) 20 Suth W R 53 (53) (DB), *Muthoora Doss* v. *Shumboo Dutt*.

('66) 5 Suth W R Misc 10 (10) (DB), *Rotty Rumun* v. *Chunder Binode*.

[**But see** ('84) 10 Cal 748 (755, 756) : 8 Ind Jur 643 (DB), *Jugmohun Mahto* v. *Luchmeshur*. (*Held* suit included execution proceedings — 9 Suth W R 402, followed.)]

14. ('98) 3 Cal W N 24 (25) (DB), *Maharaj Kumar Ganeshwar Singh* v. *Jagatadri Persad Narain Singh*. (Applications in pending suits.)

('87) 9 All 411 (413) : 1887 All W N 58 (DB), *Baldeo Singh* v. *Kishon Lal*. (Application to set aside execution sale.)

('10) 6 Ind Cas 488 (488, 489) (Lah), *Gujjar Mal* v. *Sita Ram*. (Do.)

('98) 21 Mad 494 (495, 496) : 8 Mad L Jour 75 (DB), *Ratna Iyer* v. *Krishna Doss Vithal Doss*. (Application by person dispossessed in execution.)

('87) 11 Bom 473 (474, 475) (DB), *Vinayakarao Amrit* v. *Devrao Govind*. (Application by execution purchaser for removal of obstruction to delivery of possession. Overruled in AIR 1933 Bom 457 (FB) on another point.)

('81) 1881 Pun Re No 103, *Mt. Sarwar Jan* v. *Dina*. (Application by the minor heirs of a deceased appellant for substitution of their names on the record.)

('85) 1885 Pun Re No. 91 (FB), *Rihana* v. *Harditta*. (Do.)

('86) 10 Bom 220 (221, 223) (DB), *Bhikaji Chandra* v. *Purushotam*. (Do.)

[**But see** ('97) 1897 All W N 42 (42) (DB), *Lachmi Prasad* v. *Raghu Prasad*. (Section 7, Indian Limitation Act, 1877, will not apply to an application made by a guardian of minors, who are parties to an appeal, to bring on the record of the appeal the representative of a deceased respondent.)]

Note 14

1. ('41) 28 AIR 1941 P C 6 (9): 67 Ind App 416: 193 Ind Cas 225: ILR (1941) Bom 202 (PC), *General A.F. & L. Assurance Corpn.* v. *Janmahomed*. (Suit on administration

Illustration.

A right to sue accrues to *A* in 1910 and limitation for the suit commences to run against *A* from that date. At that time, *A* has a minor son *B*. *A* does not sue during his lifetime. After *A*'s death, *B* sues on the right to sue derived by him from *A*. *B* cannot claim any extension of time under this section on the ground of his minority in 1910 when the period of limitation began to run. The reason is that, at that time, *B* was not a person entitled to sue.

It will be seen that in the above illustration, as B sues on the same cause of action as A had in his lifetime, there is no fresh starting point of limitation when B becomes entitled to sue on A's death. Hence, even if B should be a minor *at A's death*, this section will not apply to him. In other words, where limitation begins to run against one person and thereafter another person becomes entitled to sue on the *same* cause of action, there is no fresh starting point of limitation and the disability of such person at the time of his so becoming entitled to sue is no ground for the extension of limitation under this section.[2]

Illustrations.

1. *B* is in adverse possession against *A* from 1910. *A* dies in 1915 without having brought any suit for possession against *B*. *A* leaves a son, *C*, who is a minor at the time of his father's death. *C* is not entitled to any extension of time under this section.[3]

. bond given to officer of Court — Person beneficially entitled to estate, a minor at time of breach of bond—Bond subsequently assigned to him—S. 6 does not apply.)
('25) 12 AIR 1925 P C 33 (34) : 52 Ind App 69 : 47 All 165 : 27 Oudh Cas 343: 86 I. C. 249 (PC), *Rano Dip Singh* v. *Parameshwar Pershad*. (Alienation by Hindu coparcener — Subsequent birth of coparcener does not give fresh starting point.)
('41) 28 AIR 1941 Mad 449 (461, 474) (FB), *Venkateswara Sarma* v. *Venkatesa Iyer*. (Alienation for valuable consideration of mutt properties by manager of mutt — Suit for recovery of such properties by successor — Limitation under Art. 134B runs from date of death of previous manager —Successor appointed to his office subsequently cannot claim benefit of S. 6 because of his minority at time of death of previous manager — His appointment does not date back to death of previous manager. Per Abdur Rahman, J. — The appointment dates back to death of previous manager, by virtue of doctrine of continuous representation of the mutt by its managers and the successor can claim benefit of S. 6 if he was a minor at the death of previous manager though he was appointed to his office later.)
See also the further portion of the Note and the cases cited thereunder.

2. ('68) 3 Agra 389 (389) (DB), *Mukootnath* v. *Jugwunt Lall*.
('13) 18 Ind Cas 306 (307) (Oudh) (DB), *Khanjan Singh* v. *Bhikan Singh*.
('12) 15 Ind Cas 679 (681) (Cal), *Benode Behari Bhadra* v. *Ram Sarup*.
(1900) 27 Cal 379 (403) (DB), *Harnabh Pershad* v. *Mandil Dass*.
('82) 8 Cal 788 (798) : 11 Cal L R 370 : 7 Ind Jur 17, *Hemangini Dasi* v. *Nobin Chand*.
('68) 9 Suth W R 251 (252) (DB), *Bhiloo Mundul* v. *Motee Lall*.
('35) 22 AIR 1935 Lah 144 (144), *Firm Duni Chand Panna Lal* v. *Kuldip Singh*.
('10) 8 Ind Cas 318 (318) : 1910 Pun Re No. 92, *Behari Lal* v. *Kalu*.
(1865) 2 Mad H C R 340 (340) (DB), *Vira Pillay* v. *Muruga Muttayan*.
('17) 4 AIR 1917 Low Bur 100 (102) : 42 I. C. 809 (DB), *Maung Poka* v. *Ma Ku*. [*See also* ('09) 1 Ind Cas 759 (759) (All), *Ram Charan* v. *Ram Das*. (Acknowledgment of liability made during lifetime of *A* — *A* dying subsequently and *B*, his minor son, succeeding — *B* is not entitled to benefit of section.)]

3. ('20) 7 AIR 1920 Lah 209 (210) : 55 Ind Cas 335 (DB), *Ghulam Muhammad* v. *Ahmad Khan*. (Adverse possession against *ala* lambardar — Son as succeeding lambardar must sue within twelve years of cause of action.)
('69) 12 Suth W R 1 (2) : 3 Beng L R App 80, *Mohabut Ali* v. *Ali Mahommad Kulal*. (Son's suit for ejectment brought more than twelve years from the date of dispossession barred by limitation.)
('05) 7 Bom L R 135 (137), *Rama* v. *Shamrao Ganesh*. (Vatandar.)
('88) 15 Cal 703 (706) (DB), *Chintamoni Mahapatro* v. *Sarup Se*. (Assignee for valuable consideration of debutter property.)

2. *B* owes money to *A* on a bond which falls due in 1910. *A* dies in 1911 without having brought any suit and is succeeded by *C*, his minor son. *C* is not entitled to any extension of time on account of his minority.[4]

3. *B* is an agent under *A* in respect of a certain transaction. The agency terminates on the completion of the transaction in 1910 and limitation for a suit by *A* against *B* for moveable property received by the latter as agent commences to run in that year. *A* dies in 1911 without having brought any suit against *B*. *A* is succeeded by his minor son *C*. *C* cannot have any extension of time on the ground of his minority.[5]

4. *A*, the father of a joint Hindu family, alienates in 1910 joint family property under circumstances which make it liable to be set aside at the instance of other members of the coparcenary. At the time of the alienation there are in existence *B* and *C*, two sons of *A*. In 1912, *D*, another son, is born to *A*. *D* is also entitled to sue to set aside the alienation according to the law applicable in certain Provinces. *D* is not entitled to any extension of limitation on the ground of his minority. The reason is that he was not in existence in 1910 and consequently, was not entitled to sue in that year. See Note 16.

5. *A*, a Hindu widow, alienates in 1910 certain property belonging to her husband's estate under circumstances making the alienation not binding on the reversioners. At that time, the next reversioner is *B*. *B* does not bring any suit to have the alienation declared void beyond the lifetime of the widow. *B* dies in 1915. Upon *B*'s death, *C*, a reversioner of the next degree, becomes entitled to sue for a declaration. At that time he is a minor; but his minority does not entitle him to the benefit of this section. The reason is that he was not entitled to sue in 1910 and there is not a fresh start of limitation in 1915 when he becomes entitled to sue, the principle being that there is a single cause of action for all the reversioners in such cases. See Note 17.

6. Limitation for executing a decree starts against *A*, the decree-holder, in 1910. *A* dies in 1911 without having applied for execution within the period of limitation, and is succeeded by his son, *B*, who is a minor at the time. *B* is not entitled to any extension of time on the ground of his minority.[6]

7. Letters of administration are granted to *A* in respect of a certain estate in which *B* is beneficially interested. *A* executes in favour of an officer of the Court an administration bond for the due administration of the estate. After a breach of the bond takes place, the bond is assigned to *B* who institutes a suit on it. The fact that *B* was a minor at the time of the breach of the bond when limitation began to run does not make this section applicable.[6a]

But, where after limitation begins to run against A, a *distinct* cause of action accrues to B to sue the same defendant in respect of the same matter, there will be at the time of the accrual of such cause

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[But see ('68) 1 Beng L R (S N) 18 (b), *Nur Mohammed* v. *Thakoor Bibi*. (If the full period had not elapsed before the death of the predecessor, the successor, if he is a minor at the time, may sue at any time within three years of his attaining majority.)]

4. ('66) 5 Suth W R 169 (169) (DB), *Nusheeram Roy* v. *Shushee Bhooshun Roy*.
('73) 20 Suth W R 2 (2) (DB), *Taruck Chunder Sen* v. *Doorga Churn Sen*.

5. ('29) 16 AIR 1929 Lah 883 (884) : 123 Ind Cas 878, *Ramji Mal* v. *Gulzara*.

6. ('12) 15 Ind Cas 829 (829, 830) : 36 Bom 498 (DB), *Bhagwant Ramchandra* v. *Kaji Mahamad Abbas*. (Application to set aside execution sale.)
('05) 1 Nag L R 180 (182), *Sitaram* v. *Tukaram*.
('86) 1886 All W N 49 (49) (DB), *Lachman Prasad* v. *Bhagwan Singh*.
('05) 27 All 704 (705) : 2 All L Jour 453 : 1905 All W N 163 (DB), *Bhagat Bihari Lal* v. *Ram Nath*.
('05) 29 Bom 68 (70) : 6 Bom L R 639 (DB), *Jivraj* v. *Babaji*. (20 Cal 714, distinguished.)
(1865) 4 Suth W R Misc 21 (21) : 1 Ind Jur (N S) 31, *Anundee Koonwar* v. *Thakoor Pandey*.

6a. ('41) 28 AIR 1941 P C 6 (9) : 67 Ind App 416 : 193 Ind Cas 225 : I L R (1941) Bom 202 (PC), *General A. F. and L. Assurance Corpn.* v. *Janmahomed*.

of action a fresh starting point of limitation and if B is under any disability at such time, he will be entitled to the benefit of this section.

Illustrations.

1. In 1910, *A* dispossesses a Hindu widow of certain land of which she is in possession as a Hindu widow. The widow dies in 1915. Upon her death, she is succeeded by *B*, the next reversioner to her husband's estate, who is a minor at the time. He can bring his suit at any time within three years of his attaining majority. The reason is that *B* has an independent cause of action to sue for possession on the widow's death and there is a fresh start of limitation on his succeeding to the estate. See Note 19.

2. A Hindu widow adopts a son *B* who is a minor at the time of the adoption. Prior to the adoption, *C*, a stranger, has been in adverse possession against the widow of a portion of the estate. *B* is entitled to the benefit of this section, the reason being that as in the case of the reversioner, so in the case of a son adopted by a Hindu widow, there is a fresh starting point of limitation on the adoption and the adopted son is not affected by the limitation that has run against the widow. See Note 19.

It has already been seen that where a cause of action accruing to A is derived thereafter by B, the latter is not entitled to the benefit of this section by reason of his disability at the time when limitation originally began to run or at the time when he became entitled to sue on the cause of action. But, if for any special reason there is a *fresh* start of limitation in favour of the person deriving his right to sue from another, his disability at the time from which such fresh period of limitation begins to run will entitle him to the benefit of this section. Thus, where after the death of the original creditor but before the expiry of the period of limitation, there is an acknowledgment of liability by the debtor in favour of the original creditor's legal representative, such acknowledgment operates, under the provisions of section 19, as a fresh starting point of limitation, and if the legal representative is under any disability at the time of the acknowledgment, he can take advantage of this section.[7] Similarly, where a decree-holder dies leaving a minor son and an application for execution is made on behalf of the minor but is dismissed, the minor gets a fresh start of limitation from the date of such dismissal (see Art. 182), and he is entitled to the benefit of this section.[8]

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[7] ('90) 13 Mad 135 (138) (D B), *Venkataramayyar* v. *Kothandaramayyar.* (Entirely new period runs from date of acknowledgment.)
('33) 20 AIR 1933 All 100 (101):54 All 1019:142 Ind Cas 794 (DB), *Chandrabhan* v. *Raj Kumar.*
('19) 6 AIR 1919 Lah 177 (178):52 Ind Cas 115, *Ramji Lal* v. *Manya.*
('12) 14 Ind Cas 694 (698) (Cal) (D B), *Sarat Chandra Singh* v. *Sudhan Hari Mukerjea.* (Per Bret, J.)
See also Section 19 Note 37.

[8] ('35) 22 AIR 1935 Lah 144 (144), *Duni Chand-Panna Lal* v. *Kuldip Singh.*
('07) 29 All 279 (280, 281) : 4 All L Jour 145:1907 All W N 45 (DB), *Sri Ram* v. *Het Ram.* (Minor entitled to benefit of section, if he was entitled to apply at date of step-in-aid of execution.)
('02) 25 Mad 431 (436, 437) : 12 Mad L Jour 166 (FB), *Periaswamy* v. *Krishna Ayyan.* (For purposes of S. 7 the time from which the period of limitation is to be reckoned should be the latest (applicable to the case) of the various dates referred to in the clauses of Art. 179 of the Act of 1877 (now Art. 182).)
('93) 20 Cal 714 (716)(DB), *Lolit Mohun Misser* v. *Janokynath Roy.* (Minority at any one of the points mentioned in Art. 182, which may apply to the particular case is sufficient to attract the operation of this section.)

15. Disability must exist at the time from which period of limitation is to be reckoned. — The section applies only where the disability referred to therein exists at the time from which the period of limitation is to be reckoned.[1] Hence, a disability which supervenes after the commencement of limitation is no ground for extension of limitation under this section. Thus, where a decree-holder becomes insane *after* the decree is passed (the date from which limitation is to be reckoned), he is not entitled to the benefit of this section.[2]

Similarly, where after limitation commences to run against A, B becomes entitled to sue on the *same* cause of action, the disability of B at the time of his so becoming entitled to sue is no ground for extending limitation under this section. The reason is that in such cases there is no fresh starting point of limitation at the time when B becomes entitled to sue and therefore the disability is not one existent at the time from which the period of limitation is to be reckoned. See Note 14.

But, where B's right is based on a *distinct* cause of action, he will have a fresh starting point of limitation, and if he is under any disability at the time from which there is thus a fresh start of limitation, he will be entitled to the benefit of this section. See Note 14.

Further (even in cases where there is no fresh cause of action), if under any special provision of law the person entitled to sue gets a fresh starting point of limitation, his disability at the time from which there is thus a fresh start of limitation will entitle him to the benefit of this section. Thus, where there is an acknowledgment of liability by the debtor under S. 19, a fresh period of limitation is to be computed from the date of such acknowledgment. Hence, if the creditor is under a disability at the date of such acknowledgment, he will be entitled to the benefit of this section. (See Note 14.) Similarly, Article 182 provides for various starting points of limitation for an application for execution. The disability of the decree-holder at any of these points (which may apply in the particular case) will entitle him to the benefit of this section. See Note 14.

16. Suit by after-born member of Hindu joint family to set aside alienation of joint family property. — A, the

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('96) 23 Cal 374 (388) (D B), *Norendra Nath* v. *Bhupendra Narain Roy.* (Do.)
(1900) 22 All 199 (204) : 1900 All W N 8 (F B), *Zamir Hasan* v. *Sundar.* (First application on behalf of minors dismissed — Second application made when they were still minors—*Held* this section applied.)
('96) 20 Bom 383 (386) (DB), *Govindram* v. *Tatya.*
[*See also* ('07) 11 Cal W N 831 (832) (DB), *Sheikh Abdul Latif* v. *Rajani Mohun Roy.* (Execution proceedings — Death of decree-holder pending stay of execution — Right of minor to revive proceedings — Minor entitled to extension of time under this section.)]

Note 15

[1] ('18) 5 AIR 1918 All 183 (184): 40 All 630 : 46 Ind Cas 584 (FB), *Kalika Baksh Singh* v. *Ram Charan.*
('93-1900) 1893-1900 Low Bur Rul 530 (532), *Ma Nyein Aung* v. *Ma So.*
('92) 20 Ind App 38 (46):20 Cal 560 : 6 Sar 283 : 17 Ind Jur 226 (PC), *Syed Ashgar Reza* v. *Syed Mehdi Hossein Khan.*
('05) 27 All 704 (705) : 2 All L Jour 453 (D B), *Bhagat Bihari Lal* v. *Ram Nath.*

[2] ('06) 1906 Pun L R No. 72, page 218 (219), *Aya Singh* v. *Gurdial.*

father of a Mitakshara joint family, alienates family property without any legal necessity in 1910. The alienee takes possession of the property immediately. At the time of the alienation, A has a son B who is an *adult*. The alienation is made without B's consent. Under these circumstances, B is entitled to sue to set aside the alienation. The limitation for such a suit is twelve years from the date on which the alienee takes possession of the property (Art. 126) and hence expires in 1922. Subsequent to the alienation, C, another son, is born to A in 1912, i. e. before the expiry of limitation against B. According to certain schools of the Mitakshara law, C, the after-born coparcener, is also entitled to sue to set aside the alienation under such circumstances.[1] C sues to set aside the alienation in 1931 within three years of his attaining majority (claiming to be entitled under this section read with S. 8 to an extension of limitation for three years from the time of his attaining majority). Is the suit in time? No. As C was not in existence in 1910 at the commencement of limitation, he was not a person entitled to sue "at the time from which the period of limitation is to be reckoned" within this section, and hence, he is not entitled to any extension of time under this section on the ground of his minority. See Note 14.

But the question may be asked whether on his birth in 1912, C does not get a *new* cause of action so as to be entitled to a fresh starting point of limitation in that year (in which case S. 6 will apply to him—see Note 14). On this question, it is established that C does *not* get a new cause of action on his birth and that there is no fresh starting point of limitation at his birth. The cause of action arising in favour of B, the existing coparcener in 1910, arises in a representative capacity for the benefit of himself and other coparceners that may be born subsequently. Hence, the right of C, the subsequently born son, is based on the same cause of action as that of B and limitation does not start afresh on his birth.[2]

Note 16

1. **('40) 27 AIR 1940 Nag 94 (95): 185 Ind Cas 881, *Nandlal* v. *Deorao Marut Rao*. See Mulla's Hindu Law, 8th Edition, page 318.**

2. **('25) 12 AIR 1925 P C 33 (34) : 86 Ind Cas 249 : 52 Ind App 69 : 47 All 165 : 27 Oudh Cas 343 (P C), *Ranodip Singh* v. *Parmeshwar Pershad*.**

('27) 14 AIR 1927 All 54 (54) : 97 Ind Cas 591, *Deonandan* v. *Musafir*.

('26) 94 Ind Cas 180 (181) (All) (DB), *Bohra Natha Mal* v. *Jhunai Lal*.

('25) 12 AIR 1925 All 563 (564) : 87 Ind Cas 662, *Thakur* v. *Gulab*.

('25) 12 AIR 1925 All 247 (247): 86 Ind Cas 704, *Ram Kishen* v. *Baldeo*.

('25) 12 AIR 1925 All 54 (55): 82 Ind Cas 307, *Sikandar Singh* v. *Bachchu*.

('24) 11 AIR 1924 All 912 (914): 79 Ind Cas 1019, *Dhanraj* v. *Ram Naresh*.

('24) 11 AIR 1924 All 798 (799): 46 All 882: 83 I.C. 1052 (DB), *Sita Ram* v. *Cheddi*.

('24) 11 AIR 1924 All 677 (678): 79 Ind Cas 1010, *Sankat Narain* v. *Ram Bharos*.

('35) 22 AIR 1935 Mad 431 (431, 432) : 156 Ind Cas 83, *Udayamuthiar* v. *Shanmugam Chettiar*.

('21) 8 AIR 1921 Oudh 229 (229): 65 Ind Cas 404, *Sheoambur* v. *Ratipal*.

('21) 8 AIR 1921 Oudh 196 (199): 24 Oudh Cas 330: 64 I.C. 757, *Chokhey* v. *Hardeo*.

('21) 8 AIR 1921 Oudh 127 (128): 61 Ind Cas 801, *Oudh Behari* v. *Suraj Bali*.

('89) 2 C P L R 141 (144, 145), *Sardar Singh* v. *Ajit Singh*.

[*See* ('20) 7 AIR 1920 Lah 39 (40) : 1 Lah 558 : 59 Ind Cas 678 (DB), *Lachman Das* v. *Sundar Das*.]

See also Article 126 Note 5.

In view of the principle abovementioned, viz., that the after-born son does not get a fresh cause of action on his birth, such son is not entitled to a fresh starting point of limitation on his birth even in cases which do not fall within the purview of Article 126. Thus the principle will be applicable where the alienation is not by the father but by some other coparcener,[3] or where the alienee does not take possession of the property alienated.[4]

Hence, whether the suit of the after-born coparcener falls under Art. 126 or any other article, he is not entitled to any benefit under this section so far as any disability of *his own* is concerned.

Suppose, however, an alienation of joint family property is made by A, the father, in 1910. At that time he has a *minor* son, B, five years old. Another son, C, is born in 1912. It has been seen above that C will not be entitled to any extension of time under this section on account of any disability of his own, so that limitation for a suit by him to set aside the alienation will expire under Art. 126 in 1922 (unless he is entitled to an extension of time on any other ground). But, B, being in existence at the time of the alienation and being a minor at such time, he (B) is entitled to bring his suit at any time within three years of his attaining majority under this section read with S. 8. So, in the case of B, limitation will expire only in 1926. The question arises whether C can sue at any time within 1926. On this question there is a conflict of decisions. One view is that as C's right is not an independent one but is only derived from B, C is entitled to sue at any time within the period that would have applied to a suit by B himself.[5] The other view is that C is not entitled to take advantage of the extension of limitation in B's favour.[6] It is submitted that the former view does not seem to be correct. It proceeds on the footing that a person deriving his right to sue from a minor is entitled to the extension of limitation applicable to the minor himself under this section. Such a view is not correct, the right under this section being in the nature of a *personal* privilege which is not transmissible to

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[3] ('40) 27 AIR 1940 Nag 94 (95) : 185 Ind Cas 881, *Nandlal Rampratap* v. *Deorao Marut Rao.*
[*See* ('09) 1 Ind Cas 670 (674) (Cal), *Banwari Lal* v. *Sheo Shankar Misser.*
('15) 2 AIR 1915 Nag 52 (55) : 32 Ind Cas 242 : 12 Nag L R 12, *Asaram* v. *Ratansingh.*]

[4] *See* ('28) 15 AIR 1928 Bom 383 (383, 384) : 113 Ind Cas 378 (DB), *Chintaman Balwant* v. *Bhagwan Ganpati.* (Suit under Art. 120.)
('27) 14 AIR 1927 All 702 (702, 703) : 50 All 163 : 106 Ind Cas 377 (DB), *Bindeshri Upadhya* v. *Sital Upadhya.* (Do.)

[5] ('32) 19 AIR 1932 Lah 605 (605) : 13 Lah 520 : 140 Ind Cas 375 (DB), *Jowala Singh* v. *Sant Singh.*
('23) 10 AIR 1923 Oudh 52 (53): 66 I.C. 938 (DB), *Ranodip Singh* v. *Rameshar Pd.*
('25) 12 AIR 1925 All 54 (55) : 82 I. C. 307, *Sikandar Singh* v. *Bachchu Pande.*
('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj Rai* v. *Ram Naresh Rai.* (Pre-existing coparcener dying minor—After-born coparcener can sue within three years from the date on which the deceased would have attained majority if he had lived.)

[6] ('20) 7 AIR 1920 Lah 39 (40) : 1 Lah 558 : 59 Ind Cas 678 (DB), *Lachman Das* v. *Sunder Das.*
('22) 9 AIR 1922 Lah 275 (277) : 3 Lah 99 : 63 Ind Cas 760 (DB), *Ber Singh* v. *Hasara Singh.*

Section 6
Note 16

others. See Note 40. Further, it is not correct to say that C *derives* his right to sue from B. C's right is *independent*.[6a]

But, at the same time, if B sues and succeeds in such suit, C will be entitled to share in the relief, though at the date of the suit a suit by C himself would have been time-barred.[7] The reason is that B's suit is in vindication of a right common to himself and C.

It must also be noted that the fact that the suit is barred by limitation as against C, the after-born son, does not make it time-barred as against B, the pre-existing son who is entitled to an extension of limitation under this section.[8] This shows that the principle that when two persons are entitled to sue on a cause of action, the expiry of limitation as against one will make the suit time-barred as against the other also, does not apply to cases where one of the persons is entitled to the special privilege of an extension of limitation under this section.

Another feature is that the suit by B after the expiry of limitation as against C is not also liable to be dismissed for want of necessary parties on the ground that limitation having expired as against C, he cannot be joined as a party to the suit by B. The reason is that C is not a necessary party to the suit, the rule being that *any* coparcener can sue to set aside an unauthorised alienation of family property on behalf of all the coparceners.[9]

Where the pre-existing coparcener who is under a disability at the time of the alienation dies before the cessation of the disability the after-born coparcener cannot be treated as the legal representative of the deceased so as to entitle him to sue within the extended period of limitation conferred by clause 3 of this section.[10]

The above are cases in which the after-born coparcener comes into existence *before* the expiry of limitation as against the pre-existing coparcener. Suppose, the after-born coparcener comes into existence *after* the expiry of limitation as against the pre-existing coparcener. In such a case, the after-born coparcener will not be entitled to sue at all (apart from the question of limitation), the reason being that the failure of the pre-existing coparcener to sue within the period of limitation extinguishes the right of the family to the property and thus, the very basis for a suit by the after-born coparcener is destroyed.[11]

[6a] ('40) 27 AIR 1940 Nag 94 (95) : 185 Ind Cas 881, *Nandlal Rampratap* v. *Deorao Marut Rao.* (After-born sons are entitled to avoid alienation of joint family property, not as the representatives of their father but in their own right.)

[7] ('13) 20 Ind Cas 958 (965) : 40 Cal 966 : 40 Ind App 213 : 10 Nag L R 1 (PC), *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal.*

[8] *See* ('13) 20 Ind Cas 958 (965) : 40 Cal 966 : 40 Ind App 213 : 10 Nag L R 1 (PC), *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal.*

[9] ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 I. C. 972 (DB), *Bai Keval* v. *Madhu Kala.* (Suit brought three years after attaining majority of elder brother but within three years of attaining majority by younger brother not barred.)
('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bappayya.*
('09) 1 Ind Cas 530 (532) (Cal), *Dursan Singh* v. *Durbejoy Singh.*

[10] ('35) 22 A I R 1935 Mad 431 (432) : 156 Ind Cas 83, *Udayamuthier* v. *Shunmugam Chettiar.*

[11] ('16) 3 AIR 1916 All 356 (357) : 33 Ind Cas 913 : 38 All 126 (DB), *Lachm Narain Pershad* v. *Kishan Kishorechand.* (10 Ind Cas 908 distinguished.)

17. Suit by Hindu reversioner to set aside alienation or adoption by widow. — Before the Privy Council decisions in *Venkatanarayana Pillai* v. *Subbammal*[1] and *Janaki Ammal* v. *Narayanaswamy Iyer*,[2] there was a conflict of decisions as to the question whether a suit by a reversioner questioning an alienation or an adoption by a Hindu widow was a representative suit on behalf of the entire reversionary body or not. One view was that such a suit was a representative one.[3] The other view was that it was not a representative one and that the decision in a suit by one reversioner did not bind the other reversioners.[4] According to this view, each reversioner in such cases has an independent cause of action and consequently an independent starting point of limitation from the moment of his becoming entitled to sue.[5] The above Privy Council cases clearly established that a suit by a reversioner in such circumstances was a representative suit based on the *same cause of action* with reference to all the reversioners. After this, the question again came up before a Full Bench of the Madras High Court in *Varamma* v.

Note 17

[1] ('15) 2 AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 : 29 Ind Cas 298 (PC).

[2] ('16) 3 AIR 1916 P C 117 (118) : 39 Mad 634 : 43 Ind App 207 : 37 Ind Cas 161 (PC).

[3] ('90) 14 Bom 512 (515) (DB), *Chhaganram* v. *Bai Motigavri.* (Sale of property in execution of decree against widow — Suit by reversioner for declaration that sale does not affect reversionary interest — Cause of action is common to all reversioners.)

('01) 24 Mad 405 (407), *Aiyadorai* v. *Solai Ammal.* (Suit to set aside adoption.)

('02) 4 Bom L R 893 (908), *Jamnabai* v. *Dharsey Takersey.* (Do.)

('81) 1881 All W N 83 (83), *Gopi Nath* v. *Sri Narain.* (Do.)

[*See* ('75) 23 Suth W R 285 (286) : 15 Beng L R 9 (Note) (DB), *Siddessur Dutt* v. *Sham Chand Nundun.* (Suit to set aside adoption.)

('06) 29 Mad 390 (411): 1 Mad L Tim 183 : 16 Mad L Jour 307 (FB), *Chiruvolu Punnamma* v. *Chiruvolu Perrazu.* (It was held in this case that in view of certain dicta of the Privy Council, the presumptive reversioner cannot be held to represent the remote reversioner in suits relating to alienations by qualified owners, but in suits to set aside an adoption the presumptive reversioner ought, on principle, to be held to represent the remote reversioner—It was further held that an unauthorized alienation gives rise to a cause of action for a declaratory suit from the date of the alienation to all the reversioners.)]

[*See also* ('73) 10 Bom H C R 351 (352) (DB), *Bhikaji* v. *Jagannath.* (Distant reversioner can sue when nearer one has waived his rights.)]

[4] ('04) 27 Mad 588 (590), *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib.* (Overruled in AIR 1915 P C 124.)

('99) 22 All 33 (46, 47): 1899 All W N 159 (FB), *Bhagwanta* v. *Sukhi.*

('05) 32 Cal 62 (71) : 9 Cal W N 25 (DB), *Abinash Chandra Mazumdar* v. *Hari Nath Shaha.* (28 Mad 57 relied on.)

('05) 2 Cal L Jour 87 (95) : 9 Cal W N 795, *Harek Chand* v. *Bejoy Chand.*

('02) 4 Bom L R 140 (145) (DB), *Manjunath* v. *Kaveribai.*

('69) 11 Suth W R 468 (472) : 3 Beng L R A C 145 (DB), *Tarinee Churn* v. *Saroda Sooonduree.*

('17) 4 AIR 1917 Mad 30 (34) : 38 Ind Cas 270 (DB), *Venkatarow* v. *Tulja Ram.* (Overruled in AIR 1919 Mad 911 (FB).)

('15) 2 AIR 1915 Mad 800 (802, 803) : 20 I. C. 625 : 38 Mad 396 (DB), *Narayana Iyer* v. *Rama Iyer.* (Do.)

('12) 16 Ind Cas 839 (842): 36 Mad 570 (DB), *Veerayya* v. *Ganamma.* (Do.)

('05) 28 Mad 57 (60, 61): 14 Mad L Jour 209 (DB), *Govinda* v. *Thayammal.* (Do.)

[5] See cases cited in foot-note (4).

Gopaladasayya[6] with reference to the point of limitation. It was decided by the Full Bench that the effect of the said Privy Council decisions was that even with reference to the question of limitation, the reversioner entitled to sue at the time of the alienation or adoption must be held to represent the entire reversionary estate. Hence, there is only one starting point of limitation in the case of all reversioners and not a fresh start of limitation as each successive reversioner becomes entitled to sue.[7] The representative character of a suit by the reversioner in such circumstances has again been affirmed by a Full Bench of the Allahabad High Court.[8] But the High Courts of Calcutta[9] and Patna[10] and the Lahore High Court in some of its decisions[11] have held that the bar of limitation against one reversioner does not affect the rights of other reversioners. It is submitted that such a view cannot be supported in view of the clear pronouncements of the Privy Council already referred to. See also Article 120 Note 34 and Article 125 Note 7.

From the above, it is clear that where at the time of the alienation or adoption by a Hindu widow, there is a reversioner competent to sue and limitation begins to run against him, a reversioner who *subsequently becomes entitled to sue* does not get a fresh starting point of limitation and hence, he is not entitled to the benefit of this section by reason of any disability of his at the time of his becoming entitled to sue.[12]

Suppose that at the time of the alienation by a widow, there are two persons A and B, who are reversioners of the same degree and constitute the next reversioners. Suppose A is a minor and B is an adult at the time. The right of action arises simultaneously in favour of both A and B. As has been said, the cause of action of both is the same, so that they may be said to be "jointly entitled" to sue within the meaning of S.7. As to whether A will be entitled to sue at any time within three years of his attaining majority, see Notes to section 7.

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[6] ('19) 6 AIR 1919 Mad 911 (917, 920, 921) : 41 Mad 659 : 46 Ind Cas 202 (FB). (Overruling 28 Mad 57, 16 Ind Cas 839, AIR 1915 Mad 800 and AIR 1917 Mad 30.)

[7] ('41) 28 AIR 1941 Bom 197 (198), *Annu Bajaba* v. *Dadu Tukaram.* (Where the right of a prior adopted son to set aside alienation made by his widow mother is barred, no further right to sue accures to a subsequently adopted son.)
('19) 6 AIR 1919 Mad 911 (917, 920, 921) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma* v. *Gopaladasayya.* (Failure of declaratory suit in widow's lifetime by reversioner precludes suit for possession by actual reversioner after widow's death.)
('25) 12 AIR 1925 Mad 86 (86, 87) : 83 Ind Cas 140 (DB), *Hussain* v. *Venkata.*
('27) 14 AIR 1927 Mad 216 (217): 99 I.C. 668, *Neelakantamier* v. *Chinnu Ammal.*
('25) 12 AIR 1925 Lah 654 (655, 656): 6 Lah 405: 90 Ind Cas 1022 (DB), *Chiragh Din* v. *Abdullah.* (22 All 33 (FB) dissented.)
('33) 20 AIR 1933 Lah 524 (527): 149 I. C. 696 (DB), *Gajindar Singh* v. *Balwant Kaur.* (AIR 1927 Lah 348 distinguished.)
('07) 1907 Pun Re No. 22 : 1907 Pun W R No. 89 : 1908 Pun L R No. 27, *Umra* v. *Ghulam.* (After born reversioner.)
See also cases cited in foot-note (3).

[8] ('22) 9 AIR 1922 All 301 (308, 309): 44 All 19: 64 I. C. 248 (FB), *Kesho Pershad* v. *Shiva Pershad.* (Decree against one reversioner binds other reversioners.)

[9] ('24) 11 AIR 1924 Cal 481 (482) : 51 Cal 101 : 81 Ind Cas 522 (DB), *Das Ram Choudhury* v. *Tirtha Nath.* (Suit under Art. 120.)

[10] ('35) 22 AIR 1935 Pat 256 (260): 155 Ind Cas 244 (DB), *Sital Raut* v. *Adalat Raut.* (Suit under Art. 120.)

[11] ('32) AIR 1932 Lah 39 (40) : 132 Ind Cas 665 (DB), *Wali Chand* v. *Punjab Singh.* (The reasoning was that valid discharge under S. 7 could not be given by those who were not under disability.)
[*See also* ('34) 21 AIR 1934 Lah 968 (969) : 154 Ind Cas 675 (DB), *Hari Ram* v. *Sali.* (Reversioner and his minor sons alive — Reversioner's right to set aside adoption being barred does not bar son's right.)]

[12] See cases cited in foot-note (7).

18. Suit by reversioner under Punjab Customary Law to set aside alienation of ancestral property by collateral.— The right of a reversioner under Punjab Customary Law to challenge the alienation of ancestral property by a collateral is based on a cause of action which is common to the entire reversionary body. In other words, each reversioner has not an independent right to sue to set aside such alienation. Hence, if limitation begins to run against a reversioner who is competent to sue at the time of the alienation, it begins to run as against the entire reversionary body and any reversioner who may subsequently become entitled to question the alienation will not have a fresh start of limitation from the time of his becoming so entitled. Thus, a reversioner born subsequent to the alienation does not get a fresh starting point of limitation.[1] Hence, the benefit of this section cannot be claimed by any reversioner not competent to sue at the time when limitation originally starts to run. In the undermentioned cases[2] it was held that though the after-born reversioner cannot claim the benefit of this section in his own right, still he cannot be deprived of the extended period claimable by the minor reversioner in existence at the time of alienation. As has been seen in Note 16 this view does not seem to be correct.

But, where the *next* reversioner is under a disability such as minority at the time of the alienation, he is entitled to the benefit of this section, notwithstanding the presence of *remote* reversioners who are under no such disability, but who do not sue to set aside the alienation. The reason is that the remote reversioners cannot have sued in the presence of the nearer reversioner and the principle that

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Note 18

[1] ('20) 7 AIR 1920 Lah 39 (40): 1 Lah 558: 59 Ind Cas 678 (DB), *Lachman Das* v. *Sundar Das.*
('34) 21 AIR 1934 Lah 290 (291): 154 I. C. 592, *Arjan Singh* v. *Waryam Singh.*
('20) 7 AIR 1920 Lah 220 (220): 54 I. C. 838 (DB), *Miran Ditta* v. *Bihari Lal.*
('25) 12 AIR 1925 Lah 24 (25): 5 Lah 389: 82 Ind Cas 626 (DB), *Dad* v. *Lal.*
('11) 10 Ind Cas 725 (726, 727) (Lah), *Bhana Ram* v. *Hakim Singh.*
('12) 14 Ind Cas 60 (61) (Lah), *Kehar Singh* v. *Hazara Singh.*
('07) 1907 Pun W R No. 21, page 45, *Mohan Singh* v. *Dewa Singh.*
('27) 14 AIR 1927 Lah 97 (97): 97 I.C. 435: 8 Lah 19 (DB), *Shahamad* v. *Salabat.*
('07) 1907 Pun Re No. 108: 1907 Pun W R No. 196, *Inayat Khan* v. *Shabu.*
('37) 24 AIR 1937 Lah 420 (424, 425) : I L R (1937) Lah 395 : 172 Ind Cas 341 (DB), *Gobind* v. *Ram Lal.*
[*See* ('15) 2 AIR 1915 Lah 169 (170) : 29 Ind Cas 761 (DB), *Chanda Singh* v. *Mukand Singh.*]
[But see ('33) 20 AIR 1933 Lah 866 (867) : 147 Ind Cas 399, *Khushi Ram* v. *Nand Lal.*]

[2] ('38) 25 AIR 1938 Lah 1 (3) : I L R (1937) Lah 769 : 175 Ind Cas 824 (DB), *Harnam Singh* v. *Aziz.*
('37) 24 AIR 1937 Lah 420 (425) : I L R (1937) Lah 395 : 172 Ind Cas 341 (DB), *Gobind* v. *Ram Lal.*

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the failure of one reversioner to sue within limitation bars all the other reversioners applies only where the former was *competent* to sue.[3]

19. Suit by reversioner or adopted son succeeding to an estate after a Hindu widow.—It is now established that for purposes of limitation the Hindu widow does not represent the estate so as to bind the reversioners. Hence, where adverse possession commences against a widow during her lifetime and a reversioner succeeds to the estate thereafter, the reversioner has an independent cause of action to sue for possession and such cause of action accrues to the reversioner on his succeeding to the estate on the widow's death.[1] Similarly, where a widow adopts a son and the latter succeeds to the estate, he gets a fresh start of limitation from the date of his adoption even in regard to matters that have arisen before the adoption.[2] The contrary view, viz., that the reversioner or the adopted son is bound by the limitation that has run against the widow[3] is no longer law. Hence, if the reversioner or the adopted son is a minor or is under any other disability referred to in this section at the time of his succeeding to the estate, he will be entitled to the benefit of this section.[4]

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[3] ('37) 24 AIR 1937 Lah 653 (655): 172 Ind Cas 218 (DB), *Jati Khubi* v. *Matu*. (Reversing A I R 1937 Lah 485; A I R 1933 Lah 534, dissented.)

Note 19

[1] ('99) 23 Bom 725 (736): 26 Ind App 71: 1 Bom L R 607: 3 Cal W N 621: 7 Sar 543 (PC), *Runchordas Vandravandas* v. *Parvatibai*.
('29) 16 AIR 1929 P C 166 (170) : 51 All 439 : 56 Ind App 267 : 117 Ind Cas 498 (PC), *Mt. Jaggobai* v. *Utsavalal*. (Provided there is no decree against widow in her life-time depriving reversioner's right.)
('28) 15 AIR 1928 All 561 (567): 112 Ind Cas 801: 51 All 188 (FB), *Bankey Lal* v. *Raghunath*. (Boys, J.—The question whether adverse possession against widow bars reversioners must be decided as in case of decree on facts of particular case.)
('92) 14 All 156 (159): 1892 All W N 22 (FB), *Ram Kali* v. *Kedar Nath*.
('83) 9 Cal 934 (937): 13 Cal L R 372 (FB), *Srinath Kur* v. *Prosunno Kumar*.
See also Article 141 Note 13.

[2] ('95) 19 Bom 809 (815, 816) (DB), *Moro Narayan Joshi* v. *Balaji Raghunath*. (His rights come into existence from the moment of his adoption.)
('15) 2 AIR 1915 Mad 539 (540, 541) : 25 Ind Cas 692 (DB), *Kancharla Venkataratnam* v. *Kogantu Venkataramiah*. (It is unjustifiable to place an adopted son in worse position than that of reversioner.)
('05) 2 Cal L Jour 87 (95): 9 Cal W N 795 (DB), *Harek Chand* v. *Bejoy Chand*.
(1900) 2 Bom L R 411 (414) (DB), *Hari* v. *Waman*.

[3] ('66) 7 Suth W R 134 (135), *Gobind Coomar Choudhry* v. *Huro Chunder Chowdhry*. (The reasoning was that there is only one cause of action to the family on date of dispossession.)
('09) 1 Ind Cas 49 (50) : 36 Cal 394 (DB), *Girindra Mohan Roy* v. *Bocha Das*. (Suit to recover instalments due under instalment bond.)
('35) 22 AIR 1935 Bom 420 (421) : 159 Ind Cas 272, *Mariyayya Sidramayya* v. *Chanvirangouda*. (In this case, it was assumed that an adopted son suing for arrears of rent accumulated prior to adoption sues on the same cause of action as would have applied to the widow and it was held that the suit was time-barred. The assumption is not correct. In such cases, the cause of action will not pass to the adopted son at all, the right to the rent being the widow's *personal* right. The suit is liable to be dismissed on the ground that the adopted son cannot sue for the rent, at any rate, during the widow's lifetime.)

[4] ('79) 4 Cal 523 (526) : 3 Cal L R 391 (DB), *Prosonna Nath Roy Chowdry* v. *Afzolonnessa Begum*
('05) 9 Cal W N 795 (801, 802) : 2 Cal L Jour 87 (DB), *Harek Chand Babu* v. *Bejoy Chand Mahatab*.

But, if the adverse possession had commenced in the lifetime of the last full owner, the reversioner or adopted son succeeding to the estate will not have a fresh cause of action but will be bound by the limitation that has run before he succeeds to the estate.[5] The reason is that in such cases the cause of action accrues in favour of the last full owner from whom it is derived by the reversioner or adopted son.

20. Applicability of the section to periods fixed by special or local Acts. — This section is one of the sections as to which it is provided in S. 29, sub-s. (2), cl. (b) that they will not apply to the determination of the period of limitation prescribed for a suit or other proceeding by any special or local law. The language of this section also shows that it only applies to cases in which a period of limitation is laid down in the first schedule to this Act.[1] Hence, it does not apply to cases where a period of limitation is provided for by any special or local law.[2] It will, however, apply where the special or local law itself provides that it should apply to any period of limitation prescribed by such special or local law.[3] See also S. 29 Note 5.

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5. ('22) 9 AIR 1922 Mad 12 (15, 16) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetaramaraju* v. *Subbaraju.*
('21) 8 AIR 1921 Mad 272 (276) : 44 Mad 951 : 68 Ind Cas 734, *Narayanasamy Naicker* v. *Periasamy Oddyar.* (Article 141 does not cover cases where cause of action includes something more beyond death of female.)
[*See* ('23) 10 AIR 1923 Lah 106 (106, 107) : 68 Ind Cas 177, *Chanan Singh* v. *Salig Ram.* (Unless defendant shows that cause of action arose in lifetime of last male owner suit by reversioner will be governed by Art. 141.)]
[But see ('67) 7 Suth W R 453 (454), *Ram Doollub Sandyal* v. *Ram Narain Moiter.* (Submitted not correct.)]
See also Section 9 Note 10 and Article 141 Note 14.

Note 20

1. ('13) 18 Ind Cas 306 (307) (Oudh) (DB), *Khanjan Singh* v. *Bhikan Singh.* (Section will apply to the two years' period under S. 31 of the Limitation Act only if it can be treated as an amendment of Art. 132 of the first schedule.)

2. ('74) 1 Ind App 167 (176) : 13 Beng L R 292 : 21 Suth W R 318 : 3 Sar 363 (P C), *Mohummud Buhadoor Khan* v. *The Collector of Bareilly.* (Clause 20 of Act IX of 1859.)
('02) 29 Cal 813 (822) (DB), *Akhoy Kumar* v. *Bejoy Chand Mohatap.* (Section 167 of the Bengal Tenancy Act.)
('14) 1 AIR 1914 Lah 85 (86) : 1914 Pun Re No. 64 : 25 Ind Cas 448 (DB), *Secretary of State* v. *Hakim.* (Section 18 of the Land Acquisition Act.)
('15) 2 AIR 1915 Cal 541 (543) : 28 Ind Cas 241 (DB), *Shankar Prosad Jha* v. *Babu Lal Jha.* (Sonthal Parganas Regulation, III of 1872.)
('18) 5 AIR 1918 Nag 247 (247) : 46 Ind Cas 879, *Balkrishna Laxman* v. *Bala.* (Section 60, sub-section 4 (1) of the C. P. Land Revenue Act.)
('95) 18 Mad 99 (103) (F B), *Veeramma* v. *Abbiah.* (Section 77, Registration Act.)
('90) 17 Cal 263 (267) (DB), *Girja Nath Roy Bahadur* v. *Patani Bibee.* (Section 29 of the Bengal Act, VIII of 1869.)
('97) 1897 Pun Re No. 69, *Jan* v. *Ala Baksh.* (Section 40 (2) of Punjab Courts Act, 1884.)
('09) 4 Ind Cas 70 (71) (Cal), *Panch Kouri Ghosh* v. *Pran Gopal.* (Section 33, Bengal Revenue Sale Law, Act XI of 1859.)
('66) 5 Suth W R Act X Rule 41 (41, 42) (DB), *Dinonath Pandey* v. *Raghoonath Pandey.* (Bengal Act X of 1859).
[But see ('23) 10 AIR 1923 Nag 164 (166): 71 I. C. 140, *Shankargir* v. *Chinnuji.* (Submitted not correct.)]

3. ('26) 13 AIR 1926 Nag 236 (237) : 91 I. C. 563, *Madho Rao Ghatate* v. *Balaji Narayan.* (Under the provisions of S. 160 of the C. P. Land Revenue Act, S. 6 of the Limitation Act applies to a suit for the recovery of a share of proprietary profits by a minor plaintiff.)
('94) 9 C P L R 1 (2), *Daola* v. *Chitoo.* (Section 81, C. P. Tenancy Act.)

The Civil Procedure Code has been held to be not a special or local law,[4] and hence the prohibition contained in S. 29, sub-s. (2), cl. (b) above referred to will not apply to periods of limitation fixed by the Civil Procedure Code. But, in view of the express language of this section which makes it applicable only to cases in which a period of limitation has been fixed by the first schedule to this Act, this section will not apply to such periods.[5]

As regards the question whether minority or other disability can confer an exemption from the law of limitation on *general* principles of equity, even in the absence of express provisions granting such exemption, the point was raised before the Privy Council in *Mohummud Buhadoor Khan* v. *The Collector of Bareilly.*[6] Their Lordships rejected the contention that exemption could be pleaded in such cases and in doing so, observed as follows:

> "Their Lordships however think it is impossible that any Court can add to the statute that which the Legislature has not done. . . . . Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act[7] contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it."

It is submitted that the view of the Bombay High Court[8] that minority affords a general ground of exemption from the law of limitation *apart* from the statute is therefore open to question in the light of the above pronouncement of the Privy Council.

21. Applicability of the section to period of twelve years fixed by Section 48, Civil Procedure Code. — It will follow from what has been stated in Note 20, that the minority or other disability of the decree-holder will not be a ground for extending the period of twelve years fixed by S. 48, Civil Procedure Code. There is, however, a conflict of decisions on this point. On the one hand, it has been held by the High Courts of Allahabad,[1] Calcutta,[1a] Madras,[2]

('08) 11 Oudh Cas 118 (119) (DB), *Gur Pershad* v. *Gokaran Nath.* (Section 129, Oudh Rent Act.)

('29) 16 AIR 1929 Lah 819 (819, 820): 125 Ind Cas 178, *Sultan Bakhsh* v. *Painda Khan.* (Punjab Limitation (Custom) Act, I of 1920.)

('26) 13 AIR 1926 Lah 188 (189): 92 I. C. 294, *Md. Ghaus* v. *Md. Ali Shah.* (Do.) [*See also* ('14) 1 AIR 1914 Lah 87 (88) : 22 Ind Cas 637, *Natha Singh* v. *Kishen Singh.* (The Punjab Limitation (Ancestral Land Alienation) Act of 1900.)]

[4] ('12) 16 Ind Cas 149 (151) : 34 All 496, *Dropadi* v. *Hira Lal.* [*See also* ('75) 1 Cal 226 (242) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (P C), *Phoolbas Koonwur* v. *Lalla Jogeshur.*]
For a fuller discussion of the subject, see section 29 Note 6.

[5] ('09) 1 Ind Cas 178 (179) : 5 Nag L R 1, *Hirasa* v. *Jodhraj.* (Section does not apply to period of thirty days fixed by O. 21 R. 92 of the C. P. C., as the period is fixed by the Code and not this Act — It is also doubtful whether the period of thirty days mentioned in O. 21 R. 92 is a period of limitation at all.)

[6] ('74) 1 Ind App 167 (176) : 13 Beng L R 292 : 21 Suth W R 318 : 3 Sar 363 (P C).

[7] Section 20 of Act IX of 1859.

[8] ('92) 16 Bom 536 (537), *Moro Sadashiv* v. *Visaji Raghunath.*

Note 21

[1] ('15) 2 AIR 1915 All 349 (350) : 37 All 638 : 30 Ind Cas 521 (DB), *Ramnath Tewari* v. *Chatarpal Man Tewari.*

[1a] ('38) 25 AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373 : 176 Ind Cas 212 (DB), *Kartic Chandra* v. *Bata Krishna Roy.*

[2] ('14) 1 AIR 1914 Mad 526 (527, 530) : 18 Ind Cas 586 (587) : 37 Mad 186 (DB), *Rebala Ramana Reddi* v. *Rebala Babu Reddi.*

Nagpur[2a] and Patna[2b] and the Chief Court of the Punjab[3] that such period cannot be extended on the above ground. On the other hand, the Bombay High Court[4] has held that the period can be extended under such circumstances. The former view is based on the fact that the language of the section shows that it only applies to periods of limitation prescribed by the first schedule of this Act. The Bombay High Court also agrees that this section does not in terms apply to the period of twelve years under S. 48, Civil Procedure Code; but holds that on *general principles*, minority is a ground for exemption from limitation. The view of the Bombay High Court is open to question in view of the Privy Council decision in *Mohummud Buhadoor* v. *The Collector of Bareilly*.[4a] (See Note 20.)

But, in the Madras High Court itself, in the undermentioned case,[5] Sadasiva Iyer, J., following the decision of the Privy Council in *Phoolbas Koonwur* v. *Lalla Jogeshur*,[6] expressed the view that the Civil Procedure Code is not a "special statute" but is a general law of procedure and that the provisions of the Limitation Act relating to exclusion of time govern also the twelve years' period of limitation under section 48, Civil Procedure Code.

The Privy Council decision referred to above was one bearing on S. 11, Limitation Act of 1859, which did not contain any words showing that it applied only to cases in which the period of limitation was laid down by the Limitation Act itself. Under these circumstances, it was held by the Privy Council that the rule as to extension of limitation on the ground of minority contained in the above section also applied to a period of limitation fixed by the Civil Procedure Code itself. But, in view of the language of the present section which shows that it is only applicable to periods fixed by the first schedule to this Act, it is doubtful whether the principle laid down in the above Privy Council decision can be applied to the present section.

[*See also* ('29) 16 AIR 1929 Mad 394 (396) : 119 Ind Cas 39 (DB), *Mannarswamy Iyer* v. *Ramasamy Naicken*. (As regards S. 48, C. P. C., the question of minority is wholly irrelevant.)]

2a. ('39) 26 AIR 1939 Nag 245 (247) : I L R (1939) Nag 559 : 184 Ind Cas 72 (DB), *Yadorao Wasudeorao* v. *Govindrao Ramji*.

2b. ('41) 28 AIR 1941 Pat 45 (47, 48) : 20 Pat 1 : 190 Ind Cas 369 (DB), *Mt. Zalikhan Bibi* v. *Rama Prasad*. (Section 48, C. P. C., overrides Ss. 6 and 7, Limitation Act and not vice versa.)

3. ('94) 1894 Pun Re No. 128, *Jhandu* v. *Mohan Lal*.

4. ('92) 16 Bom 536 (537) (DB), *Moro Sadashiv* v. *Visaji Raghunath*.
('83) 7 Bom 179 (180) (DB), *Jagjivan* v. *Hasan Abraham*.
('30) 17 AIR 1930 Bom 508 (509) : 54 Bom 776 : 128 I. C. 428 (DB), *Ramkrishna* v. *Ramchandra*.

4a. ('74) 1 Ind App 167 (176) : 13 Beng L R 292 : 21 Suth W R 318 : 3 Sar 363 (PC).

5. ('15) 2 AIR 1915 Mad 449 (451) : 24 Ind Cas 195, *Venkata Perumal Raja* v. *Velayudha Reddi*.
[*See also* (1865) 3 Suth W R 8 (9) (DB), *Huro Soonduree Chowdhrain* v. *Anund Nath Roy Chowdhry*.
(1870) 14 Suth W R 339 (347, 348) (DB), *Sudaburt Pershad* v. *Lotf Ali Khan*.]

6. ('75) 1 Cal 226 (242, 243) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (PC).

22. Period fixed by Court cannot be extended under this section. — This section refers to the extension of a period fixed by *law*. Hence, it does not apply to a period fixed by the *Court.*[1]

23. Disabilities to which section applies. — Extension of limitation can be claimed only on grounds which are expressly provided for by the limitation Act.[1] The only grounds on which limitation can be saved under this section are *minority, lunacy* and *idiocy* of the person entitled to sue or make the application for execution.[2] Under the Act of 1859 (S. 12), married women (in cases to which the English law would apply) were included in the definition of persons under "legal disability" within the meaning of that Act. But under the later enactments married women are not regarded as persons under legal disability for purposes of limitation.

The fact that the plaintiff is a disqualified proprietor whose estate is under the management of the Court of Wards will not save limitation under this section.[3] Similarly, the plaintiff's absence from the country,[4] or the fact that there has been a dispute or litigation as to his title to the right in virtue of which the suit is brought does not entitle him to an extended period of limitation under this section.[5]

Ignorance of the accrual of the cause of action would, if brought about by the fraud of the defendant, entitle the plaintiff to an

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Note 22

1. ('84) 1884 Pun Re No. 31, *Prema* v. *Jawahir Dass.*

Note 23

1. ('26) 13 AIR 1926 Cal 65 (66, 73) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal.*
('16) 3 AIR 1916 Cal 164 (165): 28 I.C. 818 (DB), *Kuarmani Singha* v. *Wasif Ali.*
(1864) 1864 Suth W R Gap 290 (291) (DB), *Ram Kishore Acharj Chowdhry* v. *Lukhee Debee Chowdhrain.*

2. ('18) 5 AIR 1918 P C 180 (181) : 46 Cal 694 : 50 Ind Cas 202 : 46 Ind App 60 (PC), *Srimati Rani Kuar Mani Singh* v. *Nawab Bahadur of Murshidabad.*
('16) 3 AIR 1916 Cal 164 (165): 28 I.C. 818 (DB), *Kuarmani Singha* v. *Wasif Ali.*
(1864) 1864 Suth W R Gap 290 (291) (DB), *Ram Kishore Acharj Chowdhry* v. *Lukhee Debee Chowdhrain.*

3. ('18) 5 AIR 1918 P C 180 (181) : 46 Cal 694 : 50 Ind Cas 202 : 46 Ind App 60 (PC), *Srimati Rani Kuar Mani Singh* v. *Nawab Bahadur of Murshidabad.*
('31) 18 AIR 1931 Oudh 177 (225) : 136 Ind Cas 642, *Mahomed Azim Khan* v. *Mohamed Saadat Ali Khan.*
('16) 3 AIR 1916 Cal 164 (165): 28 I.C. 818 (DB), *Kuarmoni Singha* v. *Wasif Ali.*
('17) 4 AIR 1917 Cal 745 (746) : 34 I. C. 86 (DB), *Umakanta Sen Chowdhury* v. *Hira Lal Roy.* (This was a case under the Bengal Court of Wards Act, IX of 1879.)

4. (1864) 2 Mad H C R 113 (113) (DB), *Venkatasubba Pattar* v. *Giri Ammal.* (Voluntary absence abroad.)
('68) 10 Suth W R 253 (253): 1 Beng L R (S N) 25 (DB), *Domun* v. *Shubul Koolall.* (Involuntary absence due to transportation.)

5. ('69) 12 Suth W R P C 6 (20, 21) : 12 Moo Ind App 275 : 2 Beng L R P C 111: 2 Suther 222 : 2 Sar 429 (PC), *Rajah Saheb Perhlad Sein* v. *Baboo Budhoo Singh.* (Pendency of appeal to Privy Council does not put party, who subject to the appeal is the owner of an estate, under a legal disability for bringing suit in that character against third parties.)
('66) 5 Suth W R 295 (296) (DB), *Mudhun Mohun Tewaree* v. *Nund KishoreDoss.* (Adopted son, after he attains majority, is under no legal 'disability' although his title as adopted son may be disputed and has not been finally established.)
('66) 5 Suth W R 32 (33), *Kishen Mohan Koond* v. *Mudhun Mohun Tewaree.* (Do.)

extension of limitation under S. 18. But in the absence of such fraud, such ignorance is no ground for extending limitation.[6]

24. Minor. — Section 3 of the Limitation Act of 1871 defined a minor as "a person who has not completed his age of eighteen years." This definition applied to every person, whatever his domicile might have been.[1]

The Acts of 1877 and 1908 omitted this definition. Under these Acts, the question as to when a person attains majority is governed by the provisions of the Majority Act of 1875. Under this Act, the age of majority is attained by a person ordinarily in all cases on his completing the eighteenth year. There are two exceptions to this rule —

(1) Where a guardian has been appointed for the person or property of a minor or the Court of Wards has assumed superintendence over the property of a minor, he will be deemed to have attained his age of majority on completing the age of twenty-one years. Hence, in such cases, the person under disability is entitled to have the fresh period of limitation under this section calculated from the date on which he commences his twenty-second year.[2] (Section 3, Majority Act.)

(2) In regard to the capacity to act in matters of marriage, dower, divorce and adoption, the provisions of the Act do not apply (S. 2, Majority Act). Thus, it has been held that a Parsi woman suing for divorce must be deemed to be "acting" in the matter of divorce and hence is not governed by the Majority Act : so that she is entitled under the Parsi Marriage and Divorce Act of 1865, to be deemed to be a minor till the completion of her twenty-first year.[3]

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[6] ('69) 1869 Pun Re No. 29, *Mt. Maeea Davee* v. *Sukh Dyal.*
('73) 19 Suth W R 269 (270) (DB), *Reaz Ali Khan* v. *Government of India.* (Ignorance due to absence from country.)
('70) 2 N W P H C R 173 175), *Mahomed Museeh-ood-deen* v. *Clara Jane Museeh-ood-deen.* (Ignorance of defendant's residence is not a ground of exemption.)

Note 24

[1] ('79) 5 Cal L R 543 (544) (FB), *Rainey* v. *Nobo Coomar Mookerji.*

[2] ('07) 31 Bom 80 (85) : 8 Bom L R 897 (DB), *Shivram Kondo Kulkarni* v. *Krishnabai.* (Where a person obtains an order for a certificate of guardianship under the provisions of Act XX of 1864, the minor is deemed to have attained his majority when he shall have completed his age of twenty-one years by virtue of S.3, Indian Majority Act (IX of 1875)—It is not necessary for the purposes of the section that any formal certificate of guardianship in pursuance of such order should actually be obtained.)
('90) 17 Cal 347 (360) : 16 Ind App 195 (202) : 5 Sar 463 (PC), *Mungniram* v. *Gursahai Nund.*
('06) 10 Oudh Cas 247 (250, 251) (DB), *Maulvi Saiyad Ahmad* v. *Maulvi Saiyad Muhammad.*
('07) 10 Oudh Cas 1 (4) (DB), *Sidh Gopal* v. *Mohammad Nazir.*
('89) 13 Bom 285 (289), *Yeknath* v. *Warubai.*
[*See* ('27) 14 AIR 1927 Mad 36 (37) : 49 Mad 809 : 99 Ind Cas 213 (FB), *In the matter of Venkatesa Perumal.* (Order appointing guardian made dependent on prior furnishing of security—Security not furnished—There is no order of appointment of guardian—Minor attains majority on completing 18 years.)]

[3] ('98) 22 Bom 430 (435, 436) (DB), *Bai Shirinbai* v. *Khurshedji Nasarvanji.*
('94) 18 Bom 366 (367), *Sorabji Cawasji* v. *Buchoobai.*

The age of a person must be calculated from the date of his *birth* and not from the date of his *conception*.[4] (See S. 4, Majority Act.)

25. Section, whether applies to child in womb.—Can a child who is in the womb at the time from which limitation is to be reckoned be regarded as being under the disability of minority at such time within the meaning of this section ? On this question, there is a conflict of decisions. On the one hand, it has been held by the Madras High Court that such a person should be held to be entitled to sue or apply for execution at the time from which limitation is to be computed and that he should be regarded as being under the disability of minority at such time. According to this Court, though for purposes of determining when a person attains majority the age of the person must be calculated from the birth of the person, yet, there is nothing to preclude his being treated as a person in existence and as a minor from the time of his being a child in his mother's womb.[1] But, a contrary view has been taken by the Lahore High Court according to which this section does not apply to a child in the womb.[2] See also Article 126 Note 5.

26. Whether minority negatives knowledge.—Where the starting point of limitation depends on the *knowledge* of the plaintiff, the minority of the plaintiff does not in itself negative such knowledge.[1]

26a. Whether there can be adverse possession against a minor or other person under disability.—See Notes 24 and 77 under Articles 142 and 144.

27. "Insane."—The word "insane" means "mad."[1] A state of mental weakness on account of injuries sustained is not insanity within the meaning of this section.[2]

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[4] ('35) 22 AIR 1935 Mad 839 (841, 842) : 58 Mad 886 : 159 Ind Cas 1 (FB), *Ranganatha Reddi* v. *Ramaswami Mudali*. (A I R 1929 Lah 254 dissented from.)

Note 25

[1] ('35) 22 AIR 1935 Mad 839 (841, 842) : 58 Mad 886 : 159 Ind Cas 1 (FB), *Ranganatha Reddi* v. *Ramaswami Mudali*. (Overruling AIR 1931 Mad 456.)

[2] ('39) 26 AIR 1939 Lah 290 (292) : 183 Ind Cas 451 (DB), *Firm Chuni Lal-Rali Ram* v. *Altaf-ul Rahman*. (Person being in mother's womb on date of alienation of ancestral property cannot while challenging alienation claim extension of time under Section 6.)

('29) 16 AIR 1929 Lah 254 (255, 256) : 10 Lah 713 : 116 Ind Cas 545 (DB), *Mahomed Khan* v. *Ahmad Khan*.

('30) 17 AIR 1930 Lah 394 (396) : 127 I. C. 708 (DB), *Madho Ram* v. *Dharam Singh*.

('20) 7 AIR 1920 Lah 220 (220) : 54 Ind Cas 838 (DB), *Miran Ditta* v. *Bihari Lal*.

('12) 14 Ind Cas 60 (61) (Lah), *Kehar Singh* v. *Hazarana Singh*. (28 Mad 57, dissented from.)

Note 26

[1] ('20) 7 AIR 1920 Mad 793 (798, 800) : 52 Ind Cas 725 (DB), *Narasimha* v. *Krishna Chandra*.

[See however ('41) 28 AIR 1941 Sind 50 (62) : I L R (1940) Kar 534 : 194 Ind Cas 137, *Khemchand Dayaram* v. *Dayaram Jessomal*. (There can be no adverse possession against a minor because he is not in a position to know of or resist acts of ouster—*Note* : For a fuller discussion of the question whether there can be adverse possession against a minor see Note 24 under Articles 142 and 144.)]

See also Articles 142 and 144 Note 77.

Note 27

[1] See Concise Oxford Dictionary.

28. "Idiot." — An idiot is a person so deficient in mind as to be *permanently* incapable of rational conduct.[1]

Hence, it is apprehended that where the person entitled to sue or apply for execution is an idiot at the commencement of limitation, there is no question of the *cessation* of his disability. In such cases, it is conceived that cls. 3 and 4 of the section providing for cases where the person under disability dies during the continuance of the disability will come into play.

29. Onus of proof and evidence as to disability. — Section 3 provides that subject to the provisions of Ss. 4 to 25, every suit or other proceeding instituted after the period prescribed in the first schedule should be dismissed. This shows that the provisions of Ss. 4 to 25 are in the nature of *exceptions* to the general rules of limitation contained in the first schedule. It is a general principle that the burden of proving that a case falls within an exception and not the general rule, lies on the person who relies on the exception. (See Evidence Act, Ss. 103, 105 and 106.) Hence, where a suit or other proceeding is *prima facie* barred by limitation under the first schedule, the burden of proving that by reason of any of the exceptions contained in Ss. 4 to 25 the suit or proceeding is saved from the bar of limitation is on the person who pleads such exception.[1] This principle is applicable to cases under this section also. Hence, the burden of proving that a suit or application for execution is saved from the bar of limitation by virtue of the provisions of this section is on the person who relies on such provisions.[2]

Further, under O. 7 R. 6, Civil Procedure Code, when a suit is instituted after the expiration of the period prescribed by the law of limitation, the *plaint* must show the ground on which exemption from such law is claimed. Hence, where a plaintiff relies on this section as saving his suit from the bar of limitation, such fact must be clear from the *plaint* itself.[3] But the exemption need not be pleaded expressly and in so many words. It is enough if the fact of reliance on the saving provisions of this section is somehow apparent on the face of the plaint.[4]

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[2] ('24) 11 AIR 1924 Bom 290 (292, 294) : 84 Ind Cas 796 (DB), *Abdulla Muhammad* v. *Abdulla M. Zulaikhi.*

Note 28

[1] See Concise Oxford Dictionary.

Note 29

[1] See Notes under Section 3.

[2] ('10) 7 Ind Cas 505 (518) (Lah) (DB), *Husaina* v. *Sahib Nur.*
('24) 11 AIR 1924 Cal 420 (422) : 81 Ind Cas 680 (DB), *Prohlad Chandra Chowdhury* v. *Ramsaran Chowdhury.*
('30) 17 AIR 1930 Oudh 97 (100) : 121 Ind Cas 277 : 5 Luck 658 (DB), *Mehdi Ali* v. *Walayat Husain Khan.*
('02) 6 Cal W N 601 (612, 613) (DB), *Lalla Kanhoo Lal* v. *Mt. Manki Bibi.*
('14) 1 AIR 1914 Lah 142 (142, 143) : 23 Ind Cas 462 (DB), *Charanjit Singh* v. *Bishen Singh.*
('28) 15 AIR 1928 Lah 763 (764) : 109 I. C. 331, *Jagadish Ram* v. *Mukand Lal.*
('13) 18 Ind Cas 391 (392) (DB) (Cal), *Panchu Mondal* v. *Isaf.* (Court not bound to raise point *suo motu.*)
('23) 10 AIR 1923 Lah 254 (254) : 70 Ind Cas 984, *Jagat Singh* v. *Balaga Singh.*
('23) 10 AIR 1923 Lah 41 (42) : 79 Ind Cas 211, *Prem Das* v. *Sarbaland.*
('17) 4 AIR 1917 Mad 930 (932, 935) : 33 Ind Cas 969 (DB), *Ramanathan Chetty* v. *Murugappa Chetty.*

As to the kind of evidence requisite to prove age and minority under this section, see the undermentioned cases.[5]

30. Suit on behalf of Hindu idol. — A Hindu idol is recognized as a juridical person capable of holding property, though it is only in an ideal sense that property can be held by an idol. But the possession and management of dedicated property belong to the *shebait* and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait and not in the idol. Hence, where the shebait is a minor (or other person under disability) at the time from which the period of limitation is to be reckoned, he is entitled to the benefit of this section.[1]

As the right to sue for the protection of dedicated property is vested in the *shebait* and not the idol, whatever disability the idol may be conceived of as labouring under, will not be the disability of a person *entitled to sue.* Hence, this section will not apply to such disability. Though, thus, the question as to the disability or otherwise of the idol is not material for the purposes of this section, it has been held that an idol is not a perpetual minor for purposes of limitation.[2] This only means that a suit in respect of property dedicated to an idol is as much subject to the law of limitation as any other suit and that no exemption from such law can be claimed on the ground that such suit is for the benefit of an idol which is incapable of looking after its own interests.

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[3] ('13) 18 Ind Cas 391 (392) (Cal) (DB), *Panchu Mondul* v. *Isaf.*

[4] ('09) 2 Ind Cas 77 (78) (Cal), *Gangadhar Sarkar* v. *Khaja Abdul Ajij.* See also Section 3 Note 31.

[5] ('28) 15 AIR 1928 Lah 250 (252, 253) : 113 Ind Cas 53 (DB), *Zinda* v. *Mt. Roshnai.* (Medical evidence is not of much help in determining age.)

('07) 29 All 29 (32) : 1 Mad L Tim 429 : 5 Cal L Jour 4 : 11 Cal W N 130 : 17 Mad L Jour 32 : 9 Bom L R 80 : 34 Ind App 1 (PC), *Shah Ara Begam* v. *Nanhi Begam.* (In India it is no doubt difficult to prove such facts as the date of birth, after a lapse of many years, and it would be unreasonable to require such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind.)

('07) 1907 Pun L R No. 29 p. 79 (80) : 1907 Pun W R No. 6, *Fatah Mohammad* v. *Foja.* (When the age of a minor is in dispute, preference is to be given to the weight of medical evidence in the absence of any clear proof to the contrary.)

Note 30

[1] ('05) 32 Cal 129 (140, 141): 31 Ind App 203: 8 Cal W N 809: 6 Bom L R 765: 1 All L Jour 585 : 8 Sar 698 (PC), *Jagadindra Nath* v. *Hemanta Kumari Debi.*

[2] ('27) 14 AIR 1927 Pat 49 (51): 97 Ind Cas 637 (DB), *Gopalacharyya Gowswami* v. *Bhim Kali Chaudhury.*

('09) 3 Ind Cas 93 (96) (Cal), *Jnananjan Banerjee* v. *Adoremony Dassee.*

('30) 17 AIR 1930 Pat 455 (472) : 9 Pat 885 : 127 Ind Cas 817 (DB), *Naurangi Lal* v. *Ram Charan Das.*

('26) 13 AIR 1926 All 392 (393) : 48 All 348: 93 Ind Cas 652 (DB), *Chitar Mal* v. *Panchu Lal.*

[*See also* ('32) 19 AIR 1932 Mad 328 (333) : 137 Ind Cas 487, *Periyanan Chetty* v. *Govind Rao.*)]

31. "Within the same period after the disability has ceased." — In cases coming within its scope, this section enables the person under disability to sue or apply for execution within the same time from the cessation of disability as would have otherwise been allowed from the time specified in the third column of the first schedule. This provision is controlled by S. 8 which provides that the period of limitation cannot be extended under this section for more than three years from the cessation of the disability or the death of the person affected by it. For the combined effect of the two sections, see Notes under section 8.

The expression "after the disability has ceased" shows that in calculating extra period allowed under this section, the date on which the disability ceases must be excluded.[1]

See also Notes 32 and 33 below.

32. Section does not prevent running of limitation against person under disability. — The provision that in cases coming under this section the suit or application may be filed within the same period *after* the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule, does not mean that limitation does not run at all during the continuance of the disability. The provision only means that the person under disability is entitled to an *extension* of time till the expiry of the period mentioned in the first schedule calculated from the cessation of his disability (subject to the limits imposed by S. 8). Hence, when a person enters into possession in assertion of a title hostile to that of the person under disability, limitation begins to run from the date of his entering into possession and is not postponed till the cessation of disability.[1]

Illustration.

V, a Hindu who was insane, was entitled to certain properties. *B*, his wife, acting as his guardian, transferred certain properties to *C* without any proper justification. *V* then died as an insane person and was succeeded by his widow *B*. After *B's* death, *S*, a reversioner of *V*, sued the transferee for the recovery of the properties. *C* asserted that the suit was barred by limitation as he had been in adverse possession from the date of the transfer and as more than twelve years had elapsed from such date. *S* contended that as *V* had been a lunatic, limitation

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Note 31

[1] ('84) 10 Cal 748 (751) : 8 Ind Jur 673 (DB), *Jugmohun Mahto* v. *Luchmeshur.*

Note 32

[1] ('22) 9 AIR 1922 Mad 12 (15) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetaramaraju* v. *Subbaraju.*
('03) 27 Bom 515 (534) : 5 Bom L R 274 (DB), *Thakore Fatesingji* v. *Bamanji.*
('20) 7 AIR 1920 Mad 793 (798, 800) : 52 Ind Cas 725 (DB), *Narasimha* v. *Krishnachandra.*
('09) 4 Ind Cas 854 (855) : 1909 Pun Re No. 100 (DB), *Shamier* v. *Ladha Singh.*
('28) 15 AIR 1928 Oudh 481 (482) : 113 Ind Cas 258, *Mt. Ram Dulari* v. *Sher Bahadur Singh.*

NOTE. — There is, however, a conflict of views on the question whether there *can* be adverse possession against a minor or other person under disability—For this see Note 24 under Arts. 142 and 144.

could not have begun to run during his lifetime and as a reversioner he *(S)* was not bound by the limitation that might have run as against the widow. The contention was overruled and it was held that the lunacy of *V* did not prevent the running of limitation against him.[2]

It is apprehended that on the above principle, where a right to sue accrues to a person under disability in respect of a certain property and such property is afterwards transferred by him to another, limitation as against the assignee must be calculated not from the date of the assignment but from the date on which it would ordinarily have begun to run. (See Note 40.)

Suppose that a right to sue accrues to a minor in 1910 and that the ordinary period of limitation for the suit (six years) expires in 1916. The minor attains majority in 1918. Under this section read with S. 8, he has a period of three years from 1918 within which to bring his suit. But the minor dies in 1919. A suit by his legal representative brought subsequently will be time-barred, though three years may not have elapsed from 1918. The reason for this is that the extension of time under this section is a *personal privilege* conferred on the minor and is not available to persons deriving their right to sue from the minor (see Note 42). But the example also shows that limitation begins to run even *before* the date of the attainment of majority by the minor. For, otherwise, a suit brought within the period of limitation calculated from the attainment of majority must be within time although brought by the legal representative and not by the minor himself.

33. Privilege under section is not confined to proceedings instituted after the cessation of disability. — This section provides that in cases coming under it, the suit or application may be filed within the same period *after* the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. This does not mean that a suit or application filed *before* the cessation of disability will be time-barred if filed after the expiry of the ordinary period of limitation. The provision simply means that limitation is extended till the expiry of the period mentioned in the first schedule calculated from the cessation of disability. Hence, a suit or application filed on behalf of a person under disability by his next friend during the continuance of the disability but after the expiry of the ordinary period of limitation will also be saved under the provisions of this section.[1]

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[2] ('22) 9 AIR 1922 Mad 12 (15, 16) : 45 Mad 361 : 70 I. C. 678, *Seetaramaraju* v. *Subbaraju*.
[*See also* ('28) 15 AIR 1928 Oudh 481 (482) : 113 Ind Cas 258, *Mt. Ram Dulari* v. *Sher Bahadur Singh*.]

Note 33

[1] ('39) 26 AIR 1939 Pat 33 (34, 35) : 177 Ind Cas 713 (DB), *Parmeshwari Singh* v. *Ranjit Singh*. (1 Cal 226 followed.)
('75) 1 Cal 226 (243) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (PC), *Phoolbas Koonwar* v. *Lalla Jogeshur*.
('99) 23 Bom 544 (549) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (PC), *Bhagwandas Mitharam* v. *Rivett-Carnac*. (Suit on behalf of minor heir by Administrator-General.)

34. Acquisition of prescriptive title against person under disability. — Under S. 28, it is provided that at the determination of the period limited to any person for bringing a suit for the possession of any property, his right to such property shall be extinguished. Where the person entitled to sue is under a disability mentioned in this section and is entitled to an *extension* of limitation under it, his right cannot be extinguished until the expiry of such *extended* period.[1]

('87) 9 All 411 (413) : 1887 All W N 58 (DB), *Baldeo Singh* v. *Kishan Lal.*
('83) 1883 All W N 63 (63) (DB), *Har Gobind* v. *Srikishen.*
('69) 1 N W P H C R 122 (123) (DB), *Ram Autar* v. *Dhunee Ram.*
('30) 17 AIR 1930 Bom 593 (593) : 128 Ind Cas 430, *Kashinath Rajaram Somani* v. *Govind Shankar Jinsiwalla.*
('93) 20 Cal 714 (716) (DB), *Lolit Mohun* v. *Janoky Nath.*
('83) 9 Cal 181 (182) : 11 Cal L R 34 : 5 Shome L R 135 (DB), *Mon Mohun Buksee* v. *Gunga Soondery Dabee.*
('84) 10 Cal 748 (756) : 8 Ind Jur 673 (DB), *Jagmohan Mahto* v. *Luchmeshur Singh.* (9 Cal 446 dissented from.)
(1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sundar.*
('81) 7 Cal 137 (139): 8 Cal L R 306: 5 Ind Jur 644, *Khodabux* v. *Budree Narain.*
('96) 23 Cal 374 (388) (DB), *Norendra* v. *Bhupendra.*
('98) 3 Cal W N 24 (27, 28) (DB), *Guneshwar Singh* v. *Jagadhatri Pershad.*
('98) 2 Cal W N cvi (cvii) (DB), *Manmatho* v. *Manohar Mukerjee.* (13 Mad 236 and 17 Mad 189 distinguished.)
('03) 7 Cal W N 594 (595) (DB), *Shamachurn Hui* v. *Kanangai Chaitan Prosad.*
('67) 7 Suth W R 161 (162) (DB), *Ram Chundra Roy* v. *Umbica Dossia.*
('69) 11 Suth W R 468 (472) : 3 Beng L R A C 145 (DB), *Tarinee Churn Chowdhry* v. *Sharoda Sunduree Dossee.*
('70) 14 Suth W R 429 (429) (DB), *Ram Ghose* v. *Greedhur Ghose.*
('72) 17 Suth W R 419 (419) (DB), *Sreemutty Suffuronnissa Bibee* v. *Moonshee Noorul Hossein.*
('66) 6 Suth W R 19 (20)(DB), *Shahzada Woola Gowhur* v. *Mt. Shah Rukh Begum.*
('34) 21 AIR 1934 Lah 908 (908) : 154 Ind Cas 603 (DB), *Sarwan Singh* v. *Mt. Basanti.*
('29) 16 AIR 1929 Lah 661 (662) : 117 Ind Cas 909, *Padha Madho Pershad* v. *Ghanaya Lal.*
('10) 6 Ind Cas 488 (489) (Lah), *Gujjar Mal* v. *Sita Ram.*
('81) 1881 Pun Re No. 112, *Ganda* v. *Jawand Singh.* (Suit by minor to contest alienation assented to by mother as guardian.)
('85) 1885 Pun Re No. 91 (FB), *Rihana* v. *Harditta.*
('81) 1881 Pun Re No. 103, *Mt. Sarwar Jan* v. *Dina.*
('29) 16 AIR 1929 Mad 394 (396) : 119 Ind Cas 39 (DB), *Mannarswamy Iyer* v. *Ramaswamy Naicken.*
('94) 9 C P L R 9 (10), *Balkishen* v. *Khuman.*
('88) 2 C P L R 184 (185), *Agarsingh* v. *Lakhi.*
('12) 15 Ind Cas 366 (367) : 6 Low Bur Rul 52 (DB), *Ma Sein Hnyin* v. *C. S. Lutchman Chetty.* (Minor's application asking to be brought on record as legal representative.)
('36) 23 AIR 1936 Sind 84 (84, 85) : 30 Sind L R 30 : 163 Ind Cas 379 (DB), *Sainbux* v. *Alibux.* (Application for execution by Court of Wards.)
('36) 23 AIR 1936 All 152 (153) : 161 Ind Cas 330, *Ramesh Chandra* v. *Firm Kashi Ram Bhajan Lal.*
[But see ('70) 14 Suth W R 339 (348) (DB), *Sudaburt Pershad Sahoo* v. *Lotf Ali Khan.* (Submitted not correct.)]

Note 34

[1] ('35) 22 AIR 1935 Lah 924 (925, 926) : 160 Ind Cas 557, *Nawab* v. *Lachhman Singh.* (Sale of minor's property by unauthorized person — Minor can sue for possession within three years after attaining majority.)

35. Effect of existence of guardian for person under disability. — The mere fact that there is a guardian for the person under disability does not deprive such person of the indulgence granted by this section.[1] Nor is the extended period under the section inapplicable to a proceeding instituted by a *guardian* on behalf of a minor or other person under disability during the continuance of the disability.[2] But, where the person really entitled to sue or apply at the commencement of limitation is the guardian and not the minor (or other person under disability), the section will not apply merely because the suit or application would be for the benefit of the person under disability. Thus, where a document is executed in favour of a guardian in his own name, this section will not apply to a suit by the guardian on the document, although the party beneficially interested

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('01) 24 Mad 387 (395) : 28 Ind App 81 : 7 Sar 819 (PC), *Vasudeva Padhi* v. *Maguni Devan.*

('10) 5 Ind Cas 84 (84, 85) : 33 Mad 366 (DB), *Annayyan* v. *Chinnan.*

Note 35

[1] ('38) 25 AIR 1938 Pat 92 (93) : 174 Ind Cas 193, *Satyendra Narain Sinha* v. *Pitamber Singh.* (Application by guardian of minor for execution of decree obtained on his behalf dismissed as time-barred — Minor is not precluded from applying for execution of decree within statutory period of three years from date of his attaining majority.)

('05) 32 Cal 129 (142) : 31 Ind App 203 : 6 Bom L R 765 : 8 Cal W N 809 : 1 All L Jour 585 : 8 Sar 698 (PC), *Jagadindra Nath Roy* v. *Hemantha Kumari Debi.*

('75) 1 Cal 226 (243) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (PC), *Phoolbas Koonwur* v. *Lalla Jogeshur.* (He need not wait till cessation of disability.)

('83) 9 Cal 181 (182, 183) : 11 Cal L R 34 : 5 Shome L R 135 (DB), *Mon Mohun Buksee* v. *Gunga Soondery.* (His disability does not cease because he makes application for execution through guardian.)

('07) 6 Cal L Jour 383 (394) (DB), *Harihar Pershad* v. *Bholi Pershad.*

('05) 1 Cal L Jour 96 (S N), *Sawdagore Sahu* v. *Jagger Nath Pershad.*

('70) 14 Suth W R 339 (348) (DB), *Sadaburt Pershad Sahoo* v. *Lotf Ali Khan.* (But it was held that he cannot derive advantage from disability till he comes of age.)

('83) 7 Bom 179 (180) : 7 Ind Jur 373 (DB), *Jagjivan Amirchand* v. *Hasan.*

('66-67) 4 Bom H C R A C 199 (201), *Mahipatrav Chandrarav* v. *Nensuk Anandrav Shet Marvadi.*

('34) 21 AIR 1934 All 434 (435) : 148 Ind Cas 1166 (DB), *Musi Imran* v. *Collector of Bijnore.* (Lunatic is protected under S. 6 as long as he is under disability— Mere fact that there was guardian on his behalf, who could have sued earlier, will not deprive him of the protection.)

('81) 4 Mad 119 (120) (DB), *Anantharama Ayyan* v. *Karuppanan.* (Fact that minor has guardian does not remove his disability.)

('29) 16 AIR 1929 Lah 661 (662) : 117 Ind Cas 909, *Padha Madho Parshad* v. *Ghanaya Lal.*

('13) 21 I.C. 365 (367) : 16 Oudh Cas 206, *Jagat Narain* v. *Mt. Narbada Kunwar.*

('36) 23 AIR 1936 Pat 194 (196) : 158 Ind Cas 25, *Ram Das* v. *Ram Babu.* (Minor proprietor trading under trade-name through manager—Hundi in favour of proprietor in trade-name becoming payable during minority—Proprietor held entitled to benefit of S. 6, Limitation Act, though manager could sue.)

('92) 16 Bom 536 (537) (DB), *Moro Sadashiv* v. *Visaji Raghunath.*

('93) 20 Cal 714 (716) (DB), *Lolit Mohun* v. *Janoky Nath.*

('99) 3 Cal W N 24 (28) (DB), *Guneshwar Singh* v. *Jagdhatri Pershad.*

('96) 23 Cal 374 (388) (DB), *Norendra Nath* v. *Bhupendra Narain.*

[2] See Note 33.

may be a minor or other person under disability.[3] But, if a document is executed in favour of a minor (or other person under disability) or in favour of a minor by his guardian, this section will apply to a suit by the minor on the document.[4] See also Notes 36 to 39.

36. Estate of minor under management of Court of Wards. — Where the property of a minor is under the management of the Court of Wards, the person entitled to sue in regard to the property is the *minor* and not the manager of the Court of Wards, though the suit may be in the name of such manager. Hence, where a decree is passed in favour of minors whose property is under the management of the Court of Wards, the fact that the decree stands in the name of the manager of the Court of Wards is no ground for denying the minors the extension of limitation conferred by this section.[1]

37. **Appointment of administrator to estate of person under disability.** — See Note 3.

38. Estate of minor in hands of executor. — Where a testator has appointed an executor who is in charge of an estate and a right to sue accrues to the executor as such, the mere fact that the person beneficially entitled to the estate is a minor does not enlarge the period of limitation under this section. The reason is that the right of suit is vested in such cases in the executor and not the beneficiary and this section only applies to the disability of the person entitled to sue. Hence, if the executor fails to sue within the ordinary period of limitation, the minor beneficiary cannot subsequently do so, claiming the benefit of this section.[1] See also Notes 35 and 39.

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[3] ('27) 14 AIR 1927 Bom 61 (63): 50 Bom 831: 100 I. C. 95 (DB), *Pandharinath Manikshet* v. *Ajamkha.*

('86) 10 Bom 241 (242) (DB), *Yeknath Ramchandra* v. *Waman Brahmadev.* (If promissory note is taken in the name of minor alone, he would have three years from attaining his majority within which to sue.)

('03) 7 Cal W N 594 (595) (DB), *Shamachurn Hui* v. *Kanangai Chaitan Prosad.* (Mortgage in favour of guardian acting for a minor—Suit by him, in same capacity, on mortgage—Section applies.)

('24) 11 AIR 1924 Bom 468 (468) : 80 Ind Cas 474, *Vishnu Narain* v. *Keshav Gajanan.* (Section does not apply to suit on promissory note taken by the guardian of minor who alone (and not the minor) can sue on it—Following 28 Mad 205.)

('36) 23 AIR 1936 Pat 194 (196) : 158 Ind Cas 25 (26, 27) (DB), *Ram Das* v. *Ram Babu.* (*Held*, that in the circumstances, the minors were the real parties to the suit transactions and that the section applied.)

('12) 14 Ind Cas 694 (697) (Cal), *Sarat Chandra* v. *Sudhan Hari.* (Do.)

('05) 28 Mad 205 (207): 15 Mad L Jour 249 (DB), *Ramanuja* v. *Sadagopa.* (*Held*, in the circumstances the minor was not the holder or payee of the pro-note and hence section did not apply.)

[4] See cases cited in foot-note 3.

Note 36

[1] ('36) 23 AIR 1936 All 63 (64) : 160 Ind Cas 275, *L. Dina Nath* v. *Collector of Farrukabad.*

[*See also* ('36) 23 AIR 1936 Sind 84 (85) : 30 Sind L R 30 : 163 Ind Cas 379 (DB), *Sainbux* v. *Ali Bux.*]

39. Appointment of receiver to estate of person under disability. — Suppose, after a cause of action in respect of an estate has accrued to a minor, a receiver is appointed to his estate. What is the period of limitation for a suit by the receiver? Is the receiver entitled to the extended period of limitation that would have applied to a suit by the minor himself? If the receiver fails to sue within the ordinary period of limitation, is the minor entitled to the extended period under this section in respect of a suit which he brings subsequently?

The question arose before the Calcutta High Court in *Raj Kumar Girija Nandan* v. *Kanhiya Prasad*.[1] In that case, it was held that if the receiver failed to sue within the *ordinary* period of limitation, the suit by the minor subsequently would also be barred though the extended period to which he was originally entitled under this section had not expired. The decision assumes that the limitation that would have applied to a suit by the receiver is the *ordinary* period. It is held that on the appointment of the receiver the right to sue becomes completely vested in the receiver, so that he can give a complete discharge to the debtor. If he fails to sue within the period of limitation, the suit becomes completely barred and the minor cannot afterwards sue, though the extended period to which he was originally entitled has not expired.

It is doubtful whether the above decision of the Calcutta High Court is correct in view of the decision of the Privy Council in *Bhagwandas* v. *Rivett-Carnac*.[2] In that case, a cause of action had accrued to the minor heir of a deceased person and thereafter an administrator was appointed to the estate of the deceased. In a suit by the administrator on behalf of the estate brought after the ordinary period of limitation, it was held by the Privy Council that the suit was not barred by limitation as it was a suit *on behalf of the minor heir*. It is apprehended that the principle of this decision is also applicable to the case of receivers. Hence, where a receiver is appointed to the estate of a minor, a suit by the receiver on a cause of action arisen before his appointment as receiver must, it is apprehended, be deemed as a suit *on behalf of the minor* and, as such, governed by the same period as would have been applicable to a suit by the minor himself. If so, the failure of the receiver to sue within the ordinary period of limitation would not bar a suit by the minor so long as the extended period of limitation under this section has not expired.

Note 38

[1] ('24) 11 AIR 1924 Pat 721 (732) : 83 Ind Cas 812 : 3 Pat 880 (DB), *Kesho Pershad Singh* v. *Madho Prasad Singh*.

Note 39

[1] ('14) 1 AIR 1914 Cal 35 (36) : 20 Ind Cas 701 (DB).
See also Section 7 Note 9.

[2] ('99) 23 Bom 544 (549) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (P C).

Section 6
Note 40

40. Whether extension of time under the section can be claimed by assignee from person under disability.— The right to an extension of time under this section is a purely *personal* right which is confined to the person under disability. The right is not *attached to the cause of action* of the person under disability. Hence a person deriving his right to sue from the person under disability, like an assignee from him of the property which is the subject-matter of the suit, is not entitled to claim that, with reference to a suit or application by him, the extended period that would have applied to a suit by the person under disability himself should be applied.[1] Thus, suppose adverse possession commences against a minor in 1905, and in 1910 the minor transfers to another person his right to the property which is the subject-matter of the adverse possession. Limitation for a suit for possession by the transferee runs from 1905

Note 40

[1] ('38) 25 AIR 1938 Bom 358 (359) : 177 Ind Cas 475, *Bandu Annaji* v. *Yeshwant Ram Rao*.

('83) 9 Cal 663 (666, 667) : 12 Cal L R 269 (FB), *Rudra Kant* v. *Nobo Kishore*.

('98) 25 Cal 409 (412) (DB), *Harakchand* v. *Deonath Sahay*.

('02) 26 Bom 730 (733) : 4 Bom L R 513 (DB), *Mahadeo* v. *Babi*.

('19) 6 AIR 1919 Cal 893 (894) : 46 Ind Cas 802 (DB), *Bhagaban Chandra* v. *Ishan Chandra Kaibarta Das*.

('18) 5 AIR 1918 Lah 374 (375) : 44 I C 890, *Hukam Singh* v. *Shahab Din*.

('35) 22 AIR 1935 Bom 420 (420, 421) : 159 Ind Cas 272, *Mariyayya Shidramayya* v. *Chanvirangouda*. (Suit for arrears of rent accumulated in favour of a minor Hindu widow—Suit brought by son adopted by her—Assuming he is entitled to sue, he *derives* his right to sue but is not entitled to extended period under this section which would have applied if the widow herself were suing. However, assumption that adopted son is entitled to sue and derives his right to sue from widow is not right—Rent being income from the estate, widow is absolutely entitled to it and right to rent is her personal right and is not annexed to the estate—Hence, adopted son on adoption does not get any right to sue for such rent.)

('19) 6 AIR 1919 Mad 317 (318, 320) : 42 Mad 637 : 50 Ind Cas 380, *Rangasamy Chetty* v. *Thangavelu Chetty*. (On principle *expressio unius personæ vel rei, est exclusio alterius*.)

('14) 1 AIR 1914 Oudh 339 (340) : 18 Oudh Cas 34 : 27 Ind Cas 118, *Imam Uddin* v. *Mt. Mumtazunnissa*. (But transferee can maintain suit if he brings it on date of transfer.)

('88) 1888 All W N 183 (183) (DB), *Kedar Nath* v. *Lachman Das*.

('01) 1901 All W N 12 (14), *Batuk Dayal Singh* v. *Basant Ram*.

('75) 24 Suth W R 181 (182) : 15 Beng L R 357 (DB), *Md. Arsad* v. *Eakoob Ali*.

('26) 13 AIR 1926 Oudh 20 (20) : 90 Ind Cas 741, *Sitle Bux* v. *Ram Newaz*.

('22) 9 AIR 1922 Oudh 81 (32, 33) : 66 Ind Cas 101 (DB), *Muhammad Nur Khan* v. *Lachmi Narayan*. (Obiter in A I R 1914 Oudh 339, that transferee can bring suit on date of transfer, dissented from.)

('02) 5 Oudh Cas 197 (200), *Mata Din* v. *Ali Mirza*.

[But see ('05) 2 Cal L Jour 87 (90) : 9 Cal W N 795 (DB), *Harek Chand Babu* v. *Maharaj Dhiraj Bijoy Chand Mahatab*. (Per Harrington, J.—Widow adopting son after commencement of adverse possession against her — Widow minor at time of commencement of adverse possession — Adopted son becomes clothed with all her rights and he can sue within the extended period that would have applied to her if she herself were suing—Submitted view is wrong on both points involved—Adopted son does not derive right to sue from widow and assuming he does so, he is not entitled to extended period applicable to widow.)]

and he is not entitled to any extension of limitation on account of the minority of the transferor. See also Note 32.

Where, however, after a right to sue in respect of a property accrues to A, a minor, the property is transferred to B *in trust for* A, it is apprehended that B will be entitled to the benefit of the extended period of limitation that would have applied to a suit by A himself. See Notes 34 and 39.

Where A, a minor after attaining majority assigns his right to B to recover property transferred during his minority, a suit by B jointly with A within three years of A attaining majority will not be barred by limitation as the minor A does not lose his right to be joined as co-plaintiff in a suit to recover possession of the property even after the transfer.[2]

41. Whether period extended under this section is "period prescribed" for suit or application.—Various sections of the Act use the expression "period prescribed" for a suit or other proceeding. (See Ss. 4, 5, 12 to 16, 19, 20 and 28.) The question arises whether the period extended under this section is a "period prescribed" for a suit or other proceeding within the meaning of such sections. Thus, S. 4 provides that when the period *prescribed* for a suit or other proceeding expires on a holiday, the suit or other proceeding may be filed on the next working day. Suppose, the period expiring on a holiday is not the period specified in the first schedule but the additional period to which the plaintiff or applicant is entitled under this section. The question arises whether S. 4 applies to such cases so as to entitle the plaintiff or applicant to file the proceeding on the next working day. Similarly, under S. 19, if, before the expiry of the period of limitation prescribed for a suit or application, the debtor acknowledges in writing his liability, the creditor will be entitled to a fresh starting point of limitation from the date of such acknowledgment. Suppose, the acknowledgment of liability is made *after* the expiry of the period mentioned in the first schedule but *before* the expiry of the extended period under this section. The question arises whether S. 19 will apply to such cases so as to give the plaintiff or applicant a fresh start of limitation from the date of the acknowledgment.

On this question, there is a conflict of decisions. One view is that the additional period to which the plaintiff or applicant is entitled under this section is a "period prescribed" for the suit or application.[1] Accordingly, under this view, the liberty of filing a suit or other proceeding on the next working day under S. 4 will apply not only to cases where the period *fixed in the schedule* expires on a holiday but also to cases where the additional period under this section expires on a holiday.[2] Similarly (it is conceived), S. 19 will furnish a fresh starting point of limitation not only where the acknowledgment of liability by the debtor is made before the expiry of the period mentioned in the first schedule but also where such acknowledgment is made after the expiry of such period but before the expiry of the extended period under this section.[3] The view proceeds on the reasoning that inasmuch as the period of limitation for a suit or other proceeding is determined not only with reference to the relevant article in the schedule but also with reference to the particular section of the Act that may apply to the case, the expression "period prescribed" for a suit or other proceeding must mean the period prescribed by the particular article in the schedule read with the sections of the Act. This view receives support from the Privy Council decision in *Maqbul Ahmad* v. *Onkar Pratap*[4] in which it was held that the expiration of a period computed in accordance with S. 14 of the Act was the expiration of a "period prescribed" within the meaning of S. 4 of the Act.

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[2] ('38) 25 AIR 1938 Bom 358 (360) : 177 I. C. 475, *Bandu Annaji* v. *Yeshwant Ram Rao.* (The principle of the decision in A I R 1925 Bom 292, a case under Article 44, was applied.)

Note 41

[1] See cases cited in foot-notes (2) and (3) below.

According to the contrary view, the additional period to which a plaintiff or applicant may be entitled under this section is not a "period prescribed" for the suit or application.[5] Thus, under this view, an acknowledgment of liability made after the expiry of the period fixed in the schedule but before the expiry of the extended period under this section will not furnish a fresh starting point of limitation under S. 19.[6] Similarly, the extended period under this section will not be the "period prescribed" for a suit within S. 15 sub-s. (2).[7] This view is based on the reasoning that "prescribed" means prescribed by the schedule and not otherwise. It is submitted that this view is no longer good law after the Privy Council decision referred to above.

42. Clause (3): Death of person under disability. — This clause provides that if the person under disability dies *before* the cessation of the disability, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time "prescribed therefor in the third column of the first schedule." In other words, the legal representative will have a *fresh* start of limitation from the death of the person under disability.[1] Suppose, the person (originally) under disability dies *after* the cessation of disability but before the expiry of the extended period to which he would have been entitled under this section. This clause will obviously not apply to such a case and the legal representative will not have a *fresh* start of limitation from the death of his predecessor. The question arises whether the legal representative can in such cases institute the suit or make the application within the extended period which would have applied to a suit or application by the deceased person himself. On this question there is a conflict of decisions. On the one hand, the Madras[2] and Calcutta[3] High Courts have expressed the view that the legal representative cannot avail himself of the extended period applicable to the deceased person. But the Bombay High Court has taken a contrary view, holding that the specific provision in this clause does not negative the right of the legal representative to stand in the shoes of the deceased person and sue within the extended period that would have applied to the deceased himself.[4] It is submitted that this latter view is not correct. The right to an extended period of limitation under this section is, as has been seen already, a purely *personal* exemption and is *not attached to the cause of action* so as to be available to anyone who may become entitled to sue on the cause of action. See Note 40.

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[2] ('24) 11 AIR 1924 Oudh 385 (387): 81 Ind Cas 484 (DB), *Bans Bahadur Singh* v. *Mt. Sakalraj Kuar.* ('Prescribed' means prescribed by Act and not merely by first schedule.)
('32) 19 AIR 1932 Mad 139 (141) : 135 Ind Cas 587 : 55 Mad 286, *Naganna* v. *Krishnamurthy.* (Affirming on L. P. A., A I R 1928 Mad 1255.)
See also Section 4 Note 9.

[3] *See* ('30) 17 AIR 1930 Mad 991 (994): 128 I. C. 867 : 54 Mad 445 (DB), *Somi Setti Seshayya Chetty* v. *Subbadu.* (Acknowledgment made after the original period but during the period of grace under S. 31 (now repealed) is sufficient.)
('27) 14 AIR 1927 All 114 (115) : 98 Ind Cas 1005 : 49 All 67 (DB), *Sheo Pratab Singh* v. *Tajammal Hussain.* (Do.)
('30) 17 AIR 1930 Bom 187 (189): 124 Ind Cas 791 (DB), *Dunichand Bishandas* v. *Comptoir National D'Escompte D'Paris.* (Acknowledgment made after expiry of original period specified in schedule but during the period deductible under S. 14 is sufficient to give a fresh starting point of limitation under S. 19.)
See also Notes under Section 19.

[4] ('35) 22 AIR 1935 P C 85 (87, 88) : 155 I. C. 205 : 62 I. A. 80 : 57 All 242 (PC).

[5] See cases cited in foot-notes (6) and (7) below.

[6] ('28) 15 AIR 1928 Bom 319 (320, 321) : 52 Bom 521 : 112 Ind Cas 24 (DB), *Maganlal Harjibhai* v. *Amichand Gulabji.*

[7] ('20) 7 AIR 1920 Mad 793 (798, 799) : 52 Ind Cas 725 (DB), *Narasimha Deo Garu* v. *Krishnachandradeo.*

In this connexion it may be noted that the language of the corresponding section (S. 11) of the Act of 1859 was different. Under that section it was provided that in the case of the disability of the person entitled to sue, he *or his representative* might sue within the extended period allowed under the section. The language of cl. (1) of this section, on the other hand, confines the right of suing within the extended period to the person under disability.

Where a minor Hindu widow adopts a son and the adopted son succeeds to her estate, there is no *death* of the minor widow within the meaning of this clause and the adopted son (assuming that his cause of action is the same as that of the widow) is not entitled to a fresh period of limitation from the date of his adoption.[5]

Note 42

[1] ('22) 9 AIR 1922 Mad 12 (15, 16) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetaramaraju* v. *Subbaraju*. (Fact that legal representative has only limited estate does not stop running of time.)

[2] ('29) 16 AIR 1929 Mad 313 (320) : 118 Ind Cas 481 (DB), *Raja Ramasamy* v. *Govindammal*.

[3] ('83) 9 Cal 663 (667) : 12 Cal L R 269 (FB), *Rudra Kant Surma* v. *Nobo Kishore Surma*. (Case of assignee.)

[4] ('16) 3 AIR 1916 Bom 107 (107) : 40 Bom 564 : 37 Ind Cas 221, *Arjun Ramji* v. *Ramabai Raoji Vithoba*.

[5] ('35) 22 AIR 1935 Bom 420 (421) : 159 Ind Cas 272, *Mariyayya Shidramayya* v. *Chanvirangouda*. (Suit for arrears of rent under lease by minor widow—Widow

Where, after the commencement of adverse possession against a lunatic, he dies as a lunatic, his widow as his legal representative will be entitled to sue within three years from the date of his death, under this section read with S. 8. But, if the widow fails to sue within the period of three years, the reversioner succeeding to the estate afterwards will not be entitled to a fresh start of limitation from the death of the widow.[6]

See also Section 8 Note 4.

43. "Legal representative." — The expression "legal representative" is not defined in the Act. Nor is it defined in the General Clauses Act. But the expression is defined in Civil Procedure Code, S. 2, sub-s. (11). It is apprehended that the two Acts being *in pari materia*, the definition in the Civil Procedure Code may be taken as applicable to this Act also.[1] The said definition runs as follows :

> " 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

The above definition must be taken as subject to the provisions of S. 211, Succession Act, 1925. That section reads as follows :

> "(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.
>
> (2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person."

The combined effect of the two provisions is that except in cases coming under sub-s. (2) of section 211 where there is an executor or administrator, such executor or administrator alone is the legal representative of the deceased. Where there is no executor or administrator as a general rule, the heir or legatee of the deceased will be the legal

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adopting plaintiff—Suit by plaintiff for arrears—Plaintiff not entitled to sue within the extended period applicable to the widow—Submitted that the decision though correct, proceeds on incorrect reasoning — In such case the adopted son (or reversioner) would have no right to sue at all, the right to the rent being entirely the personal right of the widow which does not vest in the adopted son or reversioner—It is therefore not correct to treat the suit by the adopted son as based on the same cause of action—The proper ground for rejecting the suit is that the adopted son has no right to sue for the arrears during the widow's lifetime—In this view, the general principle that the adopted son gets an independent right to sue for the estate on the adoption is not affected.)

[6] ('22) 9 AIR 1922 Mad 12 (16) : 45 Mad 361 : 70 I. C. 678 (DB), *Seetaramaraju* v. *Subbaraju*. (Fact that widow has only limited estate does not stop running of time.)

Note 43

[1] *See* ('25) 12 AIR 1925 Pat 1 (8) : 3 Pat 371 : 78 Ind Cas 200 (FB), *Balmukund Marwari* v. *Basanta Kumari Dasi*. (The Code of Civil Procedure and the Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day — They are statutes *in pari materia* and are to be taken together as forming one system and as interpreting and enforcing each other—Overruled in A I R 1934 Pat 246 (FB) on another point.)

representative of the deceased in respect of the property got by him.[2] Where the executor refuses to accept office, the heir-at-law of the deceased will be the legal representative of the deceased and can sue on behalf of the estate.[3]

For other instances of provisions of the Act in which the expression "legal representative" occurs, reference may be made to Ss. 10 and 17 and Arts. 176 and 177. It may be noted that in S. 10 the expression is used as distinct from "assigns," showing that the term "legal representative" can properly apply only to those persons who represent the estate of a *deceased* person and will not apply to a transferee of property *inter vivos*.[4]

See also the Author's Commentaries on the Civil Procedure Code (3rd Edition) O. 22 R. 3 Note 10.

44. Clause (4) : Minority or other disability of legal representative. — This clause applies to the same class of cases as is referred to in clause (3), viz., cases in which the person under disability dies *before* the cessation of the disability. In such cases, if the legal representative of the deceased is, at the date of the death, under any disability, he will be entitled to have the period of limitation computed from the cessation of his disability.[1] But the clause does not apply to cases where the death of the person originally entitled to sue or apply occurs *after* the cessation of the disability. Hence, the disability of the legal representative at the time of such death is no ground for extending in his favour the period of limitation.[2] Under the corresponding section in the Act of 1871, the minority or other disability of the legal representative was not a ground for extension of limitation even in cases in which his predecessor had died during the continuance of his disability.[3]

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[2] ('04) 8 Cal W N 843 (856) (DB), *Dinamoni* v. *Elaha Dut Khan.* (Heir.)

('93) 17 Bom 758 (770) (DB), *Mani Lal Rewadat* v. *Bai Rewa.* (Decree for maintenance obtained by wife against husband — Appeal by husband — Death of wife pending appeal—Daughter is her legal representative for purposes of appeal.)

[*See* ('23) 10 AIR 1923 Mad 237 (237) : 45 Mad 872 : 68 Ind Cas 942 (DB), *Subbarayudu* v. *Ramadasu.* (Legatee.)]

[But see ('38) 25 AIR 1938 Mad 157 (160) : I L R (1938) Mad 533 : 174 Ind Cas 638 (DB), *Sivasankara Mudaliar* v. *Amaravathi Ammal.* (A legatee does not represent the estate and he has no direct right of action against the person who is claiming adversely to the estate.)]

[3] ('38) 25 AIR 1938 Mad 157 (160) : I L R (1938) Mad 533 : 174 Ind Cas 638 (DB), *Sivasankara Mudaliar* v. *Amaravathi Ammal.*

[4] ('29) 16 AIR 1929 Oudh 353 (354) : 117 Ind Cas 452 (DB), *Bisheshur Dayal* v. *Bajrang Bahadur Singh.* (Auction purchaser in execution of decree against underproprietor is not his legal representative.)

('29) 16 AIR 1929 All 444 (446) : 121 I. C. 689 (DB), *Mithan Lal* v. *Maya Devi.*

Note 44

[1] ('16) 3 AIR 1916 Pat 120(121): 39 I.C.85 (DB), *Brij Behari* v. *Sheo Shankar.*

[2] ('68) 10 Suth W R 285 (285) : 1 Beng L R (S N) 21 (a) (DB), *Obhoya Durga* v. *Hurry Kristo Gope.*

[But see ('75) 23 Suth W R 214 (216) : 2 Ind App 113 : 15 Beng L R 10 : 3 Sar 430 : 3 Suther 94 (PC), *Amirtolal Bose* v. *Rajonee Kant Mitter.* (Under the Regulation in force prior to the Act of 1859, period of disability of successor was also to be deducted in such cases.)]

Disability of one of several plaintiffs or applicants.

7.* Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Illustrations.

(a) A incurs a debt to a firm of which *B, C* and *D* are partners. *B* is insane, and *C* is a minor. *D* can give a discharge of the debt without the concurrence of *B* and *C*. Time runs against *B, C* and *D*.

(b) A incurs a debt to a firm of which *E, F* and *G* are partners. *E* and *F* are insane, and *G* is a minor. Time will not run against any of them until either *E* or *F* becomes sane, or *G* attains majority.

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* **Act of 1877 : S. 8.**

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

Illustrations.

(a) A incurs a debt to a firm of which *B, C* and *D* are partners. *B* is insane and *C* is a minor. *D* can give a discharge of the debt without the concurrence of *B* and *C*. Time runs against *B, C* and *D*.

(b) A incurs a debt to a firm of which *E, F* and *G* are partners. *E* and *F* are insane, and *G* is a minor. Time will not run against any of them until either *E* or *F* becomes sane, or *G* attains majority.

Act of 1871 : S. 8.

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until they all are free from disability.

Act of 1859.

No corresponding provision.

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[3] ('75) 24 Suth W R 7 (8, 9), *Sookh Moyee Chowdhrain* v. *Raghobendro Narain.*

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Where one of several persons."
4. "Jointly entitled."
5. Applicability of section to proceedings for execution.

5a. Applicability of the section to period of twelve years fixed by S. 48 of the Civil Procedure Code.

6. Disability of one of several joint decree-holders.
7. "Is under any such disability."
8. Applicability of the first part of the section.
9. "Discharge," meaning of.
10. In what cases discharge can be given by one joint claimant without the concurrence of others.

10a. "Time will run against them all." See Note 2.

11. "Where no such discharge can be given."
12. "Time will not run."

12a. "As against any of them." See Note 2.

13. "Until one of them becomes capable of giving such discharge."
14. Whether the latter part of the section applies to cases in which one of the persons entitled to sue or apply is under a disability.
15. Competency of one joint decree-holder to give discharge on behalf of all.
16. Mitakshara joint family.
17. Suit to set aside alienation of joint family property — Manager's power to give discharge.
18. Suit by members of Mitakshara joint family for redemption of mortgaged property.
19. Suit by ward on attaining majority to set aside alienation by guardian.
20. Suit by members of Dayabhaga family.
21. Karnavan of Malabar Tarwad.

21a. Hindu reversioners challenging alienation by limited owner.

21b. Reversioners under Punjab Customary Law suing to set aside alienation by collateral.

22. Joint creditors.
23. Co-heirs.
24. Partners.
25. Joint trustees.
26. Joint executors or administrators.
27. Co-sharers entitled to sue for mesne profits.
28. Persons aggrieved by the same tortious act.
29. Effect of appointment of guardian for minor.

Other Topics (miscellaneous)

Cause of action and not substantive right should be joint. See Note 4.
Civil Procedure Code, O. 21 Rr. 1 and 2—'Decree-holder,' meaning. See Note 15.
Co-mortgagees. See Notes 4 and 22.
Co-mortgagors. See Notes 18 and 22.
Discharge by guardian. See Notes 9, 15 and 29.
Discharge — Not confined to pecuniary liability. See Note 9.
Joint tenants. See Notes 16 and 25.
Mahomedan co-heirs—Decree in favour of — Power of one to give discharge. See Notes 15 and 23.
Power of eldest male member to give discharge. See Notes 16, 17 and 21b.
Section not affected by Civil Procedure Code, O. 21 R. 15. See Note 15.
Sections 6 and 7. See Notes 2,5, 7 & 12.
Tenants-in-common. See Notes 4, 10, 20, 23, 24 and 27.
Tort. See Notes 11 and 28.

1. Legislative changes. — This section corresponds to S. 8 of the Acts of 1877 and 1871. There was no *special* provision in the Act of 1859 relating to cases where several persons were jointly entitled to sue and one or more of them were under a disability.

The changes made in the section since its introduction into the statute under the Act of 1871 may be noticed under the following heads:

1. Persons to whom the section applies :

The corresponding section in the Acts of 1871 and 1877 applied to

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Notes 1–2

"joint claimants or creditors." The present section applies to persons jointly entitled to institute a suit or make an application for the execution of a decree. As to the effect of the change, see Notes 4 and 5.

2. *Computation of time where discharge cannot be given without concurrence of person under disability :*

(a) Under the Act of 1871, it was provided that in such cases, time would not run as against any of the joint claimants until they all were free from disability.

(b) Under the Act of 1877, the words "until one of them becomes capable of giving such discharge without the concurrence of the others" were substituted for the words "until they all are free from disability" which occurred in the older section.

(c) Under the present section, the words substituted under the Act of 1877 are retained, but the words "or until the disability has ceased" have been added at the end of such words, thus adopting the language of both—the section in the Act of 1877 and that in the Act of 1871.

As to the effect of the changes, see Notes 11 and 14.

3. *Illustrations to the section :*

These were first introduced in the Act of 1877. (See Notes 3 and 14.)

2. Scope of the section. — This is one of the provisions which *extends* the periods of limitation laid down by the first schedule. The ground on which such extension is allowed, is the *disability* of one or more of several persons jointly entitled to sue or apply for execution. The section serves as a proviso to S. 6 and lays down a *special* rule for some of the cases dealt with by S. 6.

The peculiar feature about the section is that limitation under it is extended or not with reference to the *entire* body of persons jointly entitled to sue or apply.[1] The extension of limitation does not take place with reference to the person under disability alone. The first part of the section provides that if a discharge *can* be given by the claimant who is free from disability without the concurrence of the claimants who are under disability, then, there is no extension of limitation, and the ordinary period of limitation alone applies to *all* the joint claimants including those who may be under disability. The second part of the section provides that if such a discharge *cannot* be given without the concurrence of the person under disability, then, limitation will be extended with reference to *all* the joint claimants and not only with reference to the person under disability.

In the above provision, the Legislature has given effect to the principle that where several persons are jointly entitled to sue on the

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Section 7 — Note 2

[1] *See* ('29) 16 AIR 1929 Mad 894 (895) : 119 Ind Cas 39 (DB), *Mannarswamy Iyer* v. *Ramaswamy Nayakkan.*

same cause of action, such cause of action cannot be barred as to some of them and not barred as to the others.[2]

In *Varamma* v. *Gopaladasayya*,[3] Seshagiri Iyer, J., of the Madras High Court observed as follows :

> "The principle of that section (S. 7) is that if there are some persons in existence who are adults who could have *safeguarded* the common rights of themselves and of others similarly situated, the failure of the persons who are *sui juris* to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances."

Thus, his Lordship seems to consider that the capacity of some of the joint claimants to *sue* on the cause of action is the basis on which the section denies an extension of limitation in some cases notwithstanding the disability of some of the joint claimants. It is submitted that his Lordship's view does not seem to be correct. The test for determining whether there is to be an extension of limitation under the section or not is not whether one of the joint claimants can *sue* without joining the others but whether he can *give a discharge* without the concurrence of the others. (See Note 9.)

The section is controlled by S. 8 which serves as an exception both to it and to section 6. (See section 6, Note 2.)

3. "Where one of several persons." — The terms of the section refer to a case where *one* of several persons jointly entitled to sue or apply is under a disability. But illustration *(a)* to the section shows that it also applies where more than one of the persons jointly entitled to sue or apply are under a disability. Similarly, illustration *(b)* shows that the section applies *mutatis mutandis* even where *all* the persons jointly entitled to sue are under disability. (See also section 6, Note 8, and also Note 14.)

4. "Jointly entitled." — This section only applies to cases in which several persons are *jointly* entitled to institute a suit or make an application for the execution of a decree. The expression "jointly entitled" refers to cases in which the *cause of action* is common to a number of persons. The section does not apply to cases in which several persons, each having a *distinct* cause of action, are entitled to combine their causes of action in the same suit.[1]

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[2] ('02) 25 Mad 26 (35, 36) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.* (Cause of action being same for all the heirs it cannot be barred as to some of them and not barred as to the others — Sections 6 and 7 are based on this principle.)
[*See also* ('19) 6 AIR 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma* v. *Gopaladasayya.*]

[3] ('19) 6 AIR 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB).

Note 4

[1] ('18) 5 AIR 1918 Mad 724 (727) : 41 Mad 102 : 40 Ind Cas 664, *Kandasamy Naicken* v. *Irusappa Naicken.* (The section contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.)
('05) 28 Mad 479 (485, 486) : 15 Mad L Jour 363, *Harold Clive Johnson* v. *Porto Novo Cundasamy.* (Beneficiaries entitled to compensation under Fatal Accidents Act (Act XIII of 1855) are not persons entitled to claim compensation jointly, but are parties entitled to relief severally.)

But, it is not necessary that the *substantive right* of the parties should be joint. The section applies to cases in which, though the *substantive right* is not joint, the *right to sue or apply* is joint. Thus, where several persons are entitled to distinct interests in the substantive right, such right will not be joint. But, their right to sue or their *cause of action* may be joint and they may be precluded from bringing separate suits in regard to their respective interests. Thus, co-mortgagees are presumed to have distinct interests in the mortgage (see S. 45, Transfer of Property Act); but they cannot bring separate suits to enforce the mortgage to the extent of their respective interests. (See S. 67, Transfer of Property Act.) Similarly, though co-heirs may be entitled to distinct interests in the substantive right inherited by them, they cannot sue separately in regard to causes of action based on transactions that happened prior to the death of the deceased. (See Note 23.) The section will apply to such cases although the *substantive right* is not joint.

Under the Act of 1877, it was held in some decisions that the section only applied to cases in which the *substantive right* was joint.[2] This view was based on the fact that the section used the words "joint creditors or claimants." The amendment of the section changing the said words into "persons jointly entitled to institute a suit or make an application for the execution of a decree" now makes it clear that the section also applies to cases in which the substantive right is *not* joint, provided that the cause of action or right to sue is joint.

But where several persons are in the position of tenants-in-common with regard to the substantive right and each of them can sue separately in regard to his own interest in the right, neither the substantive right nor the right to sue is joint and this section does not apply to such a case.[3] (See also Notes 23 and 27.)

Where a matter gives a separate right to different persons to sue for the same relief, they are not "jointly entitled" to sue within the meaning of this section. In such cases, each person has a *distinct, though similar*, right to sue. Thus, where every member of a community has an individual right to offer worship on a certain platform and the defendant unlawfully raises a structure on the platform which obstructs such right, any member of the community can sue in his own right to have the structure removed.[4] Similarly, it has been held in a case under the Bengal Patni Regulation of 1819 that any one of the co-sharers of a patni taluk can sue to set aside a sale of the taluk.[5] Reference may also be made to the view taken in some decisions (see Note 17) that the right to set aside an unauthorized alienation of joint family property is separate and distinct for each coparcener.

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[2] ('05) 28 Mad 479 (485) : 15 Mad L Jour 363, *Harold Clive Johnson* v. *Porto Novo Cundasamy.* (25 Mad 26 distinguished on the ground that right to sue for an account and share of profits of the partnership sought to be enforced by heirs of the deceased partner was joint and indivisible.)
('07) 6 Cal L Jour 388 (396, 397), *Harihar Pershad* v. *Bholi Pershad.*
[But see ('02) 25 Mad 26 (35, 41) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*]

[3] ('19) 6 AIR 1919 Cal 378 (379) : 51 Ind Cas 797, *Rakhal Chandra Ghose* v. *Mohendra Narain Sen.* (Dispossession of several persons entitled to a piece of land—Each of them entitled to sue in regard to his share of the land — Section does not apply.)
[*See also* ('07) 6 Cal L Jour 388 (388, 395), *Harihar Pershad* v. *Bholi Pershad.* (Suit for mesne profits — Instances in which discharge can be given without concurrence of others jointly entitled to sue, pointed out.)]

X, a member of a Hindu joint family transfers certain property belonging to the family. The circumstances are such that X can sue to set aside the transfer on the ground that it was brought about by fraud. The circumstances are also such that Y, another coparcener can sue to set aside the transfer on the ground that it is not binding on the family. X and Y are not "jointly entitled" to sue.[6]

Where A and B constitute a Mitakshara joint family and a cause of action accrues to A in his own *individual* right, this section does not apply, the reason being that the right is not joint.[7]

Where the cause of action is joint as between two or more persons, this section applies notwithstanding that it may be open, in a particular case, to any one of them to sue without joining the others as parties to the suit. Thus, though any member of a Mitakshara joint family can sue to set aside an alienation of family property, the cause of action is *joint* within the meaning of this section. (See Note 17.)

The joint right to sue under this section must exist *at the commencement of limitation.* (See Note 7.)

5. Applicability of section to proceedings for execution. — The words used in S. 7 of the Act of 1871 (now S. 6) to describe the person to whom it was intended to apply were "person entitled to sue." In S. 8 of the Act (now S. 7) the words were "joint creditors or claimants." When the sections were amended in the Act of 1877, the words "person entitled to sue" in S. 7 (now S. 6) were changed into "person entitled to institute a suit or make an application." But the words "joint creditors or claimants" in section 8 (now S. 7) were not changed. In view of the change of words in S. 7 (now S. 6), it was clear that that section applied both to suits and applications including applications for execution. But, as no change was made in regard to the words in section 8 (now S. 7), the question arose as to whether the section would govern applications for execution. On this question, there was a conflict of decisions. The Calcutta High Court held in the undermentioned case[1] that the words "joint creditors" in the section were wide enough to include joint execution creditors. But the Madras High Court took the contrary view.[2] According to that High Court, the expression "joint creditors or claimants" could not include joint execution creditors. The words could only apply to creditors or claimants whose claim had not merged into a decree. Further, the fact that no change was made in the wording of the section while the words in S. 7 (now S. 6) were altered as indicated above, showed that the scope of the two sections was intended to be different. (See also Note 8 to section 6.)

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[4] ('97) 24 Cal 385 (390), *Baiju Lal* v. *Gulaklal.* (There was no question of limitation in this case.)

[5] ('09) 2 Ind Cas 77 (79) (Cal), *Gangadhar Sarkar* v. *Khaja Abdul Ajij.* (This section is inapplicable in such cases.)

[6] ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan* v. *Vazhayil Devaki.*

[7] ('86) 10 Bom 241 (242) : 1886 Bom P J 13, *Yeknath Ramchandra* v. *Waman Brahmadev.* (A suit brought by a person within three years of his attaining majority, on a bond obtained by his guardian in his name alone during his minority was held to be within time, although the minor had an undivided brother who had attained majority more than three years prior to the suit, the reason being that the bond had been given to the plaintiff alone and the brother was not a party to the bond.)

The amendment of the section in the present Act which brings the words in the two sections (Ss. 6 and 7) into conformity with each other in this respect shows that both of them apply not only to suits but also to applications for execution. (See also Note 6.)

5a. Applicability of the section to period of twelve years fixed by Section 48 of the Civil Procedure Code. — This section is subsidiary to section 6 and the time mentioned in this section must be taken to be the time referred to in S. 6, that is, the time specified in the first schedule of this Act. Hence, the period of twelve years under section 48 of the Civil Procedure Code cannot be extended under this section.[1] See also section 6 Note 21.

6. Disability of one of several joint decree-holders.

Position under the old Act.

Under the Act of 1877, there was a conflict of views as to the proper interpretation of this section (then S. 8) with reference to such cases and at least four different views were expressed:

1. According to the first view, the first part of S. 8 (now S. 7) did not apply to such cases and the reasoning on which this view was based was this: The first part of the section applied only to cases in which the act of the joint decree-holder (who was free from disability) *per se* amounted to a discharge of the judgment-debtor. Under S. 258, Civil Procedure Code of 1882 (now Order 21, Rule 2), no payment or adjustment under a decree made out of Court could be recognized by the executing Court unless it had been certified to the Court. Under S. 231 (now O. 21, R. 15) it was provided that if the Court allowed any joint decree-holder to execute the decree on behalf of all the decree-

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Note 5

[1] ('12) 15 Ind Cas 664 (664, 665) (Cal), *Jagarnath Singh* v. *Mohabir Das.* See also Note 6.

[2] ('02) 25 Mad 431 (441, 442) : 12 Mad L Jour 166 (FB), *Periasamy* v. *Krishna Ayyan.*

Note 5a

[1] ('41) 28 AIR 1941 Pat 45 (47, 48) : 20 Pat 1 : 190 Ind Cas 369 (DB), *Mt. Zali Khan Bibi* v. *Rama Prasad.*

('38) 25 AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373 : 176 Ind Cas 212 (DB), *Kartic Chandra* v. *Bata Krishna.*

holders, the Court must pass such order as it deemed necessary for protecting the interests of the persons who had not joined in the application. Having regard to the above two provisions, it was not the act of the joint *decree-holder* but the act of the *Court* executing the decree that was intended to operate as a valid discharge. Hence, the first part of S. 8 (now S. 7) did not apply to such cases.[1]

The logical result of holding that one joint decree-holder could not give a valid discharge on behalf of all the decree-holders would be to make the second part of the section applicable to the case (if it was otherwise applicable), such part dealing with cases in which a discharge could not be given by one of the joint creditors on behalf of all.[2] But the decisions propounding the first view, notwithstanding they held that one joint decree-holder could not give a valid discharge on behalf of all the decree-holders, did not consider the applicability of the second part of the section to such cases at all. Having held that the first part of the section did not apply, they proceeded to consider the applicability of section 7 (now section 6).

2. The second view was expressed by Bhashyam Aiyengar, J., in *Periasamy* v. *Krishna Ayyan.*[3] The learned Judge dissented from the view that it was the act of the Court and not of the decree-holder that amounted to a discharge of the judgment-debtor in cases of adjustment or payment out of Court. But, he held that under S. 257, Civil Procedure Code of 1882 (now O. 21, R. 1), if payment was made out of Court to the decree-holder, it must be made to all the decree-holders jointly in cases where there were several joint decree-holders and that this rule applied even in cases in which, if the debt had not merged into a decree, one of the joint creditors would have been entitled to give a discharge on behalf of all the joint creditors. Hence, one joint decree-holder could not, even in such cases, give a valid discharge on behalf of all the joint decree-holders. Thus, though on a different ground, the learned Judge also came to the conclusion that the first part of section 8 (now S. 7) did not apply to cases in which one of several joint decree-holders was under disability.

But, he proceeded to consider the question whether in view of the fact that one joint decree-holder could not give a discharge so as to bind the others, the second part of the section (dealing with cases in which a discharge could not be given without the concurrence of the person under disability) applied to the case so as to give all the decree-holders the benefit of an extended period of limitation. On this question, he held that the expression "joint creditors or claimants" in

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Note 6

[1] (1900) 22 All 199 (203) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sunder.* (1884 All W N 58 is based on wrong view of S. 8 of Limitation Act of 1877.)
('90) 13 Mad 236 (239, 240), *Seshan* v. *Rajagopala.* (It was observed that S. 8 of the old Act did not include execution creditors.)
('96) 20 Bom 383 (385), *Govindram* v. *Tatia.*

[2] *See* ('02) 25 Mad 431 (441) : 12 Mad L Jour 166 (FB), *Periasamy* v. *Krishna Ayyan.*

[3] ('02) 25 Mad 431 (440, 441, 443) : 12 Mad L Jour 166 (FB).

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the section did not include joint execution creditors (see Note 5) and that, therefore, the section was not applicable at all to the case of joint decree-holders.

3. The third view was that "joint creditors" included *execution* creditors. This was the view of the Calcutta High Court in the undermentioned case[4] where the view of Bhashyam Iyengar, J., that the expression "joint creditors or claimants" in S. 8 (now S. 7) did not include execution creditors, was not accepted.

4. The fourth view was that the second part of the section applied only to cases in which all the joint creditors were under a disability and was not applicable to cases in which only one of the joint creditors was under a disability.[5] The logical result of this position was that the second part of the section would not apply to cases in which one of several joint decree-holders was under a disability.

In several decisions, the question of the applicability of S. 8 (now S. 7) to cases in which one of the joint decree-holders was under a disability was not considered at all and the question was merely considered from the point of view of S. 7[6] (now S. 6).

Thus, in most of the cases decided under the Act of 1877 it was held (expressly or tacitly) that this section did not apply to cases in which one of several joint decree-holders was under a disability at the commencement of limitation. So, the question arose as to the applicability of S. 6 in such cases. On this question there was a conflict of decisions, for a discussion of which see Note 8 to S. 6.

Position under the present Act.

Under the present section, the amendment of the opening words of the section, whereby the words "joint creditors or claimants" have been replaced by the words "persons jointly entitled to institute a suit or make an application for the execution of a decree" has removed the ground for the argument that the expression "joint creditors or claimants" did not include joint *execution* creditors but only referred to joint creditors or claimants whose claims had not merged into a decree. (See Note 5.) But the question still remains whether one decree-holder can give a valid discharge, without the concurrence of others, so as to make the first part of the section applicable (see the first view mentioned above), or, if no such discharge can be given, the second part of the section will apply. (See the fourth view mentioned above.)

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[4] ('12) 15 Ind Cas 664 (664, 665) (Cal), *Jagarnath Singh* v. *Mohabir Das.* (14 Cal 50 distinguished on the ground that the Court in that case was not dealing with an application for execution.)
See also Note 5.

[5] ('87) 14 Cal 50 (53) : 11 Ind Jur 143 (DB), *Anando Kishore* v. *Anando Kishore.*
('93) 16 Mad 436 (438, 439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bappayya.*
See also Note 14.

[6] *See* ('04) 1 All L Jour 408 (Note), *Liladhar* v. *Chaturbhuj.*
('04) 27 All 67 (68) : 1 All L Jour 407 : 1904 All W N 163, *Jiwan Ram* v. *Ram Sarup Ram.* (Section 7 (now S. 6) applies even where some only and not all of the judgment creditors are affected by legal disability.)
('07) 7 Cal L Jour 308 (309), *Sheikh Jamir* v. *Srimati Lal Bibi.* (The decree in this case was one which could be executed jointly and *severally* and the minor was *held* to have right to execute the *whole* decree.)
('06) 9 Oudh Cas 269 (270), *Nawab Ibn Hussain Khan* v. *Munir Ahmad.*

As regards the first question, it will be shown in Note 15 that it is not correct to say that when payment is made under a decree out of Court, it is the act of the *Court* and not that of the *decree-holder* that constitutes the discharge of the judgment-debtor. It will also be shown in that Note that the argument that one joint decree-holder can in no case give a discharge on behalf of other joint decree-holders unless they have constituted him their agent is not correct. As regards the argument with reference to the second question that the latter part of the section applies only to cases where *all* the joint creditors are under a disability, it will be shown in Note 14 that whatever justification there might have been for such a view under the old section, it is not sustainable under the present section. Thus, there is no reason for holding that notwithstanding the obvious intention of the section which is evident from its opening words, neither of its parts applies to cases in which one of several joint decree-holders is under a disability.

See also Section 6 Note 8.

7. "Is under any such disability." — These words relate back to S. 6 and show that the disability contemplated by this section is of the same description as that referred to in S. 6.[1] Thus, the disability must be of the *same kind* as is mentioned in S. 6. In other words, this section applies only to cases in which one of the persons entitled to sue or apply is a *minor, insane* or an *idiot*. It does not apply to any *other* kind of disability.

Again, the disability must exist *at the time* mentioned in S. 6, that is at the time from which limitation is to be reckoned.[2]

Illustrations.

(a) At the time from which the period of limitation is to be reckoned, *A* and *B* are jointly entitled to sue or apply for execution but neither of them is under any disability. Subsequently, *A* becomes insane. The section will not apply to such cases because the disability does not exist at the commencement of limitation but arises subsequently.

(b) *A*, a Hindu father, and *B* and *C*, his two adult sons, constitute a Mitakshara joint family. In 1910, *A* alienates a portion of the family property without the consent of *B* and *C* and without any justifying necessity. The transferee is put in possession of the property immediately. *B* and *C* are jointly

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Note 7

[1] ('41) 28 AIR 1941 Pat 45 (48): 20 Pat 1: 190 I C 369 (DB), *Mt. Zalikhan Bibi* v. *Rama Prasad*.

('21) 8 AIR 1921 Oudh 196 (199) : 64 Ind Cas 757 : 24 Oudh Cas 330, *Chokhey Singh* v. *Hurdeo Singh*.

[2] ('24) 11 AIR 1924 All 912 (914): 79 Ind Cas 1019, *Dhanraj* v. *Ram Naresh*.

('21) 8 AIR 1921 Oudh 196 (199) : 64 Ind Cas 757 : 24 Oudh Cas 330, *Chokhey Singh* v. *Hurdeo Singh*. (Birth of a new coparcener into a family — No fresh extension of limitation can be obtained.)

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entitled to sue to set aside the alienation. Limitation for the suit runs from 1910, the date on which the transferee is put in possession (Article 126). In 1912, during the lifetime of *B* and *C*, another son *D* is born to *A*. According to the Mitakshara law as administered in certain provinces, *D*, the after-born son, also is entitled to sue to set aside the alienation. But *D* does not get an independent cause of action on his birth, but is entitled to sue on the cause of action accrued in favour of *B* and *C*. In other words, *D* becomes *jointly* entitled with *B* and *C* to sue to set aside the alienation. But *D's* minority being a factor which arises only *after* the commencement of limitation in 1910, the disability does not attract the provisions of this section.[3]

8. Applicability of the first part of the section. — The test for the applicability of the first part of this section is that a discharge must be capable of being given without the concurrence of the person under disability.[1] The section contemplates a discharge being given by one or more of the *joint claimants* without the concurrence of the others. (See Note 9.) Hence, the nature of the obligation or the relations between the parties must be such that a discharge can be given by one or more of the joint claimants without the concurrence of the others.

Further, the section contemplates a capacity to give a discharge which exists *at the time from which limitation is to be reckoned.* Hence, although the nature of the obligation or the relations between the parties may admit of a discharge being given by one of them, if none of them is in a *position* to give a discharge at the commencement of limitation, the first part of the section will not apply.

Both the above elements are present in the example given in Illustration (a) to the section. The joint claimants being partners, the *relations* between them are such that one of them can give a discharge on behalf of all. Secondly, one of them is free from any disability at the commencement of limitation and hence, is in a *position* at such time to give a discharge on behalf of all. Hence, the first part of the section applies to the case and time begins to run against all the partners.

But, in illustration (b), although the nature of the relations of the parties is such as to admit of a discharge being given by one of them on behalf of all, all of them being under a disability at the commencement of limitation, none of them is in a position *at such time* to give a discharge. Hence, the case in illustration (b) is one in which a discharge cannot be given without the concurrence of the person under disability, within the meaning of this section. (See Note 11.)

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[3] ('24) 11 AIR 1924 All 912 (914): 79 Ind Cas 1019, *Dhanraj* v. *Ram Naresh*.
('23) 10 AIR 1923 Oudh 52 (54) : 66 Ind Cas 938, *Ranodip Singh* v. *Rameshar Prasad.* (Such after born son cannot obtain benefits of S. 6 of Limitation Act and hence can give no benefit under S. 7 to his elder brothers.)
[*See also* ('18) 5 AIR 1918 All 183 (184) : 40 All 630 : 46 I. C. 584 (FB), *Kalika Bakhsh* v. *Ramcharan*. (Case relating to application for execution.)]

Note 8

[1] *See* ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan* v. *Devaki*. (Section 7 of the Limitation Act is a disabling section, and in so far as it takes away the right conferred by S. 6, has to be strictly construed and before dismissing the suit of a minor which is in time under S. 6 the Court should be quite certain that the disabling provisions of S. 7 apply to the case.)

9. "Discharge," meaning of. — The term "discharge," when used with reference to a legal obligation means a release from such obligation. The power to give a discharge, therefore, simply means the power to release a person from liability. This power may be exercised in two ways :

(1) By the creditor or claimant accepting or receiving satisfaction of the claim from the debtor and making an acknowledgment to the effect that the claim has been satisfied and that nothing further is due from the defendant.

(2) By the creditor relinquishing or giving up the claim wholly or partially.

A person having power only to give a release in the first sense mentioned above will still be a person competent to give a discharge within the meaning of this section.[1] Thus, a partner cannot *relinquish* a claim belonging to the firm.[2] But he can receive payment of a debt due to the firm and give a discharge in respect of it. This is sufficient to make him a person capable of giving a discharge within the meaning of this section. (See illustrations to section.) Similarly, the manager of a Mitakshara joint family cannot *relinquish* a debt due to the family.[3] But he can receive payment of the debt on behalf of the family and give a good discharge in respect of it within the meaning of this section. (See Notes 16 to 18.)

The expression "discharge" is not confined to a discharge of a *debt* or other pecuniary liability. It applies to any form of quittance whereby the rights and liabilities of parties are put an end to. Thus, the expression is applicable even to cases in which the right involved is a right to set aside an alienation of property or a right to redeem a mortgage. (See Note 17.)

The right of a joint claimant to give a discharge without the concurrence of the other claimants is not identical with the right to sue or apply for execution without their concurrence or without

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Note 9

[1] *See* ('28) 15 AIR 1928 Mad 933 (937) : 112 Ind Cas 501, *Arunachallam* v. *Ramaswamy*. (*Obiter* — One of the several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees provided that the payment is made in *full* to one of the promisees of the debt.)

[*See also* ('21) 8 AIR 1921 Bom 289 (291) : 45 Bom 446 : 59 Ind Cas 759, *Bapu Tatya* v. *Bala Ravji Desai*. (The fact that the manager of a joint Hindu family can give a discharge only for the benefit of the family does not make him a person who cannot give a discharge.)

('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand* v. *Gian Chand*. (Do.)]

[2] See Patnership Act (1932), Section 19.

[3] ('28) 15 AIR 1928 Mad 601 (602) : 51 Mad 484 : 109 Ind Cas 329, *Dasaratharama Reddi* v. *Narasa Reddi*.

joining them as parties to the proceeding.[4] Hence, the fact that a joint claimant can sue without making the other claimants parties to the suit or that he cannot do so, is not conclusive of the question whether he can give a *discharge* without their concurrence. (See Notes 2 and 18.)

The discharge contemplated by this section is a discharge given by a joint claimant in his *own right* as such joint claimant. The power, therefore, which a joint claimant has, as a *guardian* of another claimant, to give a discharge on the latter's behalf is not sufficient for the purposes of this section.[5] (See also Note 15.) *A fortiori*, the mere fact that there was a guardian or other person who was not a joint claimant but who could have given a discharge on behalf of the person under disability does not deprive the claimants of the extension of limitation under this section. In this view, the undermentioned decisions[6] do not seem to be correct.

The section contemplates a discharge that can be given as a matter of *right*. A discharge that can be given only with the permission of the Court is not within the section.[7]

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[4] ('01) 25 Mad 26 (40) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*
[*See also* ('94) 4 Mad L Jour 52 (Jour). (Critical note on 16 Mad 436, *Vigneswara* v. *Bappayya.*)
('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972, *Bai Keval* v. *Madhu Kala.* (Suit for redemption on behalf of Hindu joint family — All members must be made parties to suit — Hence manager cannot give discharge in such cases although he can do so in regard to suits for setting aside alienation of joint family property, because in latter case he can sue without joining other members as parties — Submitted reasoning is not correct.)
('19) 6 AIR 1919 Mad 911 (922): 41 Mad 659: 46 Ind Cas 202 (FB), *Varamma* v. *Gopaladasayya.* (Per Seshagiri Iyer, J. — The principle of the section is that where some of the joint claimants are adults and could have safeguarded the interests of themselves and others, limitation runs against them all.)]
[But see ('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bappayya.* (Submitted not correct.)]

[5] ('02) 25 Mad 26 (39, 40) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*
('35) 22 AIR 1935 Cal 631 (632, 633): 158 Ind Cas 567: 63 Cal 92, *Abed Hossein* v. *Abdul Rahman.* (A certificated guardian is not in a position to give a discharge.)
[But see ('29) 16 AIR 1929 Cal 165 (165) : 115 Ind Cas 354, *Ashutosh Ghose* v. *Sashi Mohan Roy.* (Submitted not correct.)]
See also Note 15.

[6] ('14) 1 AIR 1914 Cal 35 (36) : 20 Ind Cas 701, *Raj Kumar Girija Nandan* v. *Kanhaiya Prasad.* (Receiver appointed for estate of minors—Capacity of receiver to give discharge—Minors not entitled to extension of limitation.)
[*See also* ('19) 6 A I R 1919 All 297 (299) : 41 All 473 : 50 Ind Cas 730, *Amina Bibi* v. *Rama Shankar.* (A Mahomedan mother, who is a *de facto* guardian having no authority to transfer or deal with the property of the minors, cannot give a valid discharge for payments made to the minors. The underlying assumption, that the capacity of a guardian to give a discharge is sufficient for the purpose of this section, is not correct.)]

[7] ('19) 6 A I R 1919 All 297 (299) : 41 All 473 : 50 Ind Cas 730, *Amina Bibi* v. *Rama Shankar.* (Guardian *ad litem*, incapacity of, to give a discharge without the leave of the Court — He cannot give discharge within the meaning of this section.)
('35) 22 AIR 1935 Cal 631 (632, 633) : 158 Ind Cas 567 : 63 Cal 92, *Abed Hossain* v. *Abdul Rahman.* (Do.)

Section 7
Notes 10–10a

10. In what cases discharge can be given by one joint claimant without the concurrence of others. — It is a matter of substantive law whether one of several persons jointly entitled to institute a suit can give a discharge on behalf of others. The general principles on the subject would seem to be as follows :

1. Where the substantive right is *joint* in the sense that each of the joint creditors is a creditor for the whole, any one of them can give a discharge so as to bind the others.[1] Thus, where there are several joint executors, one of them can give a good discharge in regard to any debts owing to the estate. (See Note 26.)

2. Where the parties are in the position of *tenants-in-common* with regard to the substantive right, one of them cannot give a discharge without the concurrence of the others. In other words, where the co-owners are entitled to *distinct* interests in the substantive right, one of them alone is not entitled to receive payment and give discharge on behalf of all.[2] (See Note 22.)

3. Where there are several co-owners of a right, they must be *presumed* to be in the position of tenants-in-common and not joint tenants in regard to such right. In other words, the general presumption under the law is that co-owners are entitled to distinct interests in the right owned by them. (See Note 22.)

4. A joint claimant who is under a legal disability cannot give a discharge even if in the absence of legal disability he could have done so. (See illustration (b).)

The above are only *general* rules and are subject to exceptions in special cases. Thus, though joint trustees are only in the position of *joint tenants* in respect of the rights and properties vested in them as trustees, the law provides that one of them *cannot* give a good discharge on behalf of all. (See Note 25.) Similarly, though the members of a Mitakshara joint family are in the position of *joint tenants* in respect of the rights belonging to the family, it is not any and every one of the members that can give a discharge on behalf of the family. Such a right is recognized only in the case of the *manager* of the family. (See Note 16.) So also, in the case of *partners*, though they may be entitled to *distinct* interests in the partnership business and in the rights which are the subject-matter of suit and as such are in the position of *tenants-in-common*, each partner has implied authority under the law to give discharge in respect of the debts due to the partnership. (See Note 24.)

10a. " Time will run against them all. " — See Note 2.

Note 10

[1] ('07) 6 Cal L Jour 383 (395), *Harihar Pershad* v. *Bholi Pershad.* (Joint right arising out of a tort — No inflexible rule that one of the holders of such a right can give a discharge without the concurrence of others.)

[2] ('07) 6 Cal L Jour 383 (395, 397), *Harihar Peshad* v. *Bholi Pershad.* (The section does not apply to persons whose rights are distinct and different, but who are permitted to enforce such separate rights by one judicial process.)

11. "Where no such discharge can be given." — These words relate to the time from which the period of limitation is to be calculated. (See Note 8.) The incompetency of one joint creditor at such time to give a discharge so as to bind the others may be due to either of two circumstances —

(1) The *nature of the debt* or liability itself or the relations between the parties may be such that one joint creditor cannot give a discharge on behalf of the other joint creditor or creditors. Thus, where the liability is based on a tort, none of the persons jointly entitled to sue in respect of it can give a discharge without the concurrence of the others (except in some special cases).[1] In such cases, the incompetency of one of the joint creditors to give a discharge so as to bind all the joint creditors is not merely a *temporary* incompetency existing at the commencement of limitation but capable of disappearing subsequently. Hence, there will be no question of one of the joint creditors *becoming* capable at any time, of giving a discharge without the concurrence of the others. In such cases, the additional period of limitation under the section should be computed from the time when the disability of such of the joint creditors as are under disability at the commencement of limitation comes to an end.

(2) None of the joint creditors may be in a *position* to give a discharge (though the nature of the *debt* or liability itself or the relations between the parties may admit of a discharge being given by any of the joint creditors). For instance, in the example given in illustration (b) to the section, the nature of the debt is such that a discharge is capable of being given by any of the joint creditors. For, the rule is that one partner can give a discharge in respect of a debt due to all the partners. (See Note 24). But all of them being under disability at the commencement of limitation, none of them is in a *position* at such time to exercise his right of giving a discharge. (See Note 10.) In such a case, the incompetency of one joint creditor to give a discharge so as to bind the other creditors is merely a *temporary* incompetency. In other words, one of the joint creditors can, in such cases, be expected subsequently to *become capable* of giving a discharge without the concurrence of the others. In such cases, the additional period of limitation under the section is to be computed from the time when one of the creditors so becomes capable of giving a discharge.[2] Thus, in the example given in illustration (b) to the section, the additional period under the

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Note 11

[1] ('07) 6 Cal L Jour 383 (395, 396), *Harihar Pershad* v. *Bholi Pershad.*

[2] ('38) 25 AIR 1938 Bom 392 (393) : 177 I. C. 286 (DB), *Bhikarchand Devidas* v. *Lachhmandas Bansilal.* (If manager of Hindu joint family is minor time will be computed from his becoming major.)

[*See* ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdish Narain* v. *Bishun Datt.* (Eldest brother being the manager of the family, time will run against the younger brother from the time when former attained majority.)]

section will run from the time when the disability of one of the partners comes to an end and he becomes capable of giving a discharge on behalf of all the partners.

Thus, the second part of the section applies *both* to cases in which the debt or liability or the relationship of the parties is of such a nature that a discharge can be given by one of the joint creditors without the concurrence of the others, as well as to cases in which such debt or liability or relationship is not of such a nature.

But, in *Harihar Pershad* v. *Bholi Pershad*,[3] Mookerjee, J., of the Calcutta High Court held that the second part of S. 8 of the Act of 1877 (now S. 7) applied only to cases in which the debt or liability of the defendant was of such a nature that a discharge was capable of being given by one of the joint creditors alone. His view was based on the wording of the second part of the section as it stood then. At that time, the words "or until the disability has ceased" which occur at the end of the present section did not find a place in the section. The second part of the section simply ran as follows : "but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The second part of the section in the Act of 1871 ran as follows: "but where no such discharge can be given, time will not run as against any of them until they all are free from disability." The learned Judge contrasted the language of the two sections and pointed out how the words of the section in the previous Act were capable of applying to cases where the debt or liability was of such a nature that one joint creditor could not give a discharge on behalf of all and how the language of the section in the later Act was not capable of applying to such cases. According to his Lordship, the substitution of the words "until one of them becomes capable of giving such discharge without the concurrence of the others" in the place of the words which occurred in the previous Act showed that the cases contemplated by the new section were those in which a discharge was capable of being given by one joint creditor alone on behalf of all, though at the commencement of limitation none of the joint creditors might be in a position to exercise the right of giving such discharge. Thus, according to his Lordship, both the parts of the section applied only to cases in which the nature of the debt or liability of the defendant was such that one of the joint creditors might alone give a discharge on behalf of all. The first part of the section referred to cases in which such discharge was *immediately* capable of being given. The second part referred to cases in which such discharge would be capable of being given as soon as one of the joint creditors attained the position in which he could exercise his right of giving a discharge.

The amendment of the section in the present Act by the addition of the words "or until the disability has ceased" at the end of the section has removed the basis for the view expressed by Mookerjee, J., in the above case. It is therefore now clear that, as already said, the latter part of the section applies also to cases where the debt or liability is of such a nature that one joint creditor alone cannot give a discharge in respect of it.

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[3] ('07) 6 Cal L Jour 383 (395, 396, 397).

In the undermentioned case,[4] however, a case arising under the present Act, it was held that this section applied only to cases "where persons who could give a discharge, could not do so on account of incapacity such as lunacy, or minority or some such thing." It is submitted that in view of the above discussion the observation is not correct.

12. "Time will not run." — It has been seen in the Notes to S. 6 that that section only *extends* the period of limitation (Note 2) and does not *prevent the running of limitation* against the person under disability. (Note 32.) It has also been seen (Note 2) that this section provides a special rule for some of the cases falling under S. 6. Under these circumstances, it follows that this section also must be considered only to *extend* the period of limitation and not to prevent the running of limitation. The words "Nothing in S. 6 or in S. 7 . . . . *shall be deemed to extend*" in S. 8, also make this clear.

The section, however, uses the words "time will not run." It is submitted that this section being really only an appendix to S. 6 (see S. 6 Note 2), the above provision must be interpreted, if possible, in the same manner as the corresponding expression in S. 6. It is possible to interpret the second part of the section as meaning that in the cases coming within its purview, the litigant should be entitled to an additional period and that such *additional* period should be computed from the cessation of the disability or from the time when one of the persons jointly entitled to sue or apply becomes capable of giving a discharge. In this view, the words "time will not run" in the second part of the section would merely refer to the *additional* period conferred by the section.

If the above interpretation is not adopted, the result will be that under this section the starting point of limitation is itself postponed till the events specified therein, while under S. 6, limitation is merely extended and the starting point is not postponed. It is submitted that such a disharmony in the construction of the two sections should, if possible, be avoided.

12a. "As against any of them." — See Note 2.

13. "Until one of them becomes capable of giving such discharge." — Under the second part of the section, the additional period of limitation conferred by it begins to run from the time when one of the persons entitled to sue or apply *becomes* capable of giving a discharge without the concurrence of the person under disability. The provision contemplates cases in which the liability is of such a nature that a discharge can be given by one of the joint claimants on behalf of all, but where none of them is in a *position* to give such a discharge. (See Note 11.)

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[4] ('27) 14 AIR 1927 Mad 216 (216): 99 I.C. 668, *Neelkantamier* v. *Chinnammal.*

Illustration (b) to the section is an instance in point. The debt being due to a firm, it is of such a nature that any of the partners (the joint claimants) can give a discharge on behalf of all. But, all the partners being under a disability at the commencement of limitation, none of them is in a position, *then*, to give a discharge. In such cases, the joint claimants are entitled to an additional period and such additional period must be computed from the time when one of them becomes free from his disability and therefore, capable of giving a discharge.

In the cases of right of action belonging to the members of Mitakshara joint family, it is only the *manager* of the family that can give a discharge. Suppose, at the commencement of limitation, though some of the coparceners entitled to sue are adults and free from any disability, none of them is in the position of the manager of the family. In such a case, if subsequently one of them becomes the manager of the family, the additional period conferred by the section should be reckoned from the time of his becoming such manager.

14. Whether the latter part of the section applies to cases in which one of the persons entitled to sue or apply is under a disability.— The opening words of the section, "where *one* of several persons jointly entitled" etc., govern both the parts of the section. Hence, the latter part of the section, which deals with cases in which no discharge can be given without the concurrence of the person under disability, also applies to cases in which *one* of several persons jointly entitled to sue or apply for execution is under a disability. It was, however, held in some cases[1] decided under the Act of 1877 that the latter part of the corresponding section of that Act (S. 8) only applied to cases in which *all* the joint creditors or claimants were under a disability and not to cases in which only *one* of them was under a disability.

Probably there was some justification for this construction under the Acts of 1871 and 1877. Thus, the second part of the section in the Act of 1871 ran as follows: "but where no such discharge can be given, time will not run as against any of them until they *all* are free from disability." The words "until they all are free from disability" perhaps could be construed as meaning that only cases in which all the joint creditors or claimants were under a disability, were in contemplation.

Note 14

[1] ('87) 14 Cal 50 (53): 11 Ind Jur 143 (DB), *Anando Kishore* v. *Anando Kishore.* *(Obiter.)*
('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bapayya.*
See also Note 6.

Similarly, the second part of S. 8 of the Act of 1877 ran as follows: "but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." Illustration (b) also was added to the section in the Act of 1877. The words "until one of them *becomes* capable of giving such discharge" together with illustration (b) probably suggested that the cases contemplated were those in which *all* the joint creditors or claimants were under a disability at the commencement of limitation but one of them subsequently *became* capable, by reason of the cessation of his disability, of giving a discharge.

Thus, under the Acts of 1871 and 1877 there was room for the view that the second part of the section only applied to cases in which all the joint creditors or claimants were under a disability.

But, under the present Act, the second part of the section has been amended by the addition of the words "or until the disability has ceased." The disability referred to in the above clause may be that of one of several persons jointly entitled to sue or apply and does not necessarily denote the disability of all of them. Hence, the amendment of the section in the present Act makes it clear that, cases in which one of the persons entitled to sue or apply is under a disability are within the purview of the second part of the section. The retention of illustration (b) is not inconsistent with such an interpretation. The illustration only shows that the principle of the latter part of the section applies *also* to cases in which all the persons entitled are under a disability. (See Note 8.)

15. Competency of one joint decree-holder to give discharge on behalf of all. — As a *general* rule, one joint decree-holder cannot give a discharge to the judgment-debtor without the concurrence of the other decree-holders.[1] The provisions of O. 21, R. 15 which enable one of several joint decree-holders to apply for execution on behalf of all the decree-holders, do not imply that one joint decree-

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Note 15

[1] ('29) 16 AIR 1929 All 267 (267) : 118 I. C. 229, *Chiranji Lal* v. *Ram Sarup*. (Where a joint decree for possession of land and demolition of a construction is passed in favour of a major brother, widow and a minor, although their interests were distinct and separate, the major cannot give a valid discharge for the minor and, therefore, and execution application by the minor within three years from attaining majority is not barred.)

('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mahomed Kazam* v. *Nadir Ali Shah*. (One of deceased decree-holder's legal representatives minor—Majors cannot give valid discharge—Section 7, Limitation Act, is not affected by C. P. C., O. 21, R. 15.)

('87) 14 Cal 50 (54) : 11 Ind Jur 143 (DB), *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*. (4 Cal 350, distinguished.)

('04) 1 Nag L R 24 (30), *Sambhusa* v. *Gopal*. (A payment to one of the joint decree-holders not proved to be for the benefit of all decree-holders operates as a discharge to the extent of the payee's share of the decree.)

('03) 26 All 318 (319, 320) : 1904 All W N 22, *Tamman Singh* v. *Lachhmin Kunwari*. (4 Cal L R 70 approved.)

Section 7
Note 15

holder can give a discharge on behalf of all the decree-holders.[2] As seen in Note 9, the capacity to *institute a suit* or make an application on behalf of another person does not necessarily imply a capacity to give a *discharge* on behalf of such person. Moreover, the right of one joint decree-holder to apply for execution on behalf of all under O. 21, R. 15 is dependent on the permission of the Court. Therefore, even supposing that such a right implies a right to give a discharge, the discharge will not be of such a character as is contemplated by the section. For, the discharge contemplated by the section is a discharge given by a person *as of right* and not one which depends on the permission of the Court. (See Note 9.)

There are, however, exceptions to the general rule that one joint decree-holder cannot give a discharge on behalf of others. For instance, when the decree itself authorizes one of the decree-holders to receive the decretal amount and to give a discharge to the judgment-debtor, he can do so without the concurrence of the other decree-holders.[3]

It has also been held that where a decree is passed in favour of a Hindu joint family, the manager of the family can give a valid discharge to the judgment-debtor.[4] The reason given is that where one of the several joint creditors is competent under the substantive law to give a discharge in respect of the *debt*, he can give such discharge even after the debt has merged into a *decree*.[5] But, this view has been dissented from in several decisions.[6] Thus, it has been held that the mere fact that a decree has been passed in favour of a joint Hindu family and that the manager of the family is not under any disability is not sufficient to enable him to give a discharge in respect of the decree so as to bind the other members of the family.[7] Similarly, it has been held that the fact that the decree is in favour of partners[8] or joint executors[9] does not make one of the decree-holders alone competent to give a discharge, though, if the debt had not passed into a decree, he would have been competent to give such discharge.

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[2] ('31) 18 AIR 1931 Lah 5 (6): 130 I.C. 403, *Mahomed Kazam* v. *NadirAli Shah.*

[3] ('34) 21 AIR 1934 Mad 103 (103): 148 I. C. 54, *Venkatarama* v. *Bheema Rao.*
('29) 16 AIR 1929 Bom 382 (384) : 121 Ind Cas 446, *Murlidhar* v. *Shivram.*

[4] ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 I. C. 990, *Rati Ram* v. *Nadar.* (Decree-holder died during pendency of execution proceedings — The adult and eldest son not applying in time for execution of the decree — Application by younger son after attaining majority held barred.)
('26) 94 Ind Cas 922 (922, 923) (All), *Radha Kant Shukul* v. *Butia Misir.* (Mortgage decree.)
('29) 16 AIR 1929 Bom 13 (13): 52 Bom 441 : 110 I. C. 276, *Supdu* v. *Sakharam.* (7 Ind Cas 939 dissented from ; A I R 1921 Bom 289 followed.)
('35) 22 AIR 1935 Cal 631 (632) : 158 Ind Cas 567 : 63 Cal 92, *Abed Hossain* v. *Abdul Rahman.* (Hindu manager's capacity to give discharge is derived from the substantive law.)
('11) 12 Ind Caş 503 (505) (Mad) (DB), *Duraisamy Sastrial* v. *Venkatarama Iyer.* (Reversing 10 Ind Cas 464.)
('36) 23 AIR 1936 Mad 434 (436, 437) : 161 Ind Cas 969, *Administrator-General, Madras* v. *Radhakrishna Chettiar.* (The power of manager to give discharge is not affected by the fact that it was another person who was representing the minor as next friend.)
('13) 18 Ind Cas 723 (724) (Mad), *Ramanadhan Sivayya* v. *Udatha Atchayya.*
('14) 1 AIR 1914 Mad 1 (1) : 22 I. C. 76, *Palaniandi Pillai* v. *Pappathiammal.* (Observations to the contrary in 25 Mad 431 (FB) not relevant as they are based on old S. 8, Limitation Act.)
('18) 5 AIR 1918 Mad 85 (86): 44 I. C. 566, *Venkatasubbiah* v. *Venkateswarlu.* (Do.)
('15) 2 AIR 1915 Oudh 227 (228) : 30 Ind Cas 75, *Naurang Singh* v. *Sheoraja.* (A I R 1914 Bom 300 referred.)
[*See also* ('29) 16 AIR 1929 Cal 165 (165) : 115 Ind Cas 354, *Asutosh Ghose* v. *Sashi Mohan Roy.* (Suit for accounts—Part of claim dismissed as barred by time —Plaintiffs 1 and 2 were members of joint Hindu family of which plaintiff 1 was the karta—*Held* S. 7 was inapplicable as plaintiff 1 could give a full discharge.)
('27) 14 AIR 1927 Pat 329 (330) : 103 I. C. 75, *Jhakhri Gope* v. *Phagu Mahto.* (C. P. C., O. 21, R. 15 — Joint decree — One joint decree-holder can give a valid discharge.)]

The above decisions proceed on two lines of reasoning :

(1) Under this section, the discharge must be the act of the *party* himself and not of the *Court*. But, having regard to the provisions of O. 21, Rr. 2 and 15 of the Civil Procedure Code, the discharge of the judgment-debtor under a decree is not the act of the *decree-holder* but that of the *Court*. Hence, one joint decree-holder cannot give a valid discharge on behalf of others.[10]

It is submitted that though the view that a discharge under this section must be the act of the *party* himself and not of the *Court* is not open to any criticism, yet, the view that under the Civil Procedure Code the discharge of the judgment-debtor under a decree is the act of the *Court* and not that of the *decree-holder* does not seem to be correct. As pointed out by Bhashyam Iyengar, J., in *Periasami* v. *Krishna*,[11] if payment be made out of Court to a sole decree-holder or several joint decree-holders, as the case may be, such payment will be a sufficient discharge of the decree debt and it is not the act of the *Court* in recording such payment that operates as a discharge. Under O. 21, R. 2, the act of the Court simply consists in *recording* satisfaction of the decree. A discharge not so recorded cannot be recognized by the Court *executing* the decree, since, for purposes of executing the decree, such record is, by statute, made indispensable evidence for proving the alleged discharge.

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[5] *See* ('11) 12 Ind Cas 503 (505) (Mad), *Duraisamy Sastrial* v. *Venkatarama Aiyar.*

[6] See cases cited in foot-notes (7), (8), (9) and (10).

[7] ('17) 4 AIR 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mahomed Silar Sahib & Co.* v. *Nabi Khan.* (No question of limitation was involved in this case.)

[8] ('17) 4 AIR 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mahomed Silar Sahib & Co.* v. *Nabi Khan.* (No question of limitation was involved in this case.)

[9] ('06) 28 All 252 (255) : 1906 All W N 16 : 3 All L Jour 49, *Lachman Das* v. *Chaturbhuj Das.* (No question of limitation was involved in this case.)

[10] ('90) 13 Mad 236 (240) (DB), *Seshan* v. *Raja Gopala.* (It was held in this case that S. 8 (now S. 7) applies only to those cases in which the act of the adult joint owner is *per se* a valid discharge.)

(1900) 22 All 199 (203) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sunder.* (1884 All W N 58 overruled.)

('96) 20 Bom 383 (385) (DB), *Govindram* v. *Tatia.*

('10) 7 Ind Cas 939 (940) : 34 Bom 672 (DB), *Mulchand Panachand* v. *Kesari Khupchand.* (Applicability of 22 All 199 and 20 Bom 383 has not ceased owing to any change in words of present S. 7.)

[11] ('02) 25 Mad 431 (440, 441) : 12 Mad L Jour 166 (FB).

Even for purposes of execution, sub-rule (3) of O. 21, R. 2 shows that it is not necessary that the payment or adjustment out of Court should *both* be certified and recorded. Where such adjustment or payment has been *certified* by the decree-holder, it must be recognized by the executing Court although it has not been *recorded* by the Court.[12]

Moreover, the view that one joint decree-holder cannot give a discharge on behalf of others will make the first part of the section inapplicable to cases of joint decree-holders, whereas the obvious intention of the section (as amended by the present Act), as evident from its opening words, is to cover such cases.

(2) The second line of reasoning is this. Under O. 21, Rr. 1 and 2 of the Civil Procedure Code, where there are several joint decree-holders, any payment under the decree out of Court or any adjustment of the decree must be made to or with *all* the decree-holders. Such payment or adjustment made to or with only one of several joint decree-holders cannot bind the others, unless he was also constituted by them an *agent* for the purpose. The mere fact that one of the joint decree-holders is the manager of a joint Hindu family or is otherwise a person who would have been able to give a discharge if the debt or liability of the defendant had not merged into a decree, will not empower him to give a valid discharge under the decree without the concurrence of the other decree-holders any more than it will empower him to execute the whole decree as of right without the concurrence of the remaining decree-holders.[13]

It is submitted that this reasoning also does not appear to be correct. The discharge contemplated by this section is a discharge given by a joint creditor in his *own right* as such creditor and not as an *agent* or *guardian* acting on behalf of the other joint creditors. (See Note 9.) Hence, a discharge given by a joint decree-holder as an *agent* of the other decree-holders will not be a discharge within the meaning of this section. As, under the view in question, a discharge cannot be given by a joint decree-holder in any other case, the result will be that *in no case* can one joint decree-holder give a discharge on behalf of others. This will make the first part of the section not applicable at all to the case of joint decree-holders—a result, which, as already pointed out, is against the plain intention of the section.

Moreover, the fact that under O. 21 R. 15 even a person in the position of a manager of a Hindu joint family is not entitled as of right to execute a decree in favour of the members of the family but can only do so with the permission of the Court, does not affect the question of his competency to give a *discharge* under the decree on behalf of the other joint decree-holders. As seen in Note 9, the capacity to sue or apply on behalf of others is a distinct matter from the capacity to give a discharge and the considerations applicable to the one are not necessarily applicable to the other.

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[12] ('15) 2 AIR 1915 Cal 744 (745) : 30 I. C. 45, *Tarak Nath* v. *Natabar Mondal.* See also the cases cited in Authors' Commentary on the Civil Procedure Code, 3rd Edn., Vol. II, O. 21 R. 2 Note 19.

[13] ('02) 25 Mad 431 (440, 441) : 12 Mad L Jour 166 (FB), *Periasami* v. *Krishna.* ('17) 4 AIR 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mohamed Silar Sahib & Co.* v. *Nabi Khan.*

The true view seems to be that the expression "decree-holder" in O. 21 Rr. 1 and 2 will include any person who is competent to act on behalf of a decree-holder. So, if one of the several joint decree-holders is a person who, if the debt or liability of the defendant had not passed into a decree, would have been competent to give a discharge, it must be held that he is competent to give a discharge under the decree.

Mention must, however, be made of the decision of the Privy Council in *Ganesha Row* v. *Tulja Ram Row*[14] and the principle involved therein. In that case, it was held that the powers of the manager of a Hindu joint family to enter into a compromise on behalf of the family are controlled by the provisions of O. 32 R. 7 of the Civil Procedure Code which provide that no next friend or guardian of an infant can enter into a compromise on behalf of the infant without the permission of the Court. Hence, it was held that the manager of a Hindu joint family who was also the guardian of a minor member of the family could not, without the permission of the Court, enter into a compromise on behalf of the minor purporting to do so as the manager of the family. It was laid down that the manager could not, without the leave of the Court, do any act which he was forbidden as guardian to do without such leave. The principle of the decision has been applied to the receipt of moneys under a decree. In such cases it is provided by O. 32 R. 6 that no moneys can be received by the guardian or next friend of a minor without the permission of the Court. Applying the principle of the Privy Council decision, it has been held that even if the next friend or guardian of the minor is the manager of a joint Hindu family of which the minor is a member and in favour of which the decree has been passed, the next friend or guardian cannot receive any moneys under the decree or give a discharge to the judgment-debtor without the permission of the Court.[15] But, where the decree itself permits one of the joint decree-holders who is also the guardian of the minor decree-holder to receive the decretal amount, no *fresh* permission from the Court is necessary to

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14. ('13) 19 Ind Cas 515 (517) : 36 Mad 295 : 40 Ind App 132 (PC). (Appeal from 8 Ind Cas 928.)

15. ('39) 26 AIR 1939 Pat 33 (34) : 177 I. C. 713, *Parmeshwari Singh* v. *Ranjit*.

('25) 12 AIR 1925 Mad 78 (80) : 82 Ind Cas 785 : 47 Mad 920 (DB), *Lakshmanan Chetty* v. *Subbiah Chetty*.

('25) 12 AIR 1925 Mad 230 (232) : 82 Ind Cas 588, *Pitchakkuttiya Pillai* v. *Doraiswamy Moopanar*.

('12) 15 Ind Cas 664 (665) (Cal) (DB), *Jagarnath Singh* v. *Mohabir Das*.

('37) 24 AIR 1937 Cal 649 (651) : 174 I. C. 887 (DB), *Kanai Lal Saha* v. *Baijanath Khetri*.

enable him to receive the amount and give a discharge to the judgment-debtor.[16]

The Privy Council decision and the other decisions which follow it are based on the general principle that a rule of statutory law must prevail over a rule of non-statutory law when there is a conflict between the two rules in any case. This principle, as seen from the above decisions, seems to be equally applicable whether the rule of statutory law is one of procedural or substantive law. Hence, the view expressed by Walsh, J., in the undermentioned case[17] seems to be open to doubt. In that case, the question under consideration was whether the fact (assuming it to be a fact) that under the Civil Procedure Code the order of the Court was necessary to constitute a discharge of the judgment-debtor under a decree, was a ground for holding that one joint decree-holder cannot give a valid discharge on behalf of all the joint decree-holders. It was observed that this section referred to the status of parties under the substantive law and was not affected by any rule of procedure which required the intervention of the Court for completing the discharge of the judgment-debtor. This view seems to be open to question for the reason already stated.

The question, therefore, arises whether the view, that a joint creditor who under the general law is competent to give a discharge to the debtor can also give a discharge after the debt has passed into a decree, does not, in view of the provisions of O. 21 Rr. 1 and 2, offend the principle stated above. It is submitted that it does not. As already stated, the expression "decree-holder" in O. 21 Rules 1 and 2 seems to *include* a person competent to act on behalf of a decree-holder whatever may be the basis of such competency.

Thus, neither of the reasons given above really militates against the view that a joint creditor who could have given a discharge if the debt had not merged into a decree can do so also after the debt has passed into a decree. (See Note 5.)

The question, whether a discharge can be given by one of the joint creditors on behalf of all, is no doubt one which does not fall to be determined *under this section*. But, in considering the question, it is proper to take into account the fact that a particular view advanced is inconsistent with the view which the Legislature seems clearly to have adopted in enacting the section and leads to a result which is directly contrary to the section. The Legislature in this section seems clearly to have proceeded on the view that a discharge *can* be given by joint decree-holders without the intervention of the Court and that in some cases one or some of them alone can give a discharge on behalf of all. Acting on this view, it has expressly made the principle of the section (under which the question of limitation depends on the capacity of one of the joint creditors to give a discharge on behalf of others) applicable to joint decree-holders also. (See Note 5 dealing with the effect of the amendment of the section under the present Act, in this respect.) To hold that in no case can one joint decree-holder give a discharge on behalf of another would be inconsistent with the view on which the Legislature seems to have proceeded and will lead to a result which is contrary to the plain words of the section.[17a]

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[16] ('29) 16 AIR 1929 Bom 382 (384) : 121 Ind Cas 446, *Murlidhar Laxman* v. *Shivaram Sadashiv*.

('34) 21 AIR 1934 Mad 103 (103): 148 I. C. 54, *Venkata Ramadoss* v. *Bheema Rao*.

[17] ('19) 6 AIR 1919 All 209 (211) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram* v. *Nadar*.

But, where, under the substantive law itself it would not have been competent to one of the joint creditors to give a discharge if the debt had not passed into a decree, it follows that after the decree is passed one of the decree-holders cannot give a discharge on behalf of all the decree-holders. Thus, where a decree is passed jointly in favour of several persons who are Muhammadan co-heirs, one of them cannot give a discharge in respect of the decree on behalf of all.[17b] The reason is that unlike the case of a Mitakshara joint family (in which the manager of the family can give a discharge on behalf of the family), no one Muhammadan co-heir can give a discharge on behalf of the others.

Reference has already been made to the fact that in view of O. 32, R. 6 of the Civil Procedure Code, the guardian of a minor decree-holder who is a joint decree-holder with him cannot give a valid discharge to the judgment-debtor on behalf of the minor *without the permission of the Court*, even though the decree-holders constitute a joint Hindu family and the guardian is the manager of such family. Is the competency of such guardian to give a discharge *with the permission of the Court* sufficient for the purpose of the section? No.[18] The reason is that a discharge under this section must be a discharge given *as of right*[19] (see Note 9). Moreover, the section contemplates a discharge given by a person in his *own right* as a joint creditor. A right to give a discharge *as guardian* of a minor joint creditor is not within the section.[20] In this view, the undermentioned decisions[21] do not seem to be correct. (See Note 9.)

[17a] *See* ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram* v. *Nadar*. (Per Piggot, J.—All cases anterior in date to the passing of Act IX of 1908 require to be re-considered in the light of the words then inserted in S. 7.)

[17b] ('29) 16 AIR 1929 Lah 467 (467, 468) : 119 I. C. 234, *Fazal Ilahi* v. *Aishan*.
('31) 18 AIR 1931 Lah 5 (6) : 130 I. C. 403, *Mahamed Kazam* v. *Nadir Ali Shah*.
('24) 11 AIR 1924 Lah 681 (682) : 78 Ind Cas 285, *Muhammad Zulfikar Ali Khan* v. *Abrar Ali*.

[18] ('25) 12 AIR 1925 Mad 78 (80) : 82 I. C. 785 : 47 Mad 920 (DB), *Lakshmanan Chetty* v. *Subbiah Chetty*. (A I R 1919 All 209 distinguished and held to be correctly decided.)
('12) 15 Ind Cas 664 (665) (Cal) (DB), *Jagarnath Singh* v. *Mohabir Das*. (The provisions of O. 32 R. 6 were not brought to the notice of the Court in 6 Cal W N 348.)
('35) 22 AIR 1935 Cal 631 (632, 633) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossein* v. *Abdul Rahman*.
[*See also* ('25) 12 AIR 1925 Mad 230 (232) : 82 Ind Cas 588, *Pitchakkuttiya Pillai* v. *Doraiswamy Moopanar*. (No question of limitation was involved in this case.)]

[19] ('35) 22 AIR 1935 Cal 631 (632) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossain* v. *Abdul Rahman*. (Section does not contemplate a legal capacity which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the Court.)
[*See also* ('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mohamed Kazam* v. *Nadir Ali Shah*. (Order 21, Rule 15, C. P. C., which enables one joint decree-holder to apply for execution on behalf of all does not imply that he can give a discharge on behalf of all as the right of the decree-holder under the rule is dependent on the section.)]

But, where the decree itself permits one of the decree-holders to receive the decretal amount on behalf of all the decree-holders, his competency to give a discharge becomes a matter of *right*. Moreover, such right arises under the *decree* itself and though he may also be the guardian of the other joint decree-holders, the right is not attributable to his guardianship but to his *own* right under the decree. Hence, his power to give a discharge in such a case is within the section.[22]

Where the manger of a Hindu joint family is not the next friend or guardian *ad litem* of a minor member thereof, O. 32 R. 6 or R. 7 does not apply to him and the fact that there is some other person who is the next friend of the minor does not deprive the manager of his power to receive moneys under a decree and give a discharge for them.[23]

16. Mitakshara joint family. — In the case of a Mitakshara joint family, no individual member of the family is entitled to a definite share of the family property till partition. The ownership of the property is in the whole body of coparceners.[1] Thus, the members of a Mitakshara joint family are in the position of *joint tenants* with regard to the family property. Hence, in regard to rights of action affecting the family property, as a general rule, they are jointly entitled to sue within the meaning of this section.[1a]

But, in spite of their being in the position of *joint tenants* and not tenants-in-common with regard to their substantive rights, one of them

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('90) 13 Mad 236 (240) (DB), *Seshan* v. *Rajagopala*. (Section only applies where the act of the joint decree-holder is *per se* a discharge of the judgment-debtor.)
('96) 20 Bom 383 (385) (DB), *Govindram* v. *Tatia*. (Do.)
(1900) 22 All 199 (203) : 1900 All W N 8 (FB), *Zamir Hasan* v. *Sunder*. (Do.)]

[20] ('35) 22 AIR 1935 Cal 631 (632) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossein* v. *Abdul Rahman*.

[21] ('29) 16 AIR 1929 Cal 165 (165) : 115 I. C. 354 (DB), *Asutosh Ghose* v. *Sashi Mohan*. (Decree in favour of Hindu joint family — Eldest member acting as manager of family and as guardian of minor members—He can give discharge in either capacity.)
('01) 6 Cal W N 348 (351), *Bholanand Jha* v. *Padmanund Singh*. (One of the joint decree-holders acting as guardian of the others—He can give a discharge.)

[22] ('34) 21 AIR 1934 Mad 103 (103): 148 Ind Cas 54, *Venkatarama* v. *Bheema*.
('29) 16 AIR 1929 Bom 382 (384) : 121 Ind Cas 446, *Murlidhar* v. *Shivram*.

[23] ('36) 23 AIR 1936 Mad 434 (436, 437) : 161 Ind Cas 969 (DB), *Administrator-General, Madras* v. *Radha Krishna Chettiar*.
('27) 14 AIR 1927 Pat 329 (330) : 103 Ind Cas 75 (DB), *Jhakhri Gope* v. *Phagu Mahto*. (No question of limitation was involved in this case.)

Note 16

[1] (1863) 9 Moo Ind App 539 (611) : 2 Suth W R P C 31 : 1 Suther 520 : 2 Sar 25 (PC), *Katama Natchiar* v. *Srimut Rajah Mootoo Vijaya*. (There is community of interest and unity of possession between all the members of the family.)

[1a] ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdis Narain* v. *Bishun Datt*.

alone cannot give a discharge in regard to causes of action in favour of the family.[2] But the member who is the *manager* of the family can give such discharge.[3] Thus, the manager can give a discharge in the following cases :

(1) Suit for debt.[4]
(2) Suit for accounts.[5]
(3) Suit for mesne profits.[6]
(4) Suit for possession against person holding adversely to the family.[7]
(5) Suit for arrears of allowance.[8]

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[2] ('38) 25 AIR 1938 Bom 206 (207) : 174 Ind Cas 820 (DB), *Sureshchandra Jamietram* v. *Bai Ishwari.* (Elder brother attaining majority but not being manager of family so as to be entitled to sue on behalf of minor brother—S. 7 does not apply.)
('18) 5 AIR 1918 Mad 29 (31) : 45 Ind Cas 419 : 41 Mad 637 (DB), *Ankalamma* v. *Chenchayya.* (Junior member of joint Hindu family cannot give discharge to debtor—It is only manager that can do so.)
('33) 20 AIR 1933 Bom 245 (249) : 145 Ind Cas 164 (DB), *Umakant Balkrishna* v. *Martand Keshav.* (Do.)
[*See also* ('16) 3 AIR 1916 Pat 120 (121) : 39 Ind Cas 85 : 2 Pat L Jour 124 (DB), *Brij Behari Singh* v. *Sheo Shankar Jha.*]

[3] ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdish Narain* v. *Bishun Datt.*
('38) 25 AIR 1938 Bom 392 (393) : 177 Ind Cas 286 (DB), *Bhikarchand Devidas* v. *Lachhamandas Bansilal.*
('33) 20 AIR 1933 Bom 245 (249) : 145 Ind Cas 164 (DB), *Umakant Balakrishna* v. *Martand Keshav.*
('29) 16 AIR 1929 Bom 382 (383) : 121 Ind Cas 446, *Murlidhar* v. *Shivram.*
('21) 8 AIR 1921 Bom 289 (291) : 45 Bom 446 : 59 Ind Cas 759 (DB), *Bapu Tatya Desai* v. *Bala Ravji Desai.* (The fact that a discharge can be given by the manager only for the benefit of the family does not make him a person who cannot give a discharge within the meaning of this section.)
('33) 20 AIR 1933 Lah 479 (480) : 142 I. C. 295, *Lal Chand* v. *Gian Chand.* (Do.)
[*See* ('18) 5 AIR 1918 Mad 29 (31) : 45 I. C. 419 : 41 Mad 637 (DB), *Ankalamma* v. *Chenchayya.*]
See also cases cited in foot-notes (4) to (11) below.

[4] ('82) 4 All 512 (514) : 1882 All W N 114 : 7 Ind Jur 268, *Surju Prasad Singh* v. *Khwahish Ali.*
('10) 7 Ind Cas 267 (267) (Mad) (DB), *Anantarama* v. *Mandarthi Shrinivasa.*

[5] ('29) 16 AIR 1929 Cal 165 (165) : 115 Ind Cas 354 (DB), *Asutosh Ghose* v. *Sashi Mohan Roy.* (Distinguishing AIR 1916 P C 148.)

[6] ('07) 6 Cal L Jour 383 (393, 395) (DB), *Harihar Pershad* v. *Bholi Pershad.*
('19) 6 AIR 1919 Mad 215 (217) : 53 Ind Cas 161 (DB), *Venkatasubba Row* v. *Yemmanur Venkatamayya.*
('09) 1 Ind Cas 670 (676) (Cal) (DB), *Banwari Lal* v. *Sheo Sankar Misser.* (14 Cal 50, distinguished on the ground that the case was governed by Dayabhaga law.)

[7] ('28) 15 AIR 1928 Lah 484 (487) : 110 Ind Cas 293 (DB), *Sharam Singh* v. *Sadhu Singh.*
('24) 11 AIR 1924 All 738 (739) : 80 Ind Cas 12 (DB), *Baijnath* v. *Ram Bilas.*

[8] ('17) 4 AIR 1917 Bom 10 (11) : 42 Bom 277 : 44 Ind Cas 851 (DB), *Huchrao* v. *Bhima Rao.* (6 Bom L R 647 distinguished on the ground that that was a case of joint decree-holders.)

(6) Suit to set aside decree.[9]

(7) Suit to set aside partition.[10]

(8) Suit to set aside alienation of joint family property.[11]

It has even been held that in regard to a suit for partition on behalf of one branch of the family which has been excluded from the enjoyment of the joint property, the father or other senior member of the branch can give a discharge within the meaning of this section.[12]

In *Nobin Chandra* v. *Chandra Madhab*[13] (a case from Bengal), a suit for accounts was brought by certain plaintiffs who were Hindu brothers. Some of the plaintiffs were minors. It was held by the Privy Council that the eldest brother could not have given a discharge so as to bind the others and that therefore the suit was not barred by limitation notwithstanding the expiry of time as against the eldest brother. In view of this decision, it has sometimes been doubted[14] whether the senior member of a joint Hindu family can give a discharge on behalf of the family within the meaning of this section. But in the vast majority of cases[15] the above Privy Council decision has not been taken as an authority for the proposition that a manager cannot give a discharge on behalf of a Mitakshara joint family. The circumstances of the case decided by the Privy Council are not clear. Perhaps, as observed by the Madras High Court in the undermentioned decision,[16] the case before the Privy Council was one under the *Dayabhaga* law and not under the *Mitakshara* law.

But, as already said, it is only the managing member that can give a discharge on behalf of a Mitakshara joint family. Although in several decisions it seems to have been assumed almost as a matter of law that the eldest adult male member of the family is the manager,[17] yet it has been held in some decisions[18] that such a presumption alone is not sufficient and that unless there is evidence that the eldest male member has actually acted as manager, his omission to sue must not be held to bar the rights of the whole family.

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[9] ('20) 7 AIR 1920 Mad 645 (646) : 43 Mad 842 : 59 Ind Cas 662 (DB), *Kuppuswami* v. *Kamalammall.* (Distinguishing AIR 1916 P C 148.)

[10] ('14) 1 AIR 1914 Bom 59 (87) : 38 Bom 449 : 22 Ind Cas 195, *Jan Mahomed* v. *Dattu Jaffar.* (Suit to set aside partition — Father of plaintiffs may give discharge.)

[11] See Note 17.

[12] ('20) 7 AIR 1920 Mad 793 (798): 52 Ind Cas 725 (DB), *Narasimha* v. *Krishna Chandra.*

('23) 10 AIR 1923 Oudh 61 (79) : 74 Ind Cas 225 (DB), *Rudra Pratap Narain Singh* v. *Nirman Prasad Singh.*

[13] ('16) 3 AIR 1916 P C 148 (149) : 44 Cal 1 : 36 Ind Cas 1 (P C).

[14] ('19) 6 AIR 1919 Mad 218 (219) : 53 Ind Cas 239 (DB), *Kalliani Amma* v. *Achuthan Nair.*

[15] See foot-notes (3) to (11).

[16] ('20) 7 AIR 1920 Mad 645 (646) : 43 Mad 842 : 59 Ind Cas 662, *Kuppuswamy* v. *Kamalammall.*

[17] ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdis Narain* v. *Bishun Datt.* (Eldest brother can give discharge as the manager of the family.)

('40) 27 AIR 1940 Mad 530 (531) : I L R (1940) Mad 752 : 191 Ind Cas 369 (DB), *Bhaktavatsaludu* v. *Venkatanarasimha Rao.* (Eldest member of joint Hindu family is presumed to be manager of family unless presumption is rebutted — In Madras he can give valid discharge without concurrence of other members.)

('34) 21 AIR 1934 Mad 469 (470): 150 Ind Cas 76: 58 Mad 155 (DB), *Jaddu Padhi* v. *Chokkapu Boddu.*

With regard to their separate properties, the members of a Mitakshara joint family do not constitute a coparcenary and one of them cannot give a discharge in regard to causes of action affecting such separate properties.[19] (See also Note 4.)

17. Suit to set aside alienation of joint family property — Manager's power to give discharge. — The general principle that the manager of a Mitakshara joint family can give a discharge in regard to causes of action accruing in favour of the family, applies also to suits to set aside alienations of the family property. Such suits may be classified as follows :

(1) Suits to set aside alienations by the *father* of the family or other coparcener. In such cases the authority of the father or other

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('36) 23 AIR 1936 Mad 914 (914, 915): 165 Ind Cas 656, *In re Annia Pillai.* (Such a presumption prevails especially in Madras.)

[*See also* ('38) 25 AIR 1938 Bom 392 (393, 394) : 177 Ind Cas 286 (DB), *Bhikarchand Devidas* v. *Lachhamandas Bansilal.* (Alienation by mother of two brothers during their minority—No other property belonging to two brothers as members of joint family—Brothers maintained by aunt—Presumption that elder brother is manager of joint family does not apply.)]

See also cases in foot-notes (3) to (11) above.

[18] ('38) 25 AIR 1938 Bom 500 (503) : 179 Ind Cas 33 (DB), *Shantaya Kotraya* v. *Mallappa Basappa.* (Eldest major brother in joint Hindu family never acting as manager and so incapable of giving valid discharge without concurrence of other brothers — Suit by other brothers to set aside alienation by father within three years of their attaining majority is not barred by time.)

('37) 24 AIR 1937 Pat 155 (156) : 167 Ind Cas 934, *Gangadeo Singh* v. *Ram Prasad Singh.* (Until it is proved by evidence that elder brother exercised authority as manager he will not be taken as such.)

('27) 14 AIR 1927 All 188 (188) : 98 Ind Cas 508, *Lachman Prasad* v. *Salu Salik Chand.* (The fact that the elder brother filed an objection in a mutation case is not sufficient to establish managership.)

('22) 9 AIR 1922 Bom 319 (321) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval* v. *Madhu Kala.* (Property managed by minors' mother — Nothing to show that the elder son on attaining majority took over charge of management — He could not have given a discharge—A I R 1921 Bom 289 Distinguished.)

('27) 14 AIR 1927 Cal 952 (954) : 55 Cal 608 : 104 I. C. 668 (DB), *Jugal Kishore Debi* v. *Baidya Nath.*

('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand* v. *Gain Chand.*

('25) 12 AIR 1925 Nag 385 (387, 388) : 88 Ind Cas 268, *Shampuri* v. *Ramchandra.* (Court cannot assume that a particular person is the manager unless there is admission of parties, proof or other material on the record.)

('29) 16 AIR 1929 Mad 394 (395) : 119 Ind Cas 39, *Mannarswamy* v. *Ramaswamy.*

('09) 1 Ind Cas 824 (825) : 31 All 156 (DB), *Gangadayal* v. *Mani Ram.*

[*See also* ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan* v. *Vizhayil Devaki.*

('24) 11 AIR 1924 All 916 (917) : 79 Ind Cas 296, *Ish Dat Tewari* v. *Tameshar.*

('27) 14 AIR 1927 Nag 145 (147) : 99 Ind Cas 1050, *Mahadeo* v. *Somaji.*

('16) 3 AIR 1916 Pat 120 (121) : 39 Ind Cas 85 (DB), *Brij Behari Singh* v. *Sheo Sankar Jha.*]

[19] ('07) 6 Cal L Jour 383 (388, 393, 397) (DB), *Harihar Persad* v. *Bholi Pershad.*

coparcener to alienate the property is called in question and hence, a question is raised as between the members of the family *inter se.*[1]

(2) Suits to set aside alienations by a *guardian* of minor coparceners.

(3) Suits to set aside alienations *not* made by either of the persons mentioned above. A suit to set aside an alienation made by the mortgagee of the joint family property will fall under this class.[2]

In classes 2 and 3 above, no question is raised as between the members of the family *inter se.* The question is purely one between the members of the family on one side and a stranger on the other side.[3]

The managing member of the family can give a discharge in all the above cases.[4]

Note 17

[1] ('35) 22 AIR 1935 All 746 (747): 155 Ind Cas 569: 57 All 891 (DB), *Anrudh Rai* v. *Sant Prasad Rai.*

[2] ('29) 16 AIR 1929 Nag 267 (268) : 118 Ind Cas 682, *Daulat* v. *Bali Ram.*

[3] *See* ('35) 22 AIR 1935 All 746 (747): 155 Ind Cas 569: 57 All 891 (DB), *Anrudh Rai* v. *Sant Prasad Rai.*

[4] ('41) 28 AIR 1941 Oudh 165 (168, 169): 191 Ind Cas 825 (DB), *Jagdis Narain* v. *Bishnu Datt.* (Alienation by guardian.)

('15) 2 AIR 1915 Mad 1201 (1202) : 21 Ind Cas 410 (412, 413) : 38 Mad 118 (DB), *Doraisamy Sirumadan* v. *Nondisamy Saluvan.* (Do).

('34) 21 AIR 1934 Mad 469 (470) : 150 Ind Cas 76 : 58 Mad 155, *Jaddu Padhi* v. *Chokkapu Boddu.* (Do.)

('17) 4 AIR 1917 Mad 700 (702): 34 Ind Cas 794 (DB), *Soundararajan* v. *Saravana Pillai.* (Do.)

('16) 3 AIR 1916 Mad 1011 (1012) : 32 Ind Cas 802 (DB), *Surapa Raju* v. *Venkayya.* (Do.)

('21) 8 AIR 1921 Bom 289 (290, 291) : 45 Bom 446 : 59 Ind Cas 759 (DB), *Bapu Tatya* v. *Bala Raojee Desai.* (Do.)

('35) 22 AIR 1935 Bom 259 (261) : 157 I. C. 592, *Kondaji* v. *Dagadu.* (Do.)

('29) 16 AIR 1929 Lah 14 (16):114 I. C. 59, *Luta Ram* v. *Shiv Ram.* (Do.)

('36) 23 AIR 1936 Mad 914 (914) : 165 I. C. 656, *In re Annia Pillai.* (Do — The fact that the elder brother did not live with the minor brothers was insufficient to rebut the presumption of managership of the elder brother.)

('28) 15 AIR 1928 Mad 42 (42) : 106 Ind Cas 863 (DB), *Kola Surayya* v. *Kola Subbamma.* (Alienation by guardian — Overruled on another point in AIR 1940 Mad 33 (FB).)

('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara* v. *Bappayya.* (Suit to set aside sale in execution of mortgage decree against father.)

('14) 1 AIR 1914 Bom 300 (301): 38 Bom 94: 21 Ind Cas 350 (DB), *Mahableshwar Krishnappa* v. *Ramchandra Mangesh Kulkarni.* (Suit to set aside sale by manager appointed by father.)

('94) 17 Mad 189 (192, 193) : 4 Mad L Jour 79 (DB), *Narayanan* v. *Damodaran.* (Per Best, J. — Suit to set aside revenue sale on ground of fraud.)

('25) 12 AIR 1925 All 672 (673) : 87 Ind Cas 177 (DB), *Shiam Lall* v. *Mool Chand.* (Suit to set aside execution sale.)

('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand* v. *Gain Chand.* (Suit by the plaintiffs claiming to be the owners of certain property alleged to have been given in trust to the defendants during plaintiffs' minority and to have been misappropriated by them.)

('29) 16 AIR 1929 Nag 267 (268) : 118 I. C. 682, *Daulat* v. *Baliram.* (Suit against purchaser from mortgagee of joint family property—AIR 1925 Nag 385, Dist.)

('35) 22 AIR 1935 All 746 (747, 748): 57 All 891 : 155 Ind Cas 569 (DB), *Anrudh Rai* v. *Sant Prasad Rai.* (Suit against transferee from tenant of the family.)

The above view is not inconsistent with the decision of the Privy Council in *Jawahir Singh* v. *Udai Parkash.*[5] In that case an alienation had been made by the father and a suit was brought by the sons to set aside the alienation. The father was made a defendant in the suit. It was held by the Privy Council confirming the judgment of the High Court that the eldest son could not have given a discharge within the meaning of this section so as to make limitation run as against all of them. The Privy Council do not give any reasons for their decision but merely express their concurrence with the decision of the High Court. But in view of the facts of the case, it seems clear that the Privy Council could not have held that the *manager* of a joint family cannot give a discharge in such cases. As the father was still living, the eldest son had never been the manager of the family so as to be able to give a discharge within the meaning of this section.[5a]

The undermentioned decisions[6] also only illustrate the rule that a member who is not the *manager* of the family cannot give a discharge. The view that any of these decisions lays down that in such cases the eldest male member of the family can never give a discharge on behalf of the whole family[7] is not correct.

But it has been held in some decisions that a discharge cannot be given *at all* on behalf of the whole family in such cases. These decisions proceed on the following lines of reasoning :

(1) The right to set aside an unauthorised alienation of the family property is not a *joint* right at all.[8] According to these decisions,

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('35) 22 AIR 1935 Mad 1085 (1087) : 158 Ind Cas 874, *Nemmayya Shetty* v. *Nagaraja Shetty.* (Proof of *de facto* management by managing member is not necessary in every case.)

('37) 24 AIR 1937 Pat 435 (439, 440) : 16 Pat 422 : 170 I. C. 362 (FB), *Karan Singh* v. *Mt. Tetar Kuar.* (Suit for possession of property alienated by the guardian.)

('36) 23 AIR 1936 Mad 434 (437) : 161 Ind Cas 969 (DB), *Administrator-General, Madras* v. *Radhakrishna Chettiar.* (Power of manager to give discharge not affected by fact that some other person is acting as next friend of minor.)

[5] ('26) 13 AIR 1926 P C 16 (18) : 93 I. C. 216 : 48 All 152 : 53 Ind App 36 (PC).

[5a] ('34) 21 AIR 1934 Mad 469 (470) : 150 Ind Cas 76 : 58 Mad 155 (DB), *Jaddu Padhi* v. *Chokkapu Boddu.*

('29) 16 AIR 1929 Lah 14 (16) : 114 Ind Cas 59, *Luta Ram* v. *Shiv Ram.*

('33) 20 AIR 1933 Lah 479 (479, 480) : 142 I. C. 295, *Lal Chand* v. *Gain Chand.*

[6] ('09) 1 Ind Cas 824 (825) : 31 All 156 (DB), *Ganga Dayal* v. *Mani Ram.* ("Nothing to show that first plaintiff ever acted as manager.")

('28) 15 AIR 1928 Mad 1055 (1056) : 109 Ind Cas 572 : 51 Mad 627 (DB), *Rajagopala Iyengar* v. *Srinivasaraghava Ayyengar.* (Father and managing member alive. A I R 1926 P C 16 followed.)

('26) 13 AIR 1926 Mad 1190 (1191) : 98 Ind Cas 31 (DB), *Narayana Naicken* v. *Venkataswamy Naicken.*

('37) 24 AIR 1937 Pat 155 (156) : 167 I. C. 934, *Gangadeo Singh* v. *Ram Prasad Singh.* (Mere coming of age of one of the brothers in a joint Hindu family does not raise a presumption that he is the manager of the family in the absence of any evidence.)

[7] ('39) 26 AIR 1939 Mad 907(908):189 I.C. 167, *Kunhi Kannan* v. *Vizhayil Devaki.*

('24) 11 AIR 1924 All 916 (917) : 79 Ind Cas 296, *Ishdat Tewari* v. *Tameshar.*

[8] ('30) 17 AIR 1930 All 861 (861) : 52 All 768 : 130 I. C. 691 (DB), *Sheonandan Prasad* v. *Mt. Tahiran Bibi.* (Alienation by father or manager.)

each coparcener has an *independent* cause of action to sue to set aside such an alienation. It is submitted that this view is not correct. As seen in the Notes to S. 6, an unauthorised alienation of joint family property gives rise to only *one* cause of action, so much so that even an after-born coparcener is only entitled to sue on the basis of an existing cause of action and does not get a fresh and independent right to sue on his birth.[8a]

(2) The expression "discharge" can only apply to the discharge of a *debt* and cannot apply to a right to have an alienation set aside.[9] But, it is submitted that this view is not correct. In a wide sense, the term "discharge" can include any form of quittance whereby the rights and liabilities of the parties are put an end to.[10] (See Note 9.)

18. Suit by members of Mitakshara joint family for redemption of mortgaged property. — In the undermentioned case[1] it was held by the Bombay High Court that the manager of a joint family cannot give a discharge on behalf of the whole family in regard to a suit for the redemption of a mortgage so as to make the suit time-barred as against all the members of the family. The decision proceeds on two grounds :

('31) 18 AIR 1931 All 398 (400) : 133 Ind Cas 155 (DB), *Kamta Rai* v. *Rani Jaluraj Kunwari.* (Alienation by guardian.)

('25) 12 AIR 1925 Nag 385 (388, 389) : 88 Ind Cas 268, *Shampuri* v. *Ramchandra.*

('28) 15 AIR 1928 Lah 484 (486) : 110 Ind Cas 293 (DB), *Sharam Singh* v. *Sadhu Singh.* (Suit against stranger claiming property by adverse possession—Suit barred against manager of the family is barred against every member of the family.)

[*See also* ('35) 22 AIR 1935 All 746 (747) : 57 All 891 : 155 Ind Cas 569 (DB), *Anrudh Rai* v. *Sant Prasad Rai.* (But where the dispute is between the family as a whole on one side and stranger on the other S. 7 is applicable.)]

[8a] This does not militate against the position that any coparcener can sue to set aside the unauthorized alienation without making the others parties to the suit. See Notes under Section 6.

[9] ('30) 17 AIR 1930 All 861 (861) : 52 All 768 : 130 I. C. 691 (DB), *Sheonandan Prasad* v. *Mt. Tahiran Bibi.*

('31) 18 AIR 1931 All 398 (400) : 133 I. C. 155 (DB), *Kamta Rai* v. *Jaduraj Kunwar.*

[10] ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval* v. *Madhu Kala.* (Discharge can be given of a right to redeem a mortgage.)

('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand* v. *Gain Chand.* (The view expressed in A I R 1931 All 398 to the effect that S. 7 applies only where the question of discharge arises with respect to a debt is not supported by any authority.)

('37) 24 AIR 1937 Pat 435 (439) : 16 Pat 422 : 170 Ind Cas 362 (FB), *Karan Singh* v. *Mt. Tetar Kuer.* (The term 'discharge' in S. 7 includes a release of rights in equity of redemption or a release of other rights as for instance a right to institute a suit.)

('15) 2 AIR 1915 Mad 723 (724) : 25 Ind Cas 755 (DB), *Parameswaran Nambudripad* v. *Sankaran Nambudripad.* ("Discharge" in S. 7 is not confined to pecuniary liability but includes also "release of rights to immovable property," and other rights which may belong to the plaintiffs.)

Note 18

[1] ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval* v. *Madhu Kala.* (The decision in this case was further influenced by the fact that the elder brother was not proved to be the manager of the family.)

(1) In a suit for redemption, all the members of the family must be made parties under the provisions of the Civil Procedure Code, while in a suit to set aside an unauthorized alienation of family property, it is open to a coparcener to proceed without making the other coparceners parties to the suit. Hence, it is open to the manager in regard to a suit to *set aside* an alienation of family property to give a discharge without the concurrence of the other members of the family, while it is not open to him to do so in regard to a suit for *redemption.* It is submitted with respect that this reasoning is not correct. The power to give a discharge is not identical with the power to sue without making the other persons jointly entitled, parties to the suit. (See Note 9.)

(2) The second reason for holding that a discharge cannot be given in such cases is couched in the following terms : "The right to redeem a mortgage of joint family property vests in all the members of the family whoever is the manager, and it is difficult to see how the right of the second plaintiff to redeem, which was in existence during his minority, could be defeated by the fact that his elder brother did not file a suit to redeem within the period allowed to him." If the meaning of this passage is that the coparceners have each an *independent* cause of action to sue for redemption, it is submitted that the correctness of the view is doubtful.

As regards the applicability of the word "discharge" to suits for redemption of a mortgage, Macleod, C. J., observed that it was difficult to say that the plaintiff seeking redemption gave a "discharge" to the mortgagee, but that if the word "discharge" was given a wider meaning as including any form of quittance whereby the rights and liabilities between two parties were put an end to, it could be said that the plaintiff seeking redemption gave a discharge when he paid the mortgage debt and recovered possession of the mortgaged property from the mortgagee, thus putting an end to all rights and liabilities between the parties, so that, no further proceedings could be taken.

19. Suit by ward on attaining majority to set aside alienation by guardian. — Article 44 of the first schedule provides a period of three years for a suit by a ward who has attained majority to set aside a transfer of property by his guardian. The period of limitation under the article starts from the date on which the ward attains majority. Suppose there are several wards who constitute the members of a Mitakshara joint family, and that the guardian of such wards transfers property belonging to them as such coparceners, to a stranger. In such a case a joint cause of action accrues in favour of the wards to sue to set aside the sale. Hence, when one of the wards attains majority and time begins to run against him under the above article it would be a case of several persons being jointly entitled to institute a suit and some of them being under a disability at the time from which the period of limitation is to be computed. Hence, if the ward who first attains majority is competent to give a discharge without the concurrence of the other wards, then, under the first part of this section, time will begin to run as against *all* the wards. In such a case, each of the wards will not be entitled to a start of limitation from the date of *his* attaining majority under the above article. The reason is that under S. 3, the articles in the first schedule must be read subject to the provisions of Ss. 4 to 25 of the Act.[1] As to the question whether the ward who attains majority first can give a discharge, see Note 17.

20. Suit by members of Dayabhaga family. — The members of a Dayabhaga family hold as *tenants-in-common* and not as joint tenants. In other words, the members are entitled to *definite* shares of the joint property even before partition.[1] Hence, it is apprehended that one member of the family cannot give a discharge in regard to causes of action accruing in favour of the members of the family.[2]

21. Karnavan of Malabar tarwad.—The karnavan and adult male members of a Malabar *tarwad* can give a discharge in respect of causes of action accruing in favour of the *tarwad*.[1] But where the claim is to avoid a transfer by the karnavan, he himself cannot give a discharge nor can he be said to be "jointly entitled" with the other members of the tarwad to sue to set aside the transfer merely because he is entitled to sue to set aside the transfer on the ground of fraud, etc.[2]

Note 19

[1] ('36) 23 AIR 1936 Mad 914 (914): 165 Ind Cas 656, *In re Annia Pillai* (A I R 1915 Mad 1201, Foll.)

('28) 15 AIR 1928 Mad 42 (42) : 106 Ind Cas 863 (DB), *Surayya* v. *Subamma.*

('15) 2 AIR 1915 Mad 1201 (1202, 1203) : 21 Ind Cas 410 : 38 Mad 118 (DB), *Doraisamy Sirumadan* v. *Nondisami Saluvan.*

('14) 1 AIR 1914 Bom 300 (301) : 21 Ind Cas 350 (351) : 38 Bom 94 (DB), *Mahableshwara Krishnappa* v. *Ramchandra Mangesh.*

Note 20

[1] ('09) 3 I. C. 878 (880) : 32 Mad 271 (DB), *Balakrishna Iyer* v. *Muthuswamy.*

[2] ('20) 7 AIR 1920 Mad 645 (646) : 43 Mad 842 : 59 Ind Cas 662 (DB), *Kuppusamy Iyengar* v. *Kamalammall.*

[*See also* ('16) 3 AIR 1916 P C 148 (149) : 36 Ind Cas 1 : 44 Cal 1 (PC), *Nobin Chandra* v. *Chandra Madhab.* (It was remarked in A I R 1920 Mad 645 that A I R 1916 P C 148 was perhaps a case dealing with Dayabhaga law.)]

Note 21

[1] ('15) 2 AIR 1915 Mad 723 (724, 725) : 25 Ind Cas 755 (DB), *Parameswaran* v. *Sankaran.* (Suit to set aside *karar* on ground of fraud.)

[*See* ('95) 18 Mad 38 (40), *Moidin Kutty* v. *Beevi Kutti Ummah.* (Suit to set aside compromise.)]

[2] ('39) 26 AIR 1939 Mad 907 (908, 909) : 189 Ind Cas 167, *Kunhi Kannan* v. *Vazhayil Devaki.* (Gift by *A* and *B* as existing members of Malabar tarwad—After *A*'s death *B* becoming Karnavan—Suit by *C* an after-born member within three years of attaining majority to set aside alienation—S. 7 held did not apply as *B* and *C* could not be said to be jointly entitled to file suit and secondly because *B* could not have given discharge without concurrence of *C*—Sadasiva Aiyar, J.'s opinion in A I R 1915 Mad 723 dissented from.)

21a. Hindu reversioners challenging alienation by limited owner. — X, a Hindu widow, alienated the property of her husband for a purpose not binding on the estate. At the date of the alienation, the next reversioners were A and B who were brothers, of whom A was an adult and B was a minor. A did not do anything by way of challenging the alienation. B filed a suit to challenge it within three years of his attaining majority but more than twelve years after the date of the alienation. It has been held in the undermentioned case[1] that one reversioner could not give a discharge on behalf of the whole body of reversioners, but that nevertheless B's suit was barred by reason of the fact that A who could have instituted the suit did not do so and that therefore limitation must be counted from the time of the alienation. As has been seen in Note 11, the basis for the reasoning on which the decision was based, namely that the section applied only to cases where persons who could give a discharge could not do so on account of disability, does not exist under the present section. The case will, it is submitted, clearly fall within the second part of the section and limitation will run against both A and B only from the date when the disability of B ceases.

21b. Reversioners under Punjab Customary Law suing to set aside alienation by collateral. — In the undermentioned case,[1] the sons of a Mahomedan governed by the Punjab Customary Law were entitled to sue for a declaration that an alienation made by their father could not affect their reversionary rights. It was contended that the eldest son who was an adult could have given a discharge and so the suit by the younger son who was a minor was also barred. In overruling the contention the Court observed as follows: "Here the plaintiff and his brothers are Mussalmans and are not members of a joint family. Their rights are *independent* of each other. The fact, therefore, that the eldest brother of the minor plaintiff can no longer sue, does not affect the right of the plaintiff to sue." It is submitted that the view that the rights of the plaintiffs were *independent* of each other seems to be open to doubt.[2] But, even if their rights are not independent of each other it does not necessarily follow from this that the eldest son could have given a discharge within the meaning of this section. On this point the position seems to be as laid down in the decision, viz., that the eldest son cannot give a discharge in such cases.[3] It is conceived that in such cases the second part of the section will apply. (See Note 21a.)

Note 21a

1. ('27) 14 AIR 1927 Mad 216 (217): 99 Ind Cas 668, *Neelankantamier* v. *Chinnu Ammal.* (Section 7 does not apply to cases of reversioners.)

Note 21b

1. ('29) 16 AIR 1929 Lah 582 (582) : 122 Ind Cas 92, *Ghulam Rasul* v. *Hussain.*
2. *See* ('32) 19 AIR 1932 Lah 39 (40) : 132 Ind Cas 665, *Wali Chand* v. *Punjab Singh.* (Case of alienation by widow.)
3. *See* ('32) 19 AIR 1932 Lah 39 (40) : 132 Ind Cas 665, *Wali Chand* v. *Punjab Singh.* (Case of alienation by widow.)

Section 7
Note 22

22. Joint creditors. — There is a conflict of decisions on the question whether one of several co-creditors of the same debt can receive payment of the debt and give a discharge on behalf of all. In *Barber Maran* v. *Ramana Goundan*,[1] it was held by the Madras High Court that one co-mortgagee could receive payment of the mortgage money and give a good discharge so as to bind all the co-mortgagees. The decision was based on S. 38 of the Contract Act and the English case of *Wallace* v. *Kelsall*.[2] Section 38 of the Contract Act provides that the refusal of a valid tender by a promisor under a contract will discharge him from the liability for non-performance of the contract and that a tender to one of several joint promisees has the same effect as one made to all the joint promisees. The decision in *Wallace* v. *Kelsall*[2] was to the effect that in the case of a joint debt, one joint creditor could receive payment of the debt and give a good discharge for it.

The correctness of the above Madras decision was doubted in some later decisions of that Court,[3] but it was approved of by a Full Bench of the Court in *Annapurnamma* v. *Akkayya*.[4] That was a case relating to a negotiable instrument and not a mortgage; but their Lordships held that there was no difference in the principle applicable to the two classes of cases.

The decision of the majority in the above Full Bench case was to the effect that one of several joint creditors of a debt can receive the debt on behalf of all and give a good discharge for it. Reliance was again placed on S. 38 of the Contract Act and the decision in *Wallace* v. *Kelsall*[2] in support of this view. Arnold White, C. J., who was a member of the Full Bench, however, differed from the majority of the Bench and held that one joint creditor cannot give a good discharge for the debt. His Lordship held, following the view laid down in *Steeds* v. *Steeds*,[5] that co-creditors must be presumed to have distinct interests in the debt and to be in the position of tenants-in-common with reference to it. In such a view, one of them could not give a good discharge for the debt, even according to the English law. His Lordship held that such a presumption is not affected by the provisions of the Contract Act. As regards S. 38 of the Contract Act, his Lordship held that it only dealt with the *tender* of a debt and not the *payment* of it.

Note 22

[1] ('97) 20 Mad 461 (463, 464) : 7 Mad L Jour 269 (DB).

[2] (1840) 10 L J Ex 12 (15) : 7 M & W 264 : 4 Jur 1064 : 56 R R 707 : 8 D P C 841.

[3] ('02) 25 Mad 26 (38, 39) (DB), *Ahinsa Bibi* v. *Abdul Kader*. (The principle of 20 Mad 461 was held applicable to joint promisees but not to the case of coheirs.)
('10) 5 Ind Cas 343 (347) (Mad) (DB), *Ramaswamy* v. *Muniandy Servai*.
('12) 10 Ind Cas 874 (876) : 35 Mad 685 (DB), *Sheikh Ibrahim* v. *Rama Iyer*.

[4] ('13) 19 Ind Cas 12 (16, 17, 18) : 36 Mad 544 (FB) (Promissory note in favour of three brothers of whom two were minors — Suit by adult brother barred, suit by minor brothers is also barred.)

[5] (1889) 22 Q B D 537 (541) : 60 L T 318 : 37 W R 378 : 58 L J Q B 302.

The above Full Bench decision has been followed in subsequent decisions of the Madras High Court,[6] though its correctness has been questioned in some of them.[7]

As regards the other High Courts, they have also accepted the principle that the same rule applies to co-creditors of a secured debt as well as to co-creditors of an unsecured debt. But, the Madras view that one co-creditor can give a good discharge for the whole debt has not been accepted by the other High Courts.[8] Thus, it has been held that one co-mortgagee cannot give a good discharge for the mortgage debt so as to bind the other co-mortgagees.[9] Similarly, it has been held that one of several co-creditors under a money bond cannot give a good discharge for the debt.[10] These decisions proceed on the view that co-creditors of a debt must be presumed to have distinct interests in the debt and to be in the position of tenants-in-common with reference to it. According to these decisions also, the authority of the decision in *Wallace* v. *Kelsall*[11] has been considerably shaken by the judgment of Farwell, J., in *Powell* v. *Brodhurst*.[12]

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[6] ('13) 20 Ind Cas 792 (795, 797) (Mad) (DB), *Appavu* v. *Nanjappa Goundan*.
('25) 12 AIR 1925 Mad 261 (263) : 85 Ind Cas 297 : 48 Mad 693 (DB), *Ramaswami* v. *Chandra Kottayya*.
('17) 4 AIR 1917 Mad 269 (270) : 32 I. C. 173 (DB), *Ponnusamy* v. *Thyagaraja*.

[7] ('17) 4 AIR 1917 Mad 269 (270) : 32 I. C. 173 (DB), *Ponnusamy* v. *Thyagaraja*.
('18) 5 AIR 1918 Mad 29 (30) : 45 Ind Cas 419 : 41 Mad 637 (DB), *Ankalamma* v. *Chenchayya*.

[8] See cases in foot-notes (9) and (10) below.
[But see ('17) 4 AIR 1917 Pat 82 (84) : 42 Ind Cas 408 (DB), *Parbhu Ram Pandey* v. *Raghubir Sah*. (A joint creditor in equity can give a valid receipt in full discharge of claims of himself and the other joint creditors.)]

[9] ('10) 8 Ind Cas 837 (839, 840) : 38 Cal 342 (DB), *Husainara Begum* v. *Rahmannessa Begum*. (6 Cal L Jour 383 relied on.)
('15) 2 AIR 1915 Cal 528 (528) : 29 Ind Cas 956 (DB), *Umes Chandra Banerji* v. *Dinabandhu Mahanti*. (The mortgage bond in this case stated expressly that mortgagors would repay the loan to the two mortgagees.)
('27) 14 AIR 1927 Cal 425 (429, 430) : 101 I. C. 530 (DB), *Satindra* v. *Jatindra*.
('34) 21 AIR 1934 Cal 1 (2) : 149 I. C. 1062 (DB), *Satish Chandra* v. *Jewan Lal*.
('14) 1 AIR 1914 All 518 (519) : 23 Ind Cas 8 (DB), *Ram Jit* v. *Khem Chand*.
('10) 5 Ind Cas 129 (130) : 32 All 164 (DB), *Ram Chandra* v. *Rajjan Lal*. (25 All 155 held to be rightly decided.)
('21) 8 AIR 1921 Pat 27 (28) : 56 Ind Cas 403 (DB), *Abbas* v. *Misri Lal*.
('20) 7 AIR 1920 Pat 464 (468) : 55 Ind Cas 841 (DB), *Banamali Satpathi* v. *Talua Ramhari*. (Case of co-heirs of same mortgagee.)
[*See* ('19) 6 AIR 1919 All 275 (276) : 41 All 631 : 51 Ind Cas 107 (DB), *Jauhari Singh* v. *Ganga Sahai*.]

[10] ('02) 25 All 155 (157, 158) : 1902 All W N 216 (DB), *Manzur Ali* v. *Mahmud-un-nissa*.
[*See* ('24) 11 AIR 1924 Cal 710 (713) : 51 Cal 566 : 84 Ind Cas 204 (DB), *Bilwar Bibi* v. *Muhamed Habibar Rahman*. (Decree-holders of a money decree.)]
[But see ('79) 4 Cal 350 (354, 355) : 1 Shome L R 169 (DB), *Ahamudeen* v. *Girish Chunder Shamunt*. (Rent paid to one of several cosharer landlords — *Held*, tenant not liable to pay rent over again to the other landlords.)
('93) 1893 Pun Re No. 60, *Daulat Ram* v. *Sayed Abdul Kasim*. (Suit for rent— Adult cosharer held capable of giving discharge without concurrence of the minor cosharers — S. 38, Contract Act, relied on.)]

[11] (1840) 10 L J Ex 12 (15) : 4 Jur 1064 : 7 M & W 264 : 56 R R 707 : 8 D P C 841.

[12] (1901) L R 2 Ch 160 (165) : 70 L J Ch 587 : 84 L T 620 : 49 W R (Eng.) 532 : 17 T L R 501.

It is submitted that the Madras view is not correct. As pointed out by Arnold White, C. J., in his dissenting judgment in *Annapurnamma* v. *Akkayya*,[13] the question does not seem to be capable of determination purely on the interpretation of the provisions of the Contract Act. Neither S. 38 nor S. 45 of that Act seems to touch the question. Section 38 merely lays down that an offer of performance made to one of several joint promisees will have the same effect as an offer made to them all. This only means that where the promisor has made an offer of performance to one of several joint promisees and the offer has not been *accepted*, the promisor is not responsible for the non-performance of the contract. The section says nothing as to what constitutes a valid *acceptance* of an offer of performance.

As regards section 45, it only provides that performance of a joint contract can only be claimed by all the joint promisees jointly and does not touch the question under consideration. As has been seen in Note 9, the power to give a discharge on behalf of all the joint claimants is not identical with the power to sue on behalf of all without joining the others. Hence, the fact that a joint claimant is prevented from suing without joining the other claimants as parties to the suit does not necessarily mean that he cannot give a good discharge for the debt without the concurrence of the other joint claimants.

Hence, it would seem that the question falls to be decided with reference to the general principles of law. And as to these, it seems well settled that co-creditors of a debt (secured or unsecured) should be presumed to be in the position of tenants-in-common and not joint tenants, so that one of them cannot give a good discharge for the debt.[14] Even the Madras High Court seems to concede that this is the true position in *equity*.[15]

This view is also supported in the case of *co-mortgagees* by the provisions of section 45 of the Transfer of Property Act. That section shows that transferees under a joint transfer for consideration are entitled to distinct interests in the subject-matter of the transfer. This means that co-mortgagees are entitled to distinct interests in the mortgage or, in other words, that they are in the position of tenants-in-common with regard to the debt and the security.

Thus, the better view seems to be that one co-creditor cannot give a good discharge for the entire debt without the concurrence of the others.

Even according to the Madras High Court, one co-mortgagee (or co-creditor of an unsecured debt) cannot *relinquish* the mortgage (or the debt) wholly or partially.[16]

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[13] ('13) 19 Ind Cas 12 (14, 15) : 36 Mad 544 (FB).

[14] See cases cited in foot-notes (9) and (10).

[15] ('97) 20 Mad 461 (464) : 7 Mad L Jour 269, *Barber Maran* v. *Ramana Goundan*.

[16] ('28) 15 AIR 1928 Mad 933 (935) : 112 I. C. 501 (DB), *Arunachallam Chetty* v. *Ramaswamy Iyer*.

Though co-creditors of secured or unsecured debts are generally in the position of tenants-in-common and not joint tenants, they are *jointly entitled* to institute a suit for such debt and cannot sue separately for their respective shares. This is clear from the provisions of S. 45 of the Contract Act and section 67 of the Transfer of Property Act. Section 45 of the Contract Act provides that the right to claim performance of a contract is vested in all the co-promisees jointly. Section 67 of the Transfer of Property Act provides that though co-mortgagees may be entitled to distinct interests in the security, they cannot sue separately in regard to their respective rights but must all sue together. Reference may also be made to S. 60 of the Transfer of Property Act which prohibits the piecemeal redemption of a mortgage though the equity of redemption may be vested in a body of persons each of whom may be entitled to a distinct interest in the equity.

23. **Co-heirs.**—Co-heirs, except when they are Hindus governed by the Mitakshara law and inherit the property of a male ancestor, are in the position of tenants-in-common with regard to the property inherited by them.[1] Thus, Muhammadan co-heirs are entitled to the estate as tenants-in-common.[2] But, in regard to causes of action based on transactions which happened during the lifetime of the deceased, the co-heirs are "jointly entitled" to sue and cannot sue separately with reference to their respective shares. Thus, when upon the death of an obligee of a money bond the right to realise the money devolves in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of money.[3] Similarly, the cause of action for a suit by the heirs of a deceased partner to sue for accounts arises from the partnership contract and all the heirs must join in such suit.[4] See also the undermentioned cases.[5]

Note 23

[1] ('02) 25 Mad 26 (39) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*
('07) 6 Cal L Jour 383 (393) (DB), *Harihar Pershad* v. *Bholi Pershad.* (Property inherited by Hindu brothers from maternal uncle — They are tenants-in-common.)

[2] ('19) 6 AIR 1919 Mad 172 (173) : 51 Ind Cas 748 (DB), *Alla Pichai Rowthan* v. *Pappathiammal.*

[3] ('85) 7 All 313 (315) : 1885 All W N 34 : 9 Ind Jur 314 (FB), *Kandhiya Lal* v. *Chandar.* (Per Oldfield, J.)

[4] ('02) 25 Mad 26 (32) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.*
('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 564 (DB), *Uthenpurayil Bavachutty* v. *Kunhi Pathumma.* (Plaintiffs as representatives of the deceased partner are *jointly entitled to sue* within the meaning of this section.)
See also S. 22 Note 18.

[5] ('19) 6 AIR 1919 Bom 78 (79) : 51 Ind Cas 79 : 43 Bom 487 (DB), *Gulam Gous Mia Khot* v. *Shriram Pandurang.* (Mortgage by deceased—Suit for redemption by heirs — They are "jointly entitled" — Suit brought within three years of the date when the youngest plaintiff attained majority was held to be within time.)
('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mahomed Kazam* v. *Nadir Ali Shah.* (Decree-holder dying leaving several heirs—The latter constitute one legal representative of the deceased decree-holder and one of them cannot execute the decree nor can he give a valid discharge.)

Section 7
Note 23

But, where one of the co-heirs was himself the debtor of the deceased, the right of the co-heirs is necessarily split up and there is no joint right to sue within the meaning of the section. Thus, where a Muhammadan woman dies leaving her husband and other heirs, her right to dower devolves on all the heirs including the husband as tenants-in-common. As the husband is himself a co-heir, the right of the co-heirs to sue for the dower debt is necessarily split up and hence, each of the other co-heirs can sue him for his or her share of the dower debt.[6]

If the cause of action is based on a transaction happening after the death of the deceased, i. e., after the inheritance has opened, the co-heirs can sue separately for their respective shares. Thus, if a stranger gets into possession of the estate of the deceased on his death, the co-heirs are not bound to sue jointly for the recovery of the property, but each of them may sue separately in regard to his particular share.[7]

As regards the question whether one of several co-heirs who are in the position of tenants-in-common can give a discharge in respect of the right in regard to which they are jointly entitled to sue, the general rule is that such discharge cannot be given.[8] But, where one or more of them have taken out a succession certificate in respect of the debt which is the subject of the suit, it has been held that he or they can give a good discharge so as to bind the other co-heirs and that this power is sufficient for making limitation run against all the co-heirs under this section.[9] The correctness of this proposition is, however, open to question, because the section contemplates a discharge given by a joint claimant by virtue of his *own right* as such joint claimant and not by virtue of some other authority. (See Note 9.)

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[6] ('29) 16 AIR 1929 All 142 (143, 144) : 116 Ind Cas 481 (DB), *Mahomed Zahur Ahsan* v. *Mt. Maimuna.* (7 All 313 distinguished.)

[7] *See* ('19) 6 AIR 1919 Mad 172 (173) : 51 I. C. 748 (DB), *Alla Pichai Rowthan* v. *Pappathiammal.*

('88) 1888 Pun Re No. 89, *Nasir-ud-din Shah* v. *Mt. Lal Bibi.* (A suit for share of inheritance.)

('03) 1903 Pun L R No. 51, p. 203 (DB), *Basant* v. *Indar.* (Right of collateral heirs to the estate of a Punjab agriculturist.)

[8] ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad* v. *Bholi Pershad.*

('02) 25 Mad 26 (39) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.* (Hindu co-heirs —Eldest if manager can give discharge; not so in case of Mahomedan co-heirs.)

('19) 6 AIR 1919 Bom 78 (79) : 43 Bom 487 : 51 Ind Cas 79 (DB), *Gulam Gous Mia Khot* v. *Shriram Pandurang.* (A suit for redemption by Mahomedan brothers—Suit brought within three years of younger brother attaining majority held not barred even as against the elder brother.)

('03) 27 Bom 292 (295) : 5 Bom L R 91 (DB), *Sitaram* v. *Shridhar.*

('16) 3 AIR 1916 Mad 1128 (1128): 29 Ind Cas 586 (DB), *Muniandi* v. *Ramasamy.*

('20) 7 AIR 1920 Pat 464 (468) : 55 Ind Cas 841 (DB), *Banamali Satpathi* v. *Talua Ramhari.* (Mortgagee dying, leaving two heirs — Payment to one cannot discharge whole mortgage.)

[9] ('24) 11 AIR 1924 Cal 710 (711, 712) : 51 Cal 566 : 84 Ind Cas 204 (DB), *Bilwar Bibi* v. *Muhamed Habibar Rahman.* (The Judges differed as to the interpretation of the succession certificate in the case—According to Walmsley, J. it was given only to some of the heirs ; but Suhrawardy, J., held that it had been given to all the heirs and therefore one could not give a discharge on behalf of all.)

As to suits by co-heirs who constitute a Mitakshara joint family, see Note 16.

24. Partners. — Though partners may be entitled to distinct interests in the partnership business, and as such, they may be in the position of tenants-in-common and not joint tenants as regards their rights as partners, yet, they can only sue jointly in regard to such rights, or in other words, they are "jointly" entitled to sue within the meaning of this section. The position is not affected by the fact that under O. 30 R. 1 of the Civil Procedure Code a suit can be brought in the name of the firm and one partner can sign and verify pleadings on behalf of all the partners in such suits.

Though partners may be in the position of tenants-in-common and not joint tenants with regard to their rights as partners, yet, one of them can give a good discharge to the debtor in respect of debts due to the partnership.[1] This is based on the principle that a partner has implied authority to do everything necessary and usual in the ordinary course of the partnership business. It has been held that this authority to receive and give discharges for debts due to the partnership even extends to cases in which the partnership has been dissolved.[2]

But, under S. 19 of the Partnership Act of 1932, a partner has, in the absence of an usage or trade-custom to the contrary, no power to *relinquish* or compromise a claim belonging to the firm. It is apprehended, however, that this will not affect the question as to the competency of a partner to give a *discharge* within the meaning of this section.

25. Joint trustees. — Joint trustees are in the position of *joint tenants* with regard to the properties and rights vested in them as trustees and so, they are persons jointly entitled to institute a suit with regard to any matter affecting such rights or property.

Being in the position of joint tenants in regard to their rights, it would seem that if the general rule referred to in Note 10 should apply, one joint trustee should be held to be competent to give a good discharge on behalf of all the joint trustees.[1] But, this general principle

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Note 24

[1] ('10) 9 Ind Cas 116 (117) (Cal) (DB), *Baikunta Nath* v. *Hara Lal.*
('09) 1 Ind Cas 200 (201) (Mad) (DB), *Veerasami Naicker* v. *Ibramsa Rowther.* (Discharge given in fraud of other partners is not binding on them.)

[2] ('18) 5 AIR 1918 Mad 238 (241) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniyappa Chettiar* v. *Veerappa Chettiar.*
('19) 6 AIR 1919 Mad 146 (149) : 52 Ind Cas 456 (DB), *Annamalai* v. *Annamalai.*

Note 25

[1] ('10) 6 Ind Cas 992 (993) : 34 Mad 284 (DB), *Thiagaraja* v. *Ratnasabapathi.* [*See also* (1901) 70 L J Ch 587 (590) : (1901) L R 2 Ch 160 : 84 L T 620 : 49 W R (Eng.) 532 : 17 T L R 501, *Powell* v. *Brodhurst.*]

seems to be subject to an exception in the case of joint trustees. In their case, it is provided by s. 42 of the Trusts Act of 1882 as follows:

> "Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof."

Construing the above section, it has been held by the Madras High Court that one joint trustee cannot give a good discharge on behalf of all the joint trustees.[2] The decision proceeds on the ground that the expression "any trustees or trustee" in the above section shows that if there are more than one trustee, all of them should join in giving the receipt. This seems to be the position even under the English law.[3] The view is also supported by s. 48 of the Trusts Act which provides that when there are more trustees than one, all must join in the execution of the trust, except when the instrument of the trust otherwise provides. In this view, the undermentioned decisions[4] do not seem to be correct.

26. Joint executors or administrators. — Section 311 of the Succession Act of 1925 provides that where there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration. Thus, one of several executors has power to release a debt due to the deceased. Hence, one of several executors or administrators can give a discharge in respect of obligations due in favour of the estate, without the concurrence of the other executors or administrators.[1]

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[2] ('16) 3 AIR 1916 Mad 692 (694) : 30 Ind Cas 713 : 39 Mad 597 (DB), *Nethiri Menon* v. *Gopalan Nair*. (Dissenting from 1 Bom L R 667—One joint trustee can however give discharge if he is authorized by his co-trustees.)

[3] See Halsbury's Laws of England, 1914 Edn., Vol. 28, page 140, foot-note (p). [But see (1901) 70 L J Ch 587 (590) : (1901) L R 2 Ch 160 : 84 L T 620 : 49 W R (Eng) 532 : 17 T L R 501, *Powell* v. *Brodhurst*.]

[4] ('10) 6 Ind Cas 992 (993) : 34 Mad 284 (DB), *Thiagaraja* v. *Ratnasabapathi Pillai*. (Where adult trustee allows his rights as such to become time-barred, the other trustees who are minors are also barred—It seems to have been taken for granted that being joint tenants, one joint trustee must necessarily be held to be competent to give a good discharge—The provisions of the Trusts Act which seem to make the case of joint trustees an exception to the general rule have not been referred to.)

('99) 1 Bom L R 667 (668) (DB), *Rambabu* v. *Committee of Rameswar*. (In case of religious or charitable endowments, it is permissible for one trustee to pass receipts for rents or dividends—The learned Judges seem to have been under a misimpression as to the wording of S. 42 of the Trusts Act — They proceed on the footing that the section uses the words "any trustee" and not "any trustees or trustee"—The decision would probably have been different if the correct wording of the section had been before the minds of the learned Judges.)

Note 26

[1] *See* (1857) 27 Beav 446 (454), *Smith* v. *Everett*. (Any one of several representatives may settle an account and the settlement is binding upon the others.)

Section 7
Notes 27–29

27. Co-sharers entitled to sue for mesne profits.—Where land belonging to two *tenants-in-common* has been wrongfully taken possession of by a stranger, each of the tenants-in-common is entitled to sue separately for his share of the mesne profits. Hence, they are not persons *jointly* entitled to sue within the meaning of this section. Further, one of them cannot give a discharge for the entire claim so as to bind the other co-sharer.[1]

28. Persons aggrieved by the same tortious act.— Where several persons are injured by the same tortious act, each of them can bring a separate suit for damages in so far as his own rights have been injured. So, such persons are not "jointly entitled to sue" within the meaning of this section as regards the right to sue.[1] Hence, the question as to whether one of them can give a valid discharge to the defendant in such cases does not arise. But assuming that the question can arise, it is clear that such discharge cannot be given as the persons are in the position of tenants-in-common and not joint tenants.[2]

29. Effect of appointment of guardian for minor. — Where a right to sue is vested jointly in X, an adult, and a minor for whose estate a guardian has been appointed by the Court, X cannot give a discharge without the concurrence of the guardian.[1]

Section 8

Special exceptions.

8.* Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more

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* **Act of 1877 : S. 7.**

7. * * * * * *

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

(1869) 4 Ch App 433 (439, 440), *Charlton* v. *Earl of Durham*. (Distinguished in 25 Mad 389.)

Note 27

1. ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad* v. *Bholi Pershad*.
('87) 14 Cal 50 (54) : 11 Ind Jur 143 (DB), *Anando Kishore* v. *Anando Kishore*.
[*See* ('09) 1 Ind Cas 670 (676) (Cal) (DB), *Bunwari Lal* v. *Daya Sunker*. (The rule will be different if the coshareers formed members of a Mitakshara joint family and one of them was the manager of the family.)]
See also Note 4.

Note 28

1. ('07) 6 Cal L Jour 383 (392, 395) (DB), *Harihar Pershad* v. *Bholi Pershad*.
2. ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad* v. *Bholi Pershad*.

Note 29

1. ('38) 67 Cal L Jour 88 (91) (DB), *Gourhari Ghose* v. *Srimati Anardai Bibi*. (Family business — *A* and *B* proprietors — *B*, a minor represented by certificated guardian — *A* cannot give valid discharge.)
('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad* v. *Bholi Pershad*. (Following (1888) Bom P J 141 and 14 Cal 50.)

than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(a) *A*, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. *A* has, under the ordinary law, only one year remaining within which to sue. But under S. 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(b) A right to sue for an hereditary office accrues to *A* who at the time is insane. Six years after the accruer *A* recovers his reason. *A* has six years,

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Illustrations.

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(b) *A*, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. *A* has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit.

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(e) A right to sue for an hereditary office accrues to *A*, who at the time is insane. Six years after the accruer *A* recovers his reason. *A* has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him, under this section.

(f) A right to sue as landlord to recover possession from a tenant accrues to *A*, who is an idiot. *A* dies three years after the accruer, his idiocy continuing up to the date of his death. *A's* representative in interest has, under the ordinary law, nine years from the date of *A's* death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Act of 1871 : S. 7.

7. * * * * * *

Nothing in this section shall be deemed to extend for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

Illustrations.

* * * * * * *

(b) *A*, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. *A* has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.

(c) A right to sue for an hereditary office accrues to *A*, who at the time is insane. Six years after the accrual of the right, *A* recovers his reason. *A* has six years, under the ordinary law, from the date when his insanity ceased, within which to institute a suit. No extension of time will be given him under this section.

(d) A right to sue as landlord to recover possession from a tenant accrues to *A*, who is an idiot. *A* dies three years after the accrual of the right, his idiocy continuing up to the date of his death. *A's* representative in interest has, under the ordinary law, nine years from the date of *A's* death within which to bring a suit. This section does not extend that time.

Act of 1859.

See Section 11 printed under S. 6.

under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under S. 6 read with this section.

(c) A right to sue as landlord to recover possession from a tenant accrues to *A*, who is an idiot. *A* dies three years after the accruer, his idiocy continuing up to the date of his death. *A's* representative in interest has, under the ordinary law, nine years from the date of *A's* death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Synopsis

1. Legislative changes.
2. Scope.
3. Suits to enforce rights of pre-emption.
4. Period of limitation under section.

Other Topics (miscellaneous)

Computation of period. See Note 4.
Section enlarges and does not curtail time. See Note 4.
Sections 6, 7 and 8 — Combined effect. See Note 4.

1. Legislative changes. — The provision excluding suits for pre-emption from the operation of Ss. 6 and 7 was not present in the Acts of 1859 and 1871 and was first introduced in the Act of 1877.

2. Scope.— This section serves as an exception to Ss. 6 and 7. It excludes from their cognizance suits for pre-emption and restricts the period for which limitation can be extended under them.

3. Suits to enforce rights of pre-emption. — The policy of the Legislature is that suits for pre-emption should be brought with as little delay as possible. Hence, it is provided under this section that the extended period of limitation under S. 6 or S. 7 does not apply to suits for pre-emption.[1] A similar provision is also made in S. 17.

Under the Acts of 1871 and 1859, however, the minority or other disability of the plaintiff formed a ground of extension of limitation even in the case of suits for pre-emption.[2]

4. Period of limitation under section. — Under section 3 the period of limitation *prima facie* applicable to a suit or other proceeding is the period prescribed in the first schedule, but this period is liable, in the particular circumstances of a case, to be modified by the provisions of Ss. 4 to 25 of the Act. Hence, if a case falls within the purview of S. 6 or S. 7, the period of limitation prescribed by the first

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Section 8 — Note 3

[1] ('04) 1 Nag L R 6 (8), *Seetaram* v. *Ram Dayal Marwari*.
('19) 6 AIR 1919 Lah 25 (26) : 52 I. C. 587 : 1919 Pun Re No. 86 (DB), *Mt. Husain Bibi* v. *Hakim*.
('24) 11 AIR 1924 Mad 57 (60) : 76 Ind Cas 467, *Viswanathan* v. *Ethirajulu*.
See also Art. 10, Note 6.

[2] ('75) 1 All 207 (211) (DB), *Raja Ram* v. *Bansi*.
('67) 7 Suth W R 279 (279) (DB), *Jungoo Lal* v. *Lalla Alum Chund*. (Case under Act of 1859.)

schedule as modified by such section will apply to the case. Section 6 provides that in the circumstances mentioned therein, the suit or application for execution may be filed within the same period after the cessation of disability or the death of the person affected by it as would otherwise have been allowed from the time mentioned in the third column of the first schedule. Section 7 provides that in the circumstances mentioned in the second part of it, time will not run as against any of the plaintiffs or applicants till one of them becomes capable of giving a discharge without the concurrence of the others or until the disability has ceased. Thus, the effect of both the sections is to provide a fresh start of limitation from one or other of certain events specified in the sections. But the two sections are subject to the provisions of this section which provides that nothing in either of the two sections shall be deemed to *extend* the period of limitation for more than three years from the cessation of disability or the death of the person affected thereby.

The combined effect of the above provisions may be discussed with reference to the following positions:

(1) Where the ordinary period of limitation expires *after* three years from the cessation of disability.

(2) Where the ordinary period of limitation expires *at the end of* three years from the cessation of disability.

(3) Where the ordinary period of limitation expires *before* the cessation of disability.

(4) Where the ordinary period of limitation expires *after* the cessation of disability, but *before* the end of three years from the cessation of disability.

In case 1, the period cannot be extended under S. 6 or S. 7. The reason is that such extension will be clearly opposed to the provisions of this section. Thus, in illustration (b) to this section, the ordinary period of limitation expires *after* three years from the cessation of the disability. This section prohibits the *extension* of the period under S. 6. This, however, does not mean that in cases coming within S. 6 or S. 7, the *period of limitation* itself should be three years from the cessation of disability or the death of the person affected by it. Hence, the section does not stand in the way of a suit being instituted within the *ordinary* period of limitation even though such period may extend to more than three years from the cessation of disability.[1] The object

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Note 4

[1] ('25) 12 AIR 1925 Pat 30 (31) : 3 Pat 275 : 83 I. C. 871 (DB), *Mahomed Nasrullah* v. *Mahomed Shukurullah.*

('68) 4 Mad H C R 54 (55, 56) (DB), *Ramanuja Chariar* v. *Venkatavarada Iyengar.* (Effect of section is to provide in every case a distinct period of limitation, where but for legal disability suit would be barred.)

(1865) 2 Suth W R 305 (305, 306) (DB), *Kalee Das* v. *Beharee Lall.*

(1865) 3 Suth W R 21 (22) (DB), *Bissumbhur Sirkar* v. *Soorodhuny Dossee.*

('66) 5 Suth W R 219 (219) (DB), *Luchmun Singh* v. *Mt. Bibee Miriam.* (Plaintiff is not bound to sue within three years of attaining majority if he has general limitation of twelve years from cause of action.)

of Ss. 6 to 8 is to provide for an *additional* period of limitation in cases where the person entitled to sue is under a disability and not to place him at a disadvantage as compared with other litigants.

In case 2, also, the period of limitation cannot be extended under S. 6 or S. 7, as such extension would contravene the provisions of this section. But, the suit may be instituted within the ordinary period of limitation.

In cases 3 and 4, the period of limitation can be extended under S. 6 or S. 7, provided that such extended period does not exceed three years from the cessation of disability. In other words, in such cases, the litigant is entitled to a *fresh starting point* of limitation from the cessation of disability, subject to the condition that in no case the period extended by this process shall exceed three years from the cessation of disability.

The above rule (i. e., the rule applicable to cases 3 and 4) may be explained further with reference to the following three positions that may arise in such cases :

(a) The period provided by the first schedule may be less than three years.

(b) The period provided by the first schedule may be three years.

(c) The period provided by the first schedule may be more than three years.

In case (a) the suit may be brought at any time within the period provided by the first schedule calculated from the cessation of disability. But the suit cannot be brought *after* the expiry of the period so calculated, though three years may not have elapsed from the cessation of disability.[2] The reason is that, as already said, this section does not provide that in cases coming under S. 6 or S. 7 the period of limitation should be three years from the cessation of disability. In other words, the section only restricts the period that can be extended under S. 6 or S. 7 where such period exceeds three years from the cessation of disability. Where such period is less than three years, this section *does not extend it to three years.*

In case (b) the suit may be brought at any time within the period of three years from the cessation of disability.

('66) 5 Suth W R 204 (204) (DB), ***Hurish Chunder Nag*** **v.** ***Abbas Ali.*** **(Do.)**
('66) 6 Suth W R 20 (20) (DB), ***Poorun Singh*** **v.** ***Kashee Nath Singh.*** **(Do.)**
('67) 7 Suth W R 3 (4) (DB), ***Radhamohun Gowee*** **v.** ***Mohesh Chunder Kotwal.*** **(Do.)**
('68) 10 Suth W R 44 (44) (DB), ***Sree Pershad*** **v.** ***Rajgooroo Treeumbuknath.***
(1864) 1864 Suth W R Gap 302 (303) (DB), ***Gus Behari Singh*** **v.** ***Mt. Beebee Washun.***

[2] **('94) 17 Mad 316 (323) : 4 Mad L Jour 152 (DB),** ***Subramaniya Pandya Chokka Talavar*** **v.** ***Siva Subramaniya Pillai.***
('25) 12 AIR 1925 Mad 379 (380) : 80 Ind Cas 992 (DB), ***Subbiah*** **v.** ***Arunachala.***
('18) 5 AIR 1918 Lah 330 (331) : 48 I. C. 399 : 1918 Pun Re No. 113, ***Hira Singh*** **v.** ***Ghulam Quadir.***
('18) 5 AIR 1918 Lah 182 (183) : 43 I. C. 712, ***Pala Singh*** **v.** ***Harnama.*** **(Section does not extend period.)**

Section 8
Note 4

In case (c) the suit may be brought at any time within three years from the cessation of disability,[3] but *not afterwards*,[4] though the full period of limitation calculated from the cessation of disability may not have elapsed. Thus, in illustration (a) to this section, the ordinary period of limitation expires at the end of one year from the cessation of the disability of A, the person entitled to sue in the illustration. In such cases, as already said, the period can be extended under S. 6. That is, A is entitled to a fresh starting point of limitation from the date of his attaining majority. But, such right is subject to the condition that the period extended by the process should not exceed three years from the cessation of his disability. Hence, although the period provided for the suit is twelve years, A only gets an extension of limitation up to three years from the date of his attaining majority.

The above illustration also brings out another point. Under this section, the extension of limitation that can be allowed under S. 6 or S. 7 is measured not from the end of the ordinary period of limitation but from the *cessation of disability*. So, in the above illustration, A is entitled to three years not from the end of the ordinary period of limitation but from the cessation of his disability which has taken place one year before the end of the ordinary period of limitation, with the result that the period of limitation in his case is only extended by two years.

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[3] ('10) 5 I. C. 84 (84, 85) : 33 Mad 366 (DB), *Annayan* v. *Chinnan*. (Title by adverse possession against a minor is not complete before the end of three years after his attaining majority.)

('16) 3 AIR 1916 Mad 33 (35, 36) : 38 Mad 1076 : 29 I. C. 314 (DB), *Pasumarti Payidanna* v. *Lakshminarasamma*.

('24) 11 AIR 1924 All 625 (633) : 83 I. C. 782 : 46 All 575, *Phulwanti Kunwar* v. *Janeshar Das*.

('16) 3 AIR 1916 All 356 (356, 357) : 33 Ind Cas 913 : 38 All 126 (DB), *Lachmi Narain Prasad* v. *Kishan Kishore Chand*.

('97) 1897 Pun Re No. 33, *Mt. Fazul Nishan* v. *Muhammadji*.

('35) 22 AIR 1935 Lah 924 (925): 160 Ind Cas 557, *Nawab* v. *Lachhman Singh*.

[4] ('18) 5 AIR 1918 P C 118 (118) : 41 All 63 : 45 I. A. 284 : 21 Oudh Cas 228 : 49 Ind Cas 540 (PC), *Banwari Lal* v. *Mahesh*.

('01) 24 Mad 387 (395, 396) : 28 Ind App 81 : 3 Bom L R 303 : 5 Cal W N 545 : 7 Sar 819 (PC), *Vasudeva Padhi* v. *Maguni Devan Bakshi*.

('25) 12 AIR 1925 All 692 (693) : 87 I. C. 315 (DB), *Anantoo* v. *Ramrup Tiwari*.

('24) 11 AIR 1924 All 625 (634) : 46 All 575 : 83 I. C. 782 (DB), *Mt. Phulwanti Kunwar* v. *Janeshar Das*.

('03) 27 Bom 515 (545) : 5 Bom L R 274 (DB), *Thakore Fatesingji* v. *Bamanji Ardeshir Dalal*.

('76) 1876 Bom P J 57 (DB), *Rama* v. *Ranu*.

('21) 8 AIR 1921 Cal 572 (573): 62 I. C. 428 (DB), *Laloo Karikar* v. *Jagat Chandra*.

('72) 18 Suth W R 173 (174) (DB), *Meer Fyezali* v. *Meer Nuzuff Ali*.

('69) 11 Suth W R 532 (532) (DB), *Chowdhry Zuhoorul Huq* v. *Mt. Bagoo Jan*.

(1865) 3 Suth W R 184 (184) (DB), *Khetter Mohun Ghose* v. *Ramessur Ghose*.

('24) 11 AIR 1924 Lah 427 (428) : 77 Ind Cas 588, *Thi Raj* v. *Kheausi*.

('26) 13 AIR 1926 Mad 284 (285) : 91 Ind Cas 914, *Thayammal* v. *Perumal Chetty*.

('20) 7 AIR 1920 Mad 793 (798) : 52 I. C. 725 (DB), *Narasimha Deo* v. *Krishnachandra Deo*. (Period of three years cannot be extended by reason of S. 15 (2).)

('15) 2 AIR 1915 Mad 398 (399) : 26 I. C. 90, *Subramaniya* v. *Kulayappan*.

('97) 7 Mad L Jour 131 (133) (DB), *Kamakshy Nayakan* v. *Ramaswamy Nayakan*.

('13) 21 Ind Cas 348 (349) : 7 Low Bur Rul 97, *Maung Shwe Pe* v. *Ma U Ma*.

('09) 4 Ind Cas 854 (855) : 1909 Pun Re No. 100 (DB), *Shamir* v. *Ladha Singh*.

('30) 17 AIR 1930 Pat 141 (142) : 123 Ind Cas 411 (DB), *Musahar* v. *Kishun Narayan*. (Execution application brought six years after attaining majority is barred.)

[*See* ('25) 12 AIR 1925 P C 264 (267) : 47 All 795 : 52 Ind App 443 : 28 Oudh Cas 371 : 91 Ind Cas 471 (PC), *Lal Bahadur* v. *Ambika Prasad*.]

Continuous running of time.

9.* Where once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Subsequent disability or inability to sue."
4. "Disability or inability to sue," meaning of.
5. Proviso.
6. No exemption from limitation except as otherwise provided for by statute.
7. Where cause of action has not arisen, limitation cannot begin to run.
8. Cause of action accruing after starting point specified in article — Effect.
9. Suits based on different causes of action are governed by different periods of limitation.
10. Several persons having distinct causes of action in respect of same matter—Distinct periods of limitation apply.
11. Satisfaction or discharge and revival of cause of action.
12. Fusion of interests of debtor and creditor.
13. Agreement to refer dispute to arbitration, whether puts an end to cause of action.
14. Limitation only applies to institution of proceedings and not their continuation.
15. Repeal of statute and running of limitation.

Other Topics (miscellaneous)

Applications — Principle of section, whether applies. See Note 4.

Defendant's absence—Not a subsequent inability. See Notes 3 and 4 and S. 13.

Fresh cause of action—Fresh period of limitation. See Note 11.

No cause of action—No limitation. See Notes 2, 7, 8 and 11.

Running of time not stopped by subsequent event. See Note 11.

Section 9 does not control S. 13. See Note 3.

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* Acts of 1877 and 1871
Same as that of Act IX of 1908.

Act of 1859 : S. 11.

11 * * * * * * *;
but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

Starting point—Whether same as cause of action. See Note 8.
Successive causes of action. See Note 9.
Suspension of time. See Note 11.
'To sue' does not cover 'to apply.' See Note 4.
War and rebellion — Limitation not checked. See Notes 4 and 11.

1. Legislative changes. — This section was first enacted in the Act of 1871. But the principle underlying the section, viz., that once limitation begins to run, no subsequent disability or inability to sue can stop it except as may be otherwise provided for by the statute, was recognized even before the Act of 1871.[1]

Under Bengal Regulation 3 of 1793, the fact that the plaintiff had been precluded by minority or *other good and sufficient cause* from obtaining redress was one of the grounds on which exemption from limitation could be claimed. It was held that the pendency of litigation between two claimants to an estate was a good and sufficient cause within the above provision for delay in the institution of a suit for the enforcement of a right on behalf of or against such estate.[2] Under the present law, such a circumstance would not be a good ground for claiming exemption from limitation. See Notes 2 and 6.

2. Scope of the section.—This section is based on the general principle that when once limitation has commenced to run, it will continue to do so unless it is stopped by virtue of any express statutory provision.[1]

The section only deals with the question of *stopping* of limitation. It does not affect any exemption from limitation which may operate

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Section 9 — Note 1

[1] (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Co.* v. *Odithchurn Paul.* (Case decided under English Statute 21 Jac. 1.)

[2] (1859) 7 Moo Ind App 323 (352, 357) : 4 Suth W R 37 : 1 Suther 367 : 1 Sar 692 (PC), *Prannath Roy* v. *Rookea Begum.*

(1858) 7 Moo Ind App 238 (258, 259) : 1 Sar 633 (PC), *Rajah Enayet Hossein* v. *Sayud Ahmed Reza.*

Note 2

[1] ('29) 16 AIR 1929 P C 158 (162) : 56 Ind App 192: 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner* v. *Naunihal Singh.* (Section follows provisions of English law.)

('27) 14 AIR 1927 All 446 (449) : 49 All 565 : 102 Ind Cas 96 (DB), *Ram Charan Sahu* v. *Goga.* (It would be dangerous to lay down generally that there is some principle outside Limitation Act under which limitation can be suspended.)

('27) 14 AIR 1927 All 818 (820) : 50 All 152 : 107 Ind Cas 45 (DB), *Rup Kishore* v. *Patrani.*

('23) 10 AIR 1923 Bom 33 (34) : 67 I. C. 757 : 47 Bom 244 (DB), *Sidhraj Bhojraj* v. *Alli Haji.* (Time during which insolvency proceedings were pending cannot be deducted.)

('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatische Bank* v. *Hira Lall Burdhan & Sons.*

('24) 11 AIR 1924 Lah 40 (41) : 4 Lah 90 : 71 Ind Cas 495 (DB), *Hukam Chand* v. *Shahab Din.* (Exemptions not specially provided are not allowed.)

('21) 8 AIR 1921 Lah 71 (72) : 2 Lah 320 : 64 Ind Cas 454 (DB), *Kartar Singh* v. *Bhagat Singh.*

('13) 19 I. C. 291 (296) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram* v. *Kanhaiya Lal.* [*See* ('80) 3 Mad 92 (94) : 5 Ind Jur 242 (DB), *Thir Singh* v. *Venkataramier.*]

without *stopping* time from running.[2] Thus, it is no bar to the *exclusion* of time under sections 12 to 16 or to the *enlargement* of the period of limitation under Ss. 6, 7 or S. 19. See Note 3.

The section provides that no subsequent disability or inability to sue can stop limitation from running. Hence, where the circumstances ensuing after limitation has begun to run do not amount to a disability or inability to sue, the section does not apply. But, even in such cases, under section 3 there will be no exemption from limitation except as otherwise provided for by the statute. See Note 4.

Where neither the proviso to this section nor any other exception provided for by the statute applies, there will be no exemption from the bar of limitation. Courts have no power to add new exceptions not recognized by the Act. (See Note 6.) But the Act must be construed and applied with reference to the following principles :

(1) Where the cause of action for a suit has not arisen, limitation for such suit cannot begin to run. See Note 7.

(2) Where a suit falls within the class of suits described in the first column of an article but the cause of action for the suit arises *after* the time specified therein as the starting point of limitation, the article will not apply to such a suit. See Note 8.

(3) Where a person has several causes of action for a certain kind of suit in regard to a matter, he is entitled to an independent period of limitation in respect of each cause of action. See Note 9.

(4) Where two or more persons have distinct causes of action for a suit of a similar nature in regard to the same matter, each is entitled to a distinct period of limitation. See Note 10.

(5) Where after the accrual of a cause of action such cause of action is satisfied or discharged and such satisfaction or discharge is nullified subsequently, a fresh cause of action arises and the plaintiff is entitled to a fresh period of limitation in regard to such cause of action. See Note 11.

(6) Limitation only applies to *institution* of suits and not their *continuation*. See Note 14.

It will be seen that none of the above principles implies any *exception* to the law of limitation contained in the Act.[3] As explained in the other Notes to this section, the above principles are perfectly consistent with a proper interpretation of the provisions of the Act and its underlying assumptions.

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[2] ('91) 5 C P L R 88 (89), *Dawala* v. *Sitaram*. (Provision that in computing the period of limitation certain period is to be excluded is not the same thing as providing that running of time is to be stopped.)

[3] *See* ('26) 13 AIR 1926 Cal 65 (73) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal*. (Cases which are supposed to lay down any general exception not found in the statute will be found not to be laying down any such exception but only interpreting cause of action where cause of action is starting point of limitation or merely interpreting particular article or applying principle of satisfaction of claim and revival of it.)

Thus, with regard to the first two principles, although in few articles in the first schedule the accrual of the cause of action is stated *in terms* to be the time from which limitation begins to run, there is no reason to suppose that the Legislature intended to contravene the principle that limitation necessarily assumes the existence of a cause of action and that where such cause of action has not arisen, there can be no limitation.

The time from which limitation is directed to run under the various articles either coincides with the accrual of the cause of action or refers to a date subsequent to the accrual of the cause of action. Where a suit falls within the first column of an article, but the cause of action for the suit accrues after the time specified in the third column of the article as the starting point of limitation, it must be held that the article does not apply to such a case. For, each article cannot be held to be *exhaustive* of the class of suits described in its first column. An article must be held to apply only to cases where *both* its first and third columns are applicable. Where the words in the third column of an article relating to the starting point of limitation refer to a time which is *before* the accrual of the cause of action for a suit, it must be held, in accordance with the principle already referred to, that such words cannot apply to the suit, or, in other words, that the article does not apply to such suit.[4] See Notes 7 and 8.

As regards principles 3 to 5, they are merely several aspects of the same principle, viz., that limitation refers to a *particular* cause of action and different periods of limitation will apply to different causes of action, although they may relate to the same subject-matter and may give rise to suits of a similar nature. The Act is clearly based on this principle and treats limitation as a matter affecting each cause of action separately and individually; so that the proposition that a separate and independent period of limitation applies to each distinct cause of action does not involve any derogation from the provisions of the Act.

The last principle clearly follows from section 3.

3. "Subsequent disability or inability to sue." — This section provides that where limitation has once commenced to run, no *subsequent* disability or inability to sue can stop it. But this does not imply that an *initial* disability or inability to sue, i. e., a disability or inability existing at the time from which limitation would otherwise have run, will *prevent* the running of limitation. Such *initial* disability or inability will have no effect on the period of limitation except as otherwise provided for by the statute. For instances of such provisions, see Ss. 6 and 17.

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[4] ('03) 26 Mad 780 (785, 786) : 13 Mad L Jour 412 (DB), *Rungiah Goundan & Co.* v. *Nanjappa Row.*
('94) 17 All 39 (41) : 1894 All W N 191, *Md. Sulaiman Khan* v. *Md. Yar Khan.*
('19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.* (Per Sreenivasa Iyengar, J.)
('02) 24 All 17 (26) : 28 Ind App 248 : 5 Cal W N 888 : 8 Sar 133 : 3 Bom L R 707 (PC), *Batul Begam* v. *Mansur Ali Khan.*
('02) 24 All 542 (545, 546) : 1902 All W N 160 (DB), *Ali Ahmad* v. *Naziran Bibi.*
('03) 30 Cal 407 (412, 413) (DB), *Ashraffuddin Ahmed* v. *Bepin Behari Mullick.*
('85) 8 All 56 (57) : 1885 All W N 327 (DB), *Thakur Das* v. *Shadi Lal.*
('94) 16 All 237 (239) : 1894 All W N 61 (DB), *Muhammad Islam* v. *Md. Ahsan.*

The section provides that a disability or inability to sue arising after time has begun to run cannot *stop* it. Thus, where at the commencement of limitation the person entitled to sue or apply is not under any disability, the fact that a disability subsequently supervenes or that a person who subsequently becomes entitled to sue or apply on the same cause of action is under a disability, will not stop the running of limitation.[1]

Under S. 6, a disability which exists at the time from which limitation is to be *reckoned* will extend the period of limitation. Hence, a disability which arises after limitation has begun to *run* but which exists at the time from which a fresh period of limitation is to be computed under S. 19 consequent on an acknowledgment of liability by the debtor under that section, will *extend* the period of limitation under S. 6, although under this section such disability cannot *stop* the running of time.[2]

Where, under any other section of the Act any matter is a ground for exclusion of time in computing the period of limitation and such matter arises in a given case *after* limitation has begun to run, the question arises whether this section will control the operation of the former section and prevent the exclusion of time in such cases. Thus, S. 13 provides for the exclusion of the time during which the defendant is absent from British India. The question arises whether in a case where the defendant is absent from British India, not at the commencement of limitation but subsequently, the plaintiff will be entitled to the exclusion of time under S. 13. It is clear that in such cases this section is no bar to the exclusion of time under S. 13,[3] for two reasons :

Note 3

[1] ('27) 14 AIR 1927 All 818 (820) : 50 All 152 : 107 I. C. 45 (DB), *Rup Kishore* v. *Patrani.*

('18) 5 AIR 1918 Cal 580 (582) : 44 Ind Cas 567 (DB), *Monmotho Nath Laha* v. *Annoda Prosad Roy.*

('24) 11 AIR 1924 All 677 (678) : 79 Ind Cas 1010, *Sankat Narain Pande* v. *Ram Bharos.* (Plaintiff not in existence when cause of action arose.)

('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj Rai* v. *Ram Naresh Rai.* (Do.)

('89) 2 C P L R 141 (145), *Sardar Singh* v. *Ajit Singh.* (Alienation of joint family property—Minority of subsequently born son does not give him any extra time.)

[2] ('33) 20 AIR 1933 All 100 (101, 102) : 54 All 1019 : 142 Ind Cas 794 (DB), *Chandrabhan* v. *Raj Kumar.*

('90) 13 Mad 185 (188) (DB), *Venkataramayyar* v. *Kothandaramayyar.* (Entirely new period runs from date of acknowledgment.)

[3] ('82) 4 All 530 (532) : 1882 A. W. N. 127 : 7 Ind Jur 276 (DB), *Beake & Co.* v. *Davis.*

('84) 8 Bom 561 (569), *Hanmantram Sadhuram Pity* v. *Arthur Bowles.* ('Disability or inability' in the section must be read with immediate context in S. 6.)

(1) This section only precludes the *stopping* of the running of time, while under S. 13 there is no question of the stopping of limitation, but the section only provides for the *exclusion* of certain time in computing the period of limitation.

(2) This section applies only to a disability or inability of the *plaintiff*. The *defendant's* absence from British India is not *plaintiff's* disability or inability. See Note 4.

4. "Disability or inability to sue," meaning of. — This section applies only where the circumstances arising subsequent to the commencement of limitation amount to a "disability or inability to sue." "Disability" has been defined as the want of *legal qualification* to act and "inability," as the want of *physical power* to act.[1] Thus the two expressions are distinct from each other.[2] But both of them clearly refer to something which pertains to the *plaintiff*.[2a] Hence, the *defendant's* absence from British India is not a disability or inability to sue within the meaning of this section.[3]

While the Act contains no instances of "inability to sue," it gives in S. 6 some instances of "disability."[4] It has been held that the fact that a plaintiff, an alien, is prevented from suing on account of the outbreak of war between his mother-country and Great Britain, will amount to either a disability or inability within the meaning of this section.[5]

('98) 25 Cal 496 (504) : 2 Cal W N 269 (FB), *Poorno Chunder Ghose* v. *Sassoon.*
('91) 5 C P L R 88 (89), *Dawala* v. *Sitaram.*
('97) 1897 Pun Re No. 26, *Mt. Janki* v. *Manohar Lal.* (Such absence cannot create any disability or inability for the plaintiff.)
[But see ('82) 6 Bom 103 (105, 106), *Narronji Bhimji* v. *Mugnirum Chandaji.* (Submitted not correct.)]
See also Section 13 Note 2.

Note 4

[1] ('18) 5 AIR 1918 Pat 505 (503) : 47 Ind Cas 798 (DB), *Sheo Saran* v. *Basudeo.*
('98) 25 Cal 496 (504) : 2 Cal W N 269 (FB), *Poorno Chunder Ghose* v. *Sassoon.*
('05) 29 Bom 68 (71) : 6 Bom L R 639 (DB), *Jivraj Gubabchand* v. *Babaji Apa.*
('19) 6 AIR 1919 Cal 1078 (1079) : 47 Ind Cas 122, *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons.*
See also the Concise Oxford Dictionary.

[2] ('05) 29 Bom 68 (71) : 6 Bom L R 639 (DB), *Jivraj Gulabchand* v. *Babaji Apa.*
('19) 6 AIR 1919 Cal 1078 (1079) : 47 Ind Cas 122, *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons.*

[2a] ('84) 8 Bom 561 (570), *Hanmanthram Sadhuram Pity* v. *Arthur Bowels.* ('Inability' is personal to plaintiff himself and does not refer to circumstances of person against whom he is entitled to institute a suit.)

[3] ('97) 1897 Pun Re No. 26, *Mt. Janki* v. *Manohar Lal.*
('84) 8 Bom 561 (569), *Hanmantram Sadhuram Pity* v. *Arthur Bowles.*
('98) 25 Cal 496 (504) : 2 Cal W N 269 (FB), *Poorno Chunder Ghose* v. *Sassoon.*
('91) 5 C P L R 88 (89), *Dawala* v. *Sitaram.*
('05) 29 Bom 68 (70) : 6 Bom L R 639 (DB), *Jivraj Gulabchand* v. *Babaji Apa.*
See also Section 13 Note 2.

[4] *See* ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398, *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons.*

[5] ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398, *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons.*

Though the section uses the words disability or inability to *sue*, it has been held applicable to applications.[6]

5. Proviso. — The proviso contains the only exception laid down by this Act to the general rule that once time begins to run, no subsequent disability or inability to sue can *stop* it. The proviso applies only where *letters of administration* to the estate of a creditor have been granted to his debtor.[1] Thus, the section does not provide for cases where the debtor is the executor under the creditor's will or there is otherwise a fusion of the interests of the debtor and creditor. But on the principles discussed in Note 12, limitation is saved even in such cases.

Under the proviso, limitation is *suspended* while the administration continues. That is to say, there is to be no *fresh* period of limitation from the time when the administration ceases, but the period that elapses *before* the grant of letters of administration will also count against the plaintiff. In *other* cases of the fusion of the interests of the debtor and creditor, there is a *satisfaction* of the cause of action itself with the result that on the separation of the two interests, there is a *fresh* period of limitation. See Note 12.

6. No exemption from limitation except as otherwise provided for by statute. — As seen in Note 2 there can be no exemption from the bar of limitation except as otherwise provided for by the statute. In other words, apart from the provisions of the statute, no exceptions to the law of limitation can be introduced on considerations of equity or hardship or on the ground that a matter is within the *reason* of a provision granting exception. The exceptions to the general rule which this Act provides for are contained in Ss. 4 to 25 (both inclusive), and unless a case comes within any of these sections, there is no exemption from the bar of limitation arising under the Act.[1]

[See however ('26) 13 AIR 1926 Cal 65 (67) : 89 I. C. 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal*. (Disability or inability contemplated by S. 9 is confined to such cases as are mentioned in the Act itself.)]

[6] ('05) 29 Bom 68 (70) : 6 Bom L R 639 (DB), *Jivraj* v. *Babaji*. (Section 9 applied to execution application.)

('12) 15 Ind Cas 829 (830) : 36 Bom 498 (DB), *Bhagwant Ramchandra* v. *Kaji Mahamad Abas*. (Do.)

('20) 7 AIR 1920 Mad 1 (10) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty* v. *Md. Madar Ammal*.

[But see ('89) 1889 Pun Re No. 109, *Bihari Lal* v. *Mrs. Banes*. (Section does not apply to execution applications.)]

Note 5

[1] ('09) 4 Ind Cas 283 (285) (Bom), *Damodar* v. *Dayal*.

Note 6

[1] ('39) 26 AIR 1939 Bom 1 (8, 16) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunath Gouda*.

('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 885 : 122 Ind Cas 817 (FB), *Mahabir Prosad* v. *Bhupal Ram*.

('19) 6 AIR 1919 Cal 1078 (1079, 1080) : 47 Ind Cas 122, *Deutsche Asiatische Bank* v. *Hiralall Burdhan & Sons*. (Section makes no exception in case of alien enemies.)

('26) 13 AIR 1926 Cal 65 (67, 73) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal*.

Section 9
Note 6

Illustrations.

1. Where a decree is passed in favour of *A* and he dies without having taken any steps for the execution of the decree and thereafter his executor applies for execution, the time taken by the executor for obtaining probate of the will cannot be excluded in computing the period of limitation applicable to such application.[2]

2. Negotiations for amicable settlement will not suspend the running of limitation and will not be ground for excluding the period taken for such negotiations in computing the period of limitation.[3]

3. In a suit for mesne profits, the period during which a prior suit by the plaintiff for possession was pending cannot be excluded in computing the period of limitation.[4]

4. That the plaintiff was a disqualified proprietor under the Bengal Court of Wards Act of 1879 is no ground for extending limitation for a suit for possession by him.[5]

5. In computing the period of limitation for a suit against a Native Prince, the time taken for obtaining the necessary permission of the Government under S. 86 of the Civil Procedure Code, for instituting the suit cannot be excluded.[6]

6. The mere fact that a creditor has instituted a suit for the administration of the estate of a deceased debtor does not save limitation for a suit by another creditor.[7]

('24) 11 AIR 1924 Lah 40 (41) : 4 Lah 90 : 71 Ind Cas 495 (DB), *Hukam Chand* v. *Shahab Din.*
('92) 6 C P L R 67 (68, 70), *Ramji* v. *Dewaji.*
('27) 14 AIR 1927 Lah 200 (208, 209) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh* v. *Muhammad Said.*
('73) 7 Mad H C R 298 (300), *Venkataramanier* v. *Manche Reddy.*
('76) 1 All 350 (352) (DB), *Stowell* v. *Billings.* (Agreement to extend limitation is not a ground for doing so.)
[*See* ('27) 14 AIR 1927 Mad 927 (929, 930) : 104 Ind Cas 750 (DB), *Venkatarama Iyer* v. *S. I. Bank of Tinnevelly.*]
[But see ('20) 7 AIR 1920 Mad 1 (12) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetti* v. *Muhamad Madar Ammal.* (Per Sadasiva Iyer, J. — In exceptional cases there can be suspension of limitation notwithstanding S. 9.)
('22) 9 AIR 1922 Mad 79 (82) : 70 Ind Cas 324 : 45 Mad 466 (DB), *Kuppusami Chettiar* v. *Rajagopala Iyer.* (Relaxations of the ordinary law of limitation provided in the Act are not exhaustive.)]
See also Section 3 Note 3.

[2] ('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *F. N. Burn* v. *G. H. Paul.*

[3] (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (P C), *The East India Company* v. *Oditchurn Paul.*
('25) 12 AIR 1925 All 276 (276) : 86 I. C. 293, *Banwari Lal* v. *Municipal Board of Cawnpore.* (Suit by employee for arrears of pay—Claim rejected by employer—Employee making another attempt to get employer alter his decision—Limitation does not stop running.)

[4] ('27) 14 AIR 1927 All 446 (450, 451) : 49 All 565 : 102 Ind Cas 96 (DB), *Ram Charan Sahu* v. *Goga.*

[5] ('18) 5 AIR 1918 P C 180 (181) : 46 Cal 694 : 46 Ind App 60 : 50 Ind Cas 202 (P C), *Mt. Mani Singh* v. *Nawab of Murshidabad.*

[6] ('29) 16 AIR 1929 Bom 14 (19, 20) : 53 Bom 12 : 115 Ind Cas 369 (DB), *Sayaji Rao* v. *Madhavrao.*
See also Section 3 Note 3.

[7] ('36) 23 AIR 1936 Bom 423 (429) : 167 Ind Cas 529, *Kisondas Prem Chand* v. *Jivatlal Pratapshi & Co.*

Section 9
Notes 6-7

As to exclusion of time under special enactments, see the undermentioned cases.[8] As to whether the adjudication of a person as insolvent will affect the limitation applicable to a suit by or against such person, see Note 8 under S. 15.

See also section 3 Note 3.

7. Where cause of action has not arisen, limitation cannot begin to run. — It is a fundamental principle that limitation always implies an existing cause of action and that unless the cause of action for a suit has arisen, limitation for such suit cannot begin to run.[1] When the cause of action for a suit arises is a matter of substantive law.

Illustrations.

1. *A* executes a simple mortgage of certain land to *B*. Afterwards, *B* sues on his mortgage and in execution of the decree in such suit, he purchases the property. In the meanwhile, *C* has dispossessed *A*, the mortgagor, and is in possession of the property at the time of the execution sale. *B* then sues *C* for possession. The cause of action for his suit arises only on the date of his purchase and not on the date on which *A*, the mortgagor, was dispossessed, the reason being that at that date *B* was not entitled to possession.[1a] It should also be noted that in the above case, *B's* cause of action is *distinct* from that of *A* which accrues on the date of his dispossession. The dispossession taking place after the execution of the mortgage does not affect the right of *B* to bring the property to sale in enforcement of his mortgage or to take possession of the property under the title acquired at such sale. But, if *after A* is ousted by *C* from a certain property, *A*

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[8] ('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 385 : 122 I. C. 817 (FB), *Mahabir Prasad* v. *Bhupal Ram*. (Vesting order under Chota Nagpur Encumbered Estates Act, S. 2 — Effect is to prohibit suit—No suit need be instituted to keep claim alive.)
('03) 30 Cal 1033 (1040, 1043) : 8 Sar 529 : 30 Ind App 177 : 8 C W N 1 (P C), *Hem Chandra Chowdhry* v. *Kali Prasanna Bhaduri*. (Case under S. 154 of Bengal Tenancy Act of 1885.)
('22) 67 Ind Cas 379 (380) (Lah), *Feroz* v. *Ghulam Sarwar*. (Plaintiff held entitled to exclusion of time under Indian Soldiers' Litigation Act, IX of 1918, S. 11.)
('33) 20 AIR 1933 Mad 376 (377) : 142 Ind Cas 286 (DB), *Secy. of State* v. *Kunhi Krishna Varma*. (Section 18, Indian Securities Act does not extend the oridinary law of limitation.)

Note 7

[1] ('19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma*. (Per Srinivasa Iyengar, J.)
('24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520 (DB), *Dwijendra Narain Roy* v. *Joges Chandra De*.
[*See* ('39) 26 AIR 1939 Lah 6 (9) : 182 I. C. 342 (DB), *Harinder Singh* v. *Anant Ram*. (Right to sue accrues only when cause of action arises. And for cause of action to arise, it must be clear that averments in plaint, if held correct, should lead to successful issue.)]

[1a] ('18) 5 AIR 1918 Cal 933 (934, 935, 939) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya Sakhi Debi* v. *Bireshwar Samanta*.
('11) 9 Ind Cas 791 (791, 794, 795) : 35 Mad 231 (DB), *Parthasarathy Naicken* v. *Lakshmana Naicken*.
[But see ('22) 9 AIR 1922 Lah 380 (385, 386) : 67 I. C. 388 : 3 Lah 188 (DB), *Ruldu Singh* v. *Sanwal Singh*. (It is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued — View not necessary for decision which is supportable on principle that cause of action for all reversioners is same in regard to a suit to avoid alienation by collateral under Punjab Customary Law.)]

mortgages the land to *B*, the latter will derive his cause of action from *A* and will not have any independent cause of action against *C*.[1b]

2. The office of trustee of a temple falls vacant, and during the interval, until the appointment of a new trustee, the temple properties are taken possession of by strangers. The cause of action in favour of the new trustee to recover such properties accrues only on his appointment and not before.[2]

3. A sale of patni taluk is set aside for irregularity, whereupon the zamindar sues the patnidar for rent. The cause of action for such suit arises on the setting aside of the sale and not before.[3]

4. At the time of the sale of certain land, in regard to which the plaintiff has a right of pre-emption, he is in possession of such land. The plaintiff is, subsequently, dispossessed by the vendee under the sale. The cause of action for the plaintiff's suit for pre-emption does not arise on his dispossession but it arises on the completion of the sale which he wants to pre-empt.[4]

5. The cause of action for a suit for setting aside a document on the ground that it was obtained by undue influence arises on the execution of such document and not on the cessation of the undue influence.[5]

6. Where a zamindar having a life-interest in an estate transfers such estate to another, the cause of action of the zamindar's successor for a suit for possession against the transferee accrues only on the zamindar's death and not before.[6]

7. Where an order of Court is the cause of action for a proceeding, as for example, an appeal, and such order is passed without notice to the parties, it has been held that the order is not deemed, under the law, as passed until it is communicated to the party, and limitation for the proceeding based on such cause of action cannot run until such communication.[7]

8. Cause of action accruing after starting point specified in article—Effect. — As has been seen in Note 7, it is a fundamental principle of the law of limitation that where the cause of action has not arisen, limitation cannot begin to run. The provisions of the Act must, therefore, be construed in conformity with this principle. Hence, although a suit may fall within the class of suits described in the first column of an article, if the cause of action, on which the suit is based in the particular instance, has not arisen at the time specified in the article as the starting point of limitation, it must be held that the article does not apply to the case.[1] For, each article must be held to contemplate only cases where the cause of action has accrued at the time specified therein as the starting point of limitation. Otherwise, limitation would begin to run in several cases even before the plaintiff has the right to sue. (See Note 2.)

[1b] ('11) 11 Ind Cas 465 (468) (Cal) (DB), *Nand Kumar Dobey* v. *Ajodhya Sahu.*

[2] ('17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (DB), *Manikam Pillai* v. *Thanikachalam Pillai.*

[3] ('68) 12 Moo Ind App 244 (251, 253) : 11 Suth W R P C 5 : 2 Beng L R P C 10 2 Suther 173 : 2 Sar 424 (P C), *Mt. Ranee Surno Moyee* v. *Shooshee Mokhee.*

[4] ('21) 62 Ind Cas 797 (798) (Lah) (DB), *Nagina Singh* v. *Duni Chand.*

[5] ('21) 8 AIR 1921 Mad 394 (398, 399) : 68 I. C. 352 (DB), *Sethupathi* v. *Kuppuswami.* (Cessation of undue influence has no relevancy on question of limitation unless it can be brought under heading of fraud.)

[6] *See* ('19) 6 AIR 1919 Mad 798 (808) : 41 Mad 749 : 47 I. C. 733 (DB), *Midnapore Zamindari Co. Ltd.* v. *Malayandi Appayasami Naicker.*

[7] ('30) 17 AIR 1930 Mad 490 (493, 494, 495) : 123 I. C. 345 : 53 Mad 491 (DB), *Swaminathan* v. *Lakshmanan Chettiar.* (Case under Ss. 73 and 77 of Registration Act.)

('11) 34 Mad 151 (154, 155) : 8 I. C. 398 (DB), *Secy. of State* v. *Narayanaswami.* (Decision under Madras Survey and Boundaries Act, 1897, S. 24.)

('35) 22 AIR 1935 Mad 149 (149, 150) : 153 I. C. 167 : 57 Mad 1030 (DB), *Vedavathi* v. *Sadashiva Rao.* (But actual knowledge is enough and formal communication is not necessary.)

Illustrations.

1. *A* sues to set aside an instrument under circumstances which would normally fall under Art. 91 of the Schedule. But owing to the intervention of certain arbitration proceedings, it is held that there is a cancellation of the cause of action which cause of action, however, is subsequently revived owing to the nullification of the cancellation of the original cause of action. The revived cause of action accrues after the time specified in the third column of Art. 91 as the starting point of limitation. It was held that under the circumstances, the article cannot apply to the case, but that the residuary article, *viz.*, Article 120, will apply to the case.[2]

2. A mortgagor sued for recovery of possession of immovable property from a person to whom it had been transferred by the mortgagee. Such a suit would normally have fallen within Art. 134, under which time begins to run from the date of the *transfer*.[2a] In the above case, however, the transferee obtained possession of the property, not on the date of the *transfer* but subsequently; so that, at the time specified in the article as the starting point of limitation, the plaintiff had no cause of action at all for a suit for possession against the transferee. It was held that, in the above circumstances, the article was not applicable to the case.[3] For a full discussion on this point, see Note 12 to Art. 134.

3. A mortgage decree was obtained under the Civil Procedure Code of 1882. The decree was for the sale of the mortgaged property in default of payment of the mortgaged money within a certain period. On the question of limitation for

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Note 8

[1] ('03) 26 Mad 780 (784, 785, 786) : 13 Mad L Jour 412 (DB), *Rungiah Gounden & Co.* v. *Nanjappa Row.* (If the various starting points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class—If the article is inapplicable to certain cases comprised in the class, those cases will be governed, in the case of suits, by the residuary Art. 120 and in the case of applications, by the residuary Art. 178 (now Art. 181).)
('19) 6 AIR 1919 Mad 972 (983, 984) : 40 Mad 1040 : 43 I. C. 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.* (Per Srinivasa Iyengar and Seshagiri Iyer, JJ.)
('94) 17 All 39 (41, 42) : 1894 All W N 191 (DB), *Muhammad Suleman Khan* v. *Muhammad Yar Khan.*
('18) 5 AIR 1918 Mad 548 (550, 551) : 41 I. C. 581 (DB), *Doraisamy Padayachi* v. *Vaithilinga Padayachi.* (Per Seshagiri Iyer, J.)
('39) 26 AIR 1939 Pat 688 (688) : 185 Ind Cas 336 (DB), *Ram Ranbijaya* v. *Mt. Bachai.* (Case relating to Art. 145.)
('92) 19 Cal 646 (650) (DB), *Bolai Chand* v. *Sumiruddeen.*
[See however ('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara Sarma* v. *Venkatesa Ayyar.* (Per majority of the Full Bench — Abdur Rahman and Krishnaswamy Iyengar, JJ., contra.)]

[2] ('18) 5 AIR 1918 Mad 548 (550, 551) : 41 I. C. 581 (DB), *Doraisami Padayachi* v. *Vaithilinga Padayachi.* (Per Seshagiri Iyer, J.)

[2a] Under Article 134 as amended by Act 1 of 1929, limitation runs from the time when the transfer becomes known to the plaintiff—But this amendment will not affect the principles discussed in this Note.

[3] ('19) 6 AIR 1919 Mad 972 (983, 986, 987) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.* (Per Srinivasa Iyengar and Seshagiri Iyer, JJ.)

an application for the execution of the decree, it was held that such a decree was not a decree directing the payment of any amount to be made at a certain date within the meaning of cl. 6 of Art. 179 of the Limitation Act of 1877. As regards the other clauses of the article, cls. 2 to 5 were held not applicable as the circumstances therein mentioned had not arisen in the case. Hence, the only question was as to cl. 1, under which the period of limitation began to run from the date of the decree. It was held that as the decree was not enforceable till the expiry of the period specified therein and that as, therefore, at the date of the decree the decree-holder had no right to apply for execution at all, the article could not apply to the case but that the case was governed by the residuary article, Art. 178 (now Article 181).[4]

The above view, however, has not always been followed. For instance, it has sometimes been held that in such cases, limitation must be held to run from the point of time specified in the article, although at such time the cause of action for the suit may not have arisen at all.[5] Thus, it has been held that limitation for a suit by a mortgagor to recover possession of immovable property from the transferee from a mortgagee will begin to run under Art. 134 from the date of the transfer although the transferee may have got possession only subsequently, and at the date of the transfer, the mortgagor may not have had any cause of action for a suit for possession at all.[6] Similarly, it has been held in some cases that limitation for a suit for the profits of immovable property wrongfully received by the defendant begins to run under Art. 109 from the date of the receipt of the profits by the defendant notwithstanding that the plaintiff's right to sue in respect of such profits may only have accrued subsequently.[7]

In a recent Full Bench decision of the Madras High Court,[7a] the facts were as follows: A, the manager of the mutt, transferred for valuable consideration certain properties belonging to the mutt. After the manager's death, his successor in office brought a suit for the recovery of the properties. It was contended on his behalf that as he was elected to the office only some years after the previous manager's death and as at the time of such death there was no one capable of suing for the recovery of the properties, Art. 134B was not applicable to the case as that article provided that time should run from the date of the death, resignation or dismissal of the previous manager—a point of time at which in the present case the cause of action could not be said to have arisen at all because of the absence of any person capable of suing. The majority of the Full Bench rejected this contention holding that Art. 134B applied to the case. Their decision proceeds on the ground that granting that it is a general principle that limitation can only be deemed to run from the date when the cause of action accrues and that a cause of action cannot exist unless there is a person capable of suing, the Legislature can make an arbitrary starting point irrespective of whether there is a person capable of suing or not. It is submitted with respect that the above decisions are not correct. Abdur Rahman and Krishnaswami Iyengar, JJ., in the above Madras Full Bench case did not agree with the majority and held that Art. 134B did not apply to the case, in accordance with the principle that limitation cannot run before the cause of action accrues.

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[4] ('03) 26 Mad 780 (781, 782, 785, 786) : 13 Mad L Jour 12 (DB), *Rungiah Gounden & Co.* v. *Nanjappa Row.*

[5] *See* ('26) 13 AIR 1926 Cal 65 (66, 67, 73) : 89 I. C. 1000 (DB), *Sarat Kaminee Dasi* v. *Nagendra Nath Pal.* (It was observed in this case that the starting point of limitation under the Act does not always coincide with the accrual of the cause of action and that while in some cases the starting point is *posterior* to the accrual of the cause of action, in some instances, the starting point is *anterior* to the accrual of the cause of action — But no instance is given of the latter type.)

[6] ('19) 6 AIR 1919 Mad 972 (979, 981) : 40 Mad 1040 : 43 I. C. 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.* (Per Wallis, C. J. and Coutts-Trotter, J.)

[7] *See* ('26) 13 AIR 1926 Cal 65 (73) : 89 I. C. 1000 (DB), *Sarat Kamini Dasi* v. *Nagendra Nath Pal.*

[7a] ('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara* v. *Venkatesa Ayyar.*

In some decisions, the view has been taken that in such cases the starting point of limitation under the article must be held to be *postponed* till the accrual of the cause of action. Thus, in the undermentioned case,[8] where the plaintiff's right to sue for the profits of immovable property accrued only after the profits had been *received* by the defendant, it was held that limitation for the suit ran under Art. 109 only from the *accrual of the right to sue*, notwithstanding that the article mentions the date of the *receipt* of the profits by the defendant as the starting point of limitation. Similarly, where a purchaser at court auction had a *fresh* cause of action to apply for possession of the property purchased by him *after* the sale had been confirmed, it was held that limitation under Art. 180 ran only from the accrual of such fresh cause of action although the article specifies the *confirmation of the sale* as being the starting point of limitation.[9] It is submitted that such a view is also not correct as it involves the importation into the respective articles of words which are not there.

The question whether the point of time specified in the third column of an article is identical with the date of the cause of action is a matter of interpretation of the particular article and depends on the facts of the particular case.

Illustrations.

1. A mortgagee with possession transfers for valuable consideration the mortgaged property to *A*, who subsequently obtains possession of the property. The mortgagor sues for recovery of possession from *A*. Such a suit falls within the class of suits described in the first column of Art. 134. Under that article, time begins to run from the date of the *transfer*.[9a] In the undermentioned Full

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[8] ('24) 11 AIR 1924 Cal 600 (602, 608, 609) : 79 Ind Cas 520 (DB), *Dwijendra Narain Roy* v. *Joges Chandra De.* (Execution of lease deed in plaintiff's favour —Lease deed compulsorily registrable but not registered till later date — Suit for mesne profits by lessee for prior period — Time runs under Art. 109 only from registration of lease deed when only plaintiff gets right to sue.)
See also Art. 109, Note 16.

[9] ('35) 22 AIR 1935 Cal 333 (335) : 62 Cal 66 : 158 I. C. 191 (DB), *Jateendra Chandra* v. *Rebatee Mohan Das.*

[9a] Under Article 134 as amended by Act I of 1929, limitation runs from the time when the transfer *becomes known to the plaintiff.* But this amendment will not affect the principles discussed in this Note.

Bench case,[10] two of the learned Judges[11] held that the expression "transfer" in the context refers only to transfer of *possession* so that time, in the above case, would begin to run only from the date on which *A* obtains possession and the plaintiff's cause of action accrues. The other learned Judges,[12] however, differed and held that time would begin to run under the article from the date on which the *title* is transferred and not from the time when *possession* is transferred, so that, according to them, if the article applies to the case, time would begin to run under the article even before the accrual of the cause of action.

2. A patni taluk was sold for arrears of rent. The sale was subsequently set aside for some irregularity. Thereupon, the landlord sued for the same arrears for which the sale had been held. It was held by the Privy Council that on the sale being set aside, the patni was taken back by the tenant subject to the obligation of paying the arrears for which the sale had been held and that such arrears became "due" within the meaning of S. 32 of Bengal Act X of 1859 when the sale was set aside, so that limitation for the suit began to run under the above section from the date on which the sale was set aside.[13]

3. *M* purchased certain property from *C*. The creditors of *C* attached the property in execution of a money decree obtained against *C*. Thereupon, *M* filed a suit for a declaration that the property belonged to him and was not liable for attachment and sale in execution of the decree against *C*. While an appeal in this suit was pending before the Privy Council, the Government acquired this property and there was an award by the Collector under the Land Acquisition Act. Money awarded by the Collector was distributed by the executing Court to the creditors of *C*. Eventually the claim of *M* was decreed by the Privy Council. *M* then brought a suit against the creditors for recovery of the sums distributed to them. On the interpretation of the words "when the right to sue accrues" in Art. 120 which was held applicable to the case, it was held that the right to sue did not accrue to *M* until the decision of the Privy Council in the previous suit for declaration and that the suit was not barred by limitation.[14]

9. Suits based on different causes of action are governed by different periods of limitation. — It is a general principle of law that limitation applies only to the particular cause of action on which a suit is based and where such cause of action is not barred by limitation, the fact that the period of limitation has expired with reference to another suit of a similar nature, in respect of the same subject-matter, but based on a different cause of action, does not affect the suit based on the former cause of action. Hence, where the plainttff is entitled to successive causes of action in regard to the same matter, he will be entitled to an independent period of limitation in respect of each such cause of action. The question, whether the plaintiff is entitled to successive causes of action in regard to a matter, is one of substantive law. The following are some illustrative cases bearing on the question :

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[10] ('19) 6 AIR 1919 Mad 972 (980, 981, 982, 983) : 40 Mad 1040 : 43 I. C. 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.*

[11] Per Abdur Rahim and Seshagiri Iyer, JJ.

[12] Per Wallis, C. J., Coutts-Trotter and Srinivasa Iyengar, JJ.

[13] ('68) 12 Moo Ind App 244 (251, 253) : 11 Suth W R P C 5 : 2 Beng L R P C 10 : 2 Suther 173 : 2 Sar 424 (PC), *Surnomoyee* v. *Shooshee Mokhee.*

[14] ('39) 26 AIR 1939 Lah 6 (9) : 182 I. C. 342 (DB), *Harinder Singh* v. *Anant Ram.*

(1) In a suit for compensation for non-delivery of goods purchased and paid for, the cause of action arises on the date on which the failure to deliver takes place and there is no fresh cause of action when the defendant refuses to pay compensation.[1]

(2) Where the *act* of the defendant itself constitutes a legal injury, the mere fact that the plaintiff suffers *damage* subsequently will not entitle him to a fresh cause of action.[2]

(3) A promise to pay an existing debt will furnish a fresh cause of action if it is intended to create a fresh obligation.[3]

See also the undermentioned cases.[4]

10. Several persons having distinct causes of action in respect of same matter—Distinct periods of limitation apply. —On the principle stated in Note 9, where two persons are entitled to bring a suit of a similar nature in regard to the same matter but each has a *distinct* cause of action, a distinct period of limitation will apply to the suit by each.[1] But where a cause of action accrues in favour of

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Note 9

[1] (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (P C), *The East India Company* v. *Oditchurn Paul.*

[2] See Section 24 Note 1.

[3] *See* ('21) 8 AIR 1921 Cal 67 (69) : 66 Ind Cas 209 : 48 Cal 817, *Narendra Lal* v. *Tarubala Dassi.* (Verbal promise by client to pay attorney his costs which have become overdue, when money is recovered in certain execution cases—A promise on strength of which attorney has not taken steps to enforce payment is an answer to any objection based on limitation made by client against application by attorney for order for payment.)

[4] ('24) 11 AIR 1924 Mad 840 (841, 842) : 84 I.C. 276, *Parthasarathi Appa Rao* v. *T. Subba Row.* (Cause of action for suit for account accruing against an agent during his life time — Death of agent does not give fresh cause of action against his legal representative —Following A I R 1915 Mad 596.)

('36) 23 AIR 1936 Lah 394 (400) : 17 Lah 403 : 166 Ind Cas 157 (DB), *Dhuman Khan* v. *Gurmukh Singh.* (Tenant mortgaging property — Landlord although having knowledge of mortgage not taking steps to challenge it—Property brought to sale in mortgage decree — Landlord objecting to sale— Dismissal of objection does not give him fresh period of limitation.)

('81) 1881 All W N 70 (70) (DB), *Mohan* v. *Mohsin Ali.* (*A* in adverse possession against *B* — Award declaring *B*'s title does not extend period of limitation for suit for possession by *B*.)

('30) 17 AIR 1930 Lah 284(285): 122 I.C.225(DB),*Ghulam Rasul* v. *Rahim Baksh.* (Declaratory suit—Fresh invasion of plaintiff's rights gives fresh cause of action.)

('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math, Dwarka* v. *Rajrajeshvarashram.* (Suit for declaration — Circumstances obviating threat to plaintiff's right — After some time plaintiff's right again in jeopardy—Plaintiff gets fresh cause of action.)

('36) 23 AIR 1936 Lah 164 (165) : 161 Ind Cas 703, *Baru Mal* v. *Daulat Ram.* (Claim barred — Only express promise provides fresh period of limitation under Contract Act, S. 25 (3).)

('66) 5 Suth W R 100 (101) : Beng L R Sup Vol App 10 (F B), *Sreenath Ghosal* v. *Kenaram Singh.* (Regulations VII of 1799, VIII of 1819, S. 18 Cl. 4—Cause of action — Ineffectual execution proceedings in summary suit does not give fresh cause of action for regular suit.)

Note 10

[1] For cases see illustrations that follow.

A and thereafter B becomes entitled to sue on the *same* cause of action he will not be entitled to a fresh period of limitation from the time he becomes so entitled.[2]

Illustrations.

1. Where a Hindu widow in possession of her husband's estate is dispossessed by a stranger, her cause of action for a suit for possession against the stranger is *distinct* from the cause of action of the reversioner who is entitled to sue for possession after her death.[3] In such cases, the reversioner does not derive his right to sue from the widow. The same principle applies to the suit of a person who is adopted by the widow, after her dispossession by the stranger. The adopted son gets a right to sue for possession on his adoption and this right is independent of the widow's right to sue for possession and is not affected by the limitation that may have run out in respect of such right.[4] But where the cause of action accrued in the life-time of the last full owner himself and limitation began to run in his life-time, it is not interrupted by the intervention of the widow's estate and the person succeeding the widow is not entitled to a fresh cause of action or a fresh period of limitation from the date of his succeeding to the estate.[5]

2. Where *A* is entitled to a life-interest in an estate and *B* is entitled to the remainder, and the cause of action for a suit for possession of such estate accrues in *A's* life-time, *B* gets a *fresh* cause of action on the termination of *A's* life-interest and the falling into possession of *B's* estate.[6] But where the cause of action accrued in the life-time of the last full owner himself, the intervention of

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2. ('41) 28 AIR 1941 Bom 197 (198), *Annu Bajaba* v. *Dadu Tukaram.* (Alienation by Hindu widow — Adoption made afterwards — Adopted son dying after attaining majority — Second adoption — Suit by second adopted son to set aside alienation held barred.)

('18) 5 AIR 1918 Mad 526 (527,528) : 41 I.C. 605 (DB), *Lakshmi Narayana* v. *Venkata Subbarao.* (Debt due to *M*—*M* dying—*M's* heir has no fresh cause of action.)

('09) 1 Ind Cas 906 (908, 909) : 5 Nag L R 28, *Lukhmichand* v. *Ganpat.* (Where a landlord comes to know of a transfer, time commences to run from the date of the knowledge and a successor landlord cannot compute time from the date of his (successor's) knowledge.)

(1865) 3 Suth W R Act X Rule 121 (121, 122) (DB), *Mohesh Chunder Chowdhry* v. *Buneead Khan.* (Son has no new cause of action on succeeding to his father.)

('93) 20 Cal 560 (575) : 20 Ind Cas 38 (P C), *Asghar Reza* v. *Mehdi Hossein.* (Cause of action in favour of *A*—*A's* heirs have no fresh cause of action.)

('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *F. N. Brown* v. *G. H. Paul.* (Where the creditor fails to execute decree, the time taken to prove his will cannot be excluded in calculating the period for execution of decree.)

3. For cases, see Notes to Article 141.

4. ('15) 2 AIR 1915 Mad 539 (539, 540) : 25 Ind Cas 692 (DB), *Venkatratnam* v. *Venkataramiah.*

('05) 2 Cal L Jour 87 (94, 95) : 9 Cal W N 795 (DB), *Harekchand Babu* v. *Bejoy Chand Mahatab.*

See also S. 2 (8) Note 3 and Arts. 142 & 144 Note 83.

5. ('24) 11 AIR 1924 Lah 292 (292) : 69 Ind Cas 398, *Khilu Ram* v. *Bhiran Bai.* (Following 12 Ind Cas 453.)

('26) 13 AIR 1926 Pat 192 (194) : 92 Ind Cas 177 : 5 Pat 441 (DB), *Mt. Batisa Kuer* v. *Rajaram Pandey.*

('07) 6 Cal L Jour 621 (635) (DB), *Lilabati Misrain* v. *Bishun Chobey.*

('15) 2 AIR 1915 Cal 629 (633) : 27 Ind Cas 954 (DB), *Mohendra Nath Biswas* v. *Shamsunnessa Khatun.*

See also Section 6 Note 19 and Art. 141 Note 14.

6. ('29) 16 AIR 1929 P C 158 (159, 160, 161) : 56 Ind App 192 : 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner* v. *Naunihal Singh.*

A's life-interest will not interrupt the running of limitation nor will *B* have a fresh cause of action on *A*'s death, for *B*'s cause of action, if any, would be one derived from the previous full owner.[7]

3. The cause of action for a suit by a Hindu reversioner challenging an alienation or adoption by a Hindu widow is common to all the reversioners and each reversioner is not entitled to an independent period of limitation.[8]

4. Where a cause of action accrues in favour of the holder of a religious or secular office as such, the succeeding holder also will derive from the last holder of the office such cause of action and will not be entitled to a fresh period of limitation.[9]

See also illustration 1 in Note 7.

11. Satisfaction or discharge and revival of cause of action. — Where a cause of action is, through Court or otherwise, satisfied or discharged, limitation stops running in regard to such cause of action, on the fundamental principle that limitation always implies an existing cause of action, and where there is no cause of action, there can be no limitation. In such cases, where the satisfaction or the discharge of the cause of action is nullified by subsequent events, the plaintiff is entitled to a *fresh* cause of action, consequent on such nullification, and a fresh period of limitation in respect of such cause of action.[1] It will be noted that there is no *exception* to the law of limitation involved in such a position. For, limitation has to be determined with reference to each cause of action, and where the plaintiff is entitled to a fresh cause of action, he is also entitled to a fresh period of limitation in respect of such cause of action.

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[7] ('29) 16 AIR 1929 P C 158 (159, 160, 162) : 56 Ind App 192 : 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner* v. *Naunihal Singh.*
See also Art. 140 Note 2.

[8] ('19) 6 AIR 1919 Mad 911 (916, 920, 922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma* v. *Gopala Dasayya.*
('21) 8 AIR 1921 Mad 380 (380, 381) : 44 Mad 218 : 60 Ind Cas 98 (DB), *Venkata Sivayya* v. *Ademma.*
[*See* (1900) 27 Cal 379 (403) (DB), *Hurnabh Pershad* v. *Mandil Dass.*]
[*See also* ('41) 28 AIR 1941 Bom 197 (198), *Annu Bajaba* v. *Dadu Tukaram.* (Alienation by Hindu widow — Adoption made afterwards — Adopted son dying after attaining majority — Second adoption — Suit by second adopted son held barred.)]
See also Art. 120 Note 34 and Art. 125 Note 7.

[9] ('21) 8 AIR 1921 Mad 595 (596) : 70 Ind Cas 477 (DB), *Subraminia Gurukkal* v. *Ammakkannu Ammal.* (Where lands constituting emoluments of an office are held by a person not entitled to the office for more than 12 years as owner, he gets absolute and indefeasible right thereto not only as against the then holder of the office, but also as against all the succeeding holders.)
('22) 9 AIR 1922 Mad 406 (407) : 70 Ind Cas 369 (DB), *Madura Devasthanam* v. *Samia Pillai.*
('18) 5 AIR 1918 Cal 580 (581, 582) : 44 Ind Cas 567 (DB), *Manmotho Nath Laha* v. *Annoda Prosad Roy.* (Alienation of debutter property by shebait of idol—Suit for possession against transferee—Succeeding shebait has no fresh cause of action.)
('04) 7 Bom L R 135 (136, 137) (DB), *Rama* v. *Shamrao.* (Adverse possession commenced in the lifetime of one vatandar avails as against the subsequent vatandar—Following 9 Bom 198.)
('20) 7 AIR 1920 Lah 209 (210) : 55 Ind Cas 335 (DB), *Ghulam Muhammad* v. *Ahmad Khan.* (Adverse possession of land which ala lambardar is entitled to hold—Possession is adverse to any ala lambardar *in esse* or *in posse* and no fresh starting point of limitation is available on appointment of new ala lambardar.)
See also Section 2 (8) Note 6.

Note 11

[1] ('39) 26 AIR 1939 Bom 1 (17) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunath Gouda.*
See cases in foot-notes (2) to (5) below.

Illustrations.

1. A sale of a patni taluk for arrears of rent is set aside for irregularity and thereupon, the landlord sues for the same arrears. The sale puts an end to his original cause of action for the rent and on the sale being set aside, there is a fresh cause of action in respect of which, the landlord is entitled to a fresh period of limitation.[2]

2. Where after the accrual of a cause of action, the rights of the parties merge into a decree, so as to bar a further suit on their basis, the cause of action is at an end. But where, subsequently, such decree is set aside under circumstances which make a fresh suit in respect of the matter competent, the plaintiff will be entitled to a fresh cause of action and a fresh period of limitation in respect of such cause of action.[3]

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[2] ('68) 12 Moo Ind App 244 (252, 253, 254) : 11 Suth W R P C 5 : 2 Beng L R P C 10 : 2 Suther 173 : 2 Sar 424 (PC), *Mt. Ranee Surnomoyee* v. *Shooshee Mokhee.*
('25) 12 AIR 1925 Cal 1216 (1217, 1218) : 85 Ind Cas 1007, *Bijoy Chand Mahatab* v. *Nilmoni Lahiri.* (In such cases, limitation in respect of the fresh cause of action is not suspended till decree setting aside sale is confirmed in appeal.)
('20) 7 AIR 1920 Pat 786 (786, 787) : 59 Ind Cas 314, *Midnapore Zamindary Co. Ltd.* v. *Jaganath Sarangi.* (Suit for apportionment of rent suspends right to recover rent.)
[*See also* ('21) 8 AIR 1921 Cal 572 (573) : 62 Ind Cas 428 (DB), *Laloo Karikar* v. *Jagat Chandra.* (Transfer of property of Muhammadan minors for payment of debts by *de facto* guardian—Sale held void and delivery of possession back to minors decreed — Vendee can sue for recovery of debt on the basis of revival of right and his suit will not be barred by limitation.)
('72) 18 Suth W R 59 (60) (DB), *Mohesh Chunder Chakladar* v. *Gungamonee Dossee.* (Zemindar, being indebted on bond, giving assignment on putnidars for portion of putni rent to be paid to bond-holder — Bond-holder not receiving money suing zemindar who, thereupon, in his turn, suing putnidars for rent — *Held,* zemindar was entitled to fresh period of limitation.)]

[3] ('35) 22 AIR 1935 Cal 333 (334, 335) : 62 Cal 66 : 158 I. C. 191 (DB), *Jateendra Chandra* v. *Rebatee Mohan Das.* (Application for delivery of possession by auction-purchaser—Declaration obtained by another that auction-purchaser had obtained no right—Declaration set aside on appeal—Auction-purchaser is entitled to avail of fresh cause of action for subsequent application for delivery of possession.)
('21) 8 AIR 1921 Lah 71 (71, 72) : 2 Lah 320 : 64 Ind Cas 454 (DB), *Kartar Singh* v. *Bhagat Singh.* (Award, suit on—Cause of action ends when decree is passed on award and revives when such decree is set aside.)
[*See* ('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 I. C. 452 (PC), *Srimati Nrityamoni Dassi* v. *Lakhan Chandra Sen.* (Affirming 35 Cal 209 — Plaintiffs were defendants in former suit — They associated with plaintiff in former suit and asked for adjudication of their rights in that suit—Court referring them to another suit—*Held* limitation for plaintiff's suit remained in suspense for period of that suit—It is submitted that their Lordships were applying S. 14 of the Act to the case and did not proceed on any principle of satisfaction and revival of cause of action.)
('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math* v. *Rajrajeshvarashram.*
('27) 14 AIR 1927 All 446 (450, 451) : 102 Ind Cas 96 : 49 All 565 (DB), *Ram Charan Sahu* v. *Goga.*]
[See however ('27) 14 AIR 1927 Mad 597 (597) : 50 Mad 417 : 100 Ind Cas 776, *Satyanarayana Brahman* v. *M. Seethayya.* (Declaration obtained from trial

3. *A* owed a sum of money to *B*. It was agreed between them that this sum should be treated as part of the consideration for a sale of land which *A* was to execute to *B*. But the parties failed to agree as to certain other terms and a suit brought by *A* for specific performance of the agreement to purchase was dismissed on the ground that no effectual agreement had been made. It was held that this decree brought about a new state of things and imposed a new obligation on *A*, who could no longer allege that he was absolved by *B* being entitled to the *land* instead of the *money*. He became bound to pay that which he had retained in payment for his land, the date of the decree being the date on which he incurred this new obligation.[4]

4. Certain disputes between a principal and agent were referred to arbitration and under the award thereon, certain moneys were paid by the agent in satisfaction of the principal's claim. Afterwards, the proceedings were set aside on the ground of fraud and coercion, and the principal had to refund the moneys received by him. Thereupon, the principal sued the agent to enforce the original liability to account. The defendant pleaded limitation. It was held that the former proceedings had put an end to the original cause of action and on their being set aside, the plaintiff got a fresh cause of action in respect of which, his suit was within time.[5]

5. Where a sale is held in execution of a decree and the decretal amount is paid to the decree-holder out of the sale proceeds, his claim to execute the decree is satisfied. If, thereafter, the sale is set aside and he is compelled to refund the amount paid to him, he gets a fresh right to execute the decree and is entitled to a fresh period of limitation in respect of such right.[5a]

6. On a sale in execution being confirmed, the auction purchaser is entitled to apply for delivery of possession. It has been held that if, subsequently, an application is made to set aside the sale, the effect is the same as if the sale had not been confirmed and the auction purchaser has no right to apply for possession; but that, on the application for setting aside the sale being dismissed and the sale being confirmed again, the auction purchaser gets a fresh right to apply for delivery of possession and a fresh period of limitation in respect of such application.[5b]

See also the undermentioned case.[5c]

Court that pronote in *A's* favour was obtained by fraud and undue influence and was supported by no consideration—Decree set aside in appeal — Nevertheless *A* has no fresh cause of action for suit on pronote—Declaration obtained from trial Court that pronote in *A's* favour was obtained by fraud and undue influence and was not supported by consideration—No prayer for injunction nor injunction granted—Decree set aside in appeal—*Held*, nevertheless *A* had no fresh cause of action for suit on pronote.)]

[4] ('89) 11 All 47 (53, 54, 56, 57) : 15 Ind App 211 : 5 Sar 260 : 12 Ind Jur 450 (P C), *Basu Kuar* v. *Dhum Singh*.

[5] ('20) 7 AIR 1920 Mad 663 (663, 664) : 43 Mad 845 : 59 Ind Cas 472 (DB), *Muthuveerappa Chetty* v. *Adaikappa Chetty*.
('30) 17 AIR 1930 Cal 5 (6, 7, 10) : 56 Cal 639 : 120 Ind Cas 710, *Abdul Rahim Oosman & Co.* v. *Ojamshee Purshottamdas & Co.* (Following A I R 1921 Lah 71.)

[5a] For cases, see Notes to Article 182, clause 6.

[5b] ('20) 7 AIR 1920 Mad 1 (5, 6, 7) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty* v. *Mahomed Madar Ammal*. (Oldfield, J., dissenting.)

[5c] ('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math* v. *Rajrajeshvarashram*. (Suit for declaration — Circumstances obviating threat to plaintiff's right—After some time, plaintiff's right again in jeopardy—Plaintiff gets fresh cause of action.)

Where the circumstances ensuing after the accrual of a cause of action do not result in the satisfaction or discharge of such cause of action, limitation will not stop running and the plaintiff will not be entitled to any exemption from the ordinary law of limitation, except under any of the special provisions which create exemptions from such law.[6]

Illustrations.

1. *A* sues the Government for recovery of cess paid under protest (Art. 16) in respect of a certain year. The suit is dismissed in the trial Court but decreed in the appellate Court. These circumstances do not bring about the cancellation and revival of the plaintiff's cause of action for a similar suit against the Government in respect of the cess paid for a *subsequent year*.[7]

2. *A*, a stranger, dispossesses *B* and *C*, two co-owners, of certain land, and holds the land adversely against them both. Subsequently, *B* dies and *A* succeeds to his interest. This does not put an end to *C's* cause of action against *A*. The reason is that although *A* becomes co-owner with *C*, and one co-owner's possession must be held to be *on behalf of* other co-owners and not *adverse* to them, yet this rule is subject to the exception that where one co-owner *ousts* another, the former's possession is adverse to the latter. In this case, the *ouster* of *C* by *A*, which took place when he dispossessed both *B* and *C*, is not interrupted by *B's* interest devolving on *A* subsequently.[8]

3. *A* and *B* are owners of a patni taluk. The taluk is sold for arrears of rent and the surplus sale proceeds are paid to *A*. *B's* claim for share of such proceeds is governed by Art. 62. The fact that, subsequently, the patni sale is set aside and again restored in appeal does not affect the running of limitation.[9]

4. A preliminary decree is passed in a mortgage suit in favour of the mortgagee. Afterwards, a decree is passed against both the mortgagor and mortgagee in a suit by a third person negativing the title of the mortgagor to the property. This decree is, subsequently, reversed in appeal. In these circumstances, there is no discharge and revival of the mortgagee's claim for a final decree so as to entitle him to a fresh period of limitation from the decree of the appellate Court.[10]

5. Where a mortgagee's cause of action for suing to enforce the mortgage has accrued, the cause of action is not affected by the fact that the mortgaged property is submerged under water.[11]

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6. ('21) 8 AIR 1921 Cal 596 (596) : 64 I. C. 315 (DB), *Janaki Nath* v. *Bijoy Chand.*

7. ('20) 7 AIR 1920 Mad 948 (955, 958, 962) : 59 Ind Cas 98 (SB), *Secy. of State* v. *Zamindarini of Vegayammapeta Estate.*

See also Art. 16 Note 4.

8. ('19) 6 AIR 1919 P C 44 (45, 46, 47) : 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (P C), *N. Varada Pillai* v. *Jeevarathnammal.*

[*See* ('24) 11 AIR 1924 Cal 118 (121, 122) : 76 I. C. 511 (DB), *Pankaj Mohan Rai* v. *Bipin Behari.* (*A's* possession after he became co-owner would not have been adverse were it not for the fact that he continued to hold the land in the assertion of the same hostile title as he had set up before he became co-owner.)]

9. ('25) 12 AIR 1925 Cal 67 (72, 74) : 83 Ind Cas 110 (DB), *Niranka Chandra* v. *Atul Krishna.*

10. ('25) 12 AIR 1925 Mad 334 (334, 335, 338) : 85 Ind Cas 272 (DB), *Ammathayi Ammal* v. *Sivarama Pillai.*

See also Section 15 Note 11 and Art. 181 Note 4.

11. ('33) 20 AIR 1933 Pat 693 (693, 694) : 146 Ind Cas 856, *Raghunath Bhagat* v. *Meghu Mander.*

See also Art. 132 Note 25.

6. A landlord sued his tenant for possession on the allegation that his tenancy had determined. The suit was dismissed and thereupon the landlord sued for rent. It was held that the landlord's cause of action for suing for rent was in no way affected by his suit for possession and that limitation could not be saved on account of such suit.[12]

7. *A*, a Hindu widow, alienates certain property belonging to her husband's estate. *B*, a reversioner, sues during her lifetime for a declaration that the alienation cannot bind the reversionary interest. The suit is dismissed on the ground that *B* is not the next reversioner, but *C*. After the death of the widow, *C* sues the alienee for possession but the suit is dismissed on the ground that he is not a reversioner at all. Thereupon, *B's* son sues for possession. At the time of instituting the suit more than twelve years have elapsed from the death of the widow. There is no suspension and revival of the right to sue so as to give a fresh right of action on the decree in *C's* suit.[13]

8. Where a cause of action is furnished by a decree, such cause of action is not affected by an appeal being filed against such decree, and the dismissal of the appeal, therefore, does not cause a *revival* of the right so as to furnish a fresh period of limitation.[14] Thus, a patni taluk is sold for arrears of rent. The sale is set aside by a decree, whereupon, the purchaser sues the landlord for the refund of the money paid by him. The cause of action for such a suit arises on the passing of the decree setting aside the sale and is not affected by the fact that the decree is appealed against and is confirmed in appeal.[15]

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[12] ('83) 9 Cal 255 (258, 259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (P C), *Huro Pershad Roy* v. *Gopal Das Dutt.*
('21) 8 AIR 1921 Cal 525 (525) : 48 Cal 65 : 57 Ind Cas 992 (DB), *Nagendra Nath Sen* v. *Sadhu Ram Mandal.*
[But see ('71) 16 Suth W R 79 (80) : 8 Beng L R 537n (DB), *Eshan Chunder Roy* v. *Khajah Assanoollah.* (Suit for rent—Time during which landlord was suing for ejectment of defendant as trespasser must be deducted—Case under Bengal Act X of 1859.)
('72) 17 Suth W R 415 (416) : 8 Beng L R 536 (DB), *Deen Dayal Paramanick* v. *Radha Kishore Debee.* (Do.)]

[13] ('23) 10 AIR 1923 Mad 108 (108, 109) : 70 Ind Cas 446 (DB), *Ranganatha Rao* v. *Rama Pandithar.*
See also Art. 141 Note 21.

[14] ('27) 14 AIR 1927 Lah 200 (208, 209, 210) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh* v. *Muhammad Said.* (Suit upon *ex parte* foreign judgment—Period during which proceedings to set aside decree were pending cannot be excluded.)
('25) 12 AIR 1925 Cal 1216 (1216, 1217, 1218) : 85 Ind Cas 1007 (DB), *Bijoy Chand Mahtab* v. *Nilmoni Lahiri.* (Sale of patni for arrears of rent — Sale set aside by decree—Limitation for suit for rent thereafter runs from date of trial Court's decree and not appellate decree confirming it.)
('28) 15 AIR 1928 All 46 (47, 49) : 50 All 211 : 107 Ind Cas 42 (DB), *Salig Ram Misir* v. *Lachhman Das.* (Decree-holder purchasing property in execution but losing it in separate suit by third party — His fresh application for execution or for revival of execution, if maintainable, must be filed within three years of trial Court's decree.)
('17) 4 AIR 1917 Oudh 91 (91, 92) : 20 Oudh Cas 205 : 41 Ind Cas 858, *Jagdish Singh* v. *Ram Adhin Singh.* (Application for a decree absolute under O. 34, R. 5 (2), C. P. C.—Under the rule the right to make an application begins as soon as the period limited in the decree expires — Institution of appeal against the decree—Limitation for making an application for a decree absolute is not thereby extended—Following A I R 1915 All 336.)

[15] ('18) 5 AIR 1918 P C 151 (152, 153) : 46 Cal 670 : 46 Ind App 52 : 50 Ind Cas 444 (PC), *Juscurn Boid* v. *Pirthichand Lal.*

Section 9
Notes 11–12

9. The mere fact that the plaintiff, an alien, is prevented from suing on account of the outbreak of war does not suspend his cause of action.[16]

10. The pendency of an application by the judgment-debtor to enter satisfaction of decree does not suspend the decree-holder's cause of action for applying for execution of the decree.[17]

11. The institution by the plaintiff of a suit for possession does not suspend his cause of action for a suit for mesne profits.[18]

See also the undermentioned cases.[19]

12. **Fusion of interests of debtor and creditor.** — It is a general principle of law that when a fusion of the interests of the debtor and the creditor takes place, that is to say, when the interests both of the debtor and creditor become vested in the same person, the debtor must be held to have paid off his debt and hence, such a fusion of interests will amount in law to a satisfaction of the cause of action.[1] When, subsequently, there is a separation of the two interests, the person, on whom the interest of the creditor devolves, will have a fresh cause of action from the date of such separation of interests. Thus, where a mutt is in the position of a tenant and a temple in the position of landlord over such tenant and the same person is trustee both for the temple and the mutt, it must be held that the mutt pays to the temple the rent for the holding as and when it falls due. When, subsequently, another person becomes a trustee for the temple alone, he gets a fresh cause of action for the recovery of such rent. But his cause of action is not for its recovery as *rent* but as part of the temple property in the hands of the ex-trustee.[2] Similarly,

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[16] ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatesche Bank* v. *Hira Lall Burdhan and Sons.* ("Even if there should be any Common law rule that would avail the plaintiff in such a "case we have here a statutory provision which would override such rule.")

[17] ('22) 9 AIR 1922 Mad 79 (80, 82) : 45 Mad 466 : 70 Ind Cas 324 (DB), *Kuppusami Chettiar* v. *Rajagopala Iyer.*

[18] ('27) 14 AIR 1927 All 446 (447, 451) : 102 Ind Cas 96 : 49 All 565 (DB), *Ram Charan Sahu* v. *Goga.*

[19] ('39) 26 AIR 1939 Bom 1 (8, 9, 17, 18) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunath Gouda.* (*A*, a stranger, in adverse possession of property against *B* — *A* suing *B* for declaration that *B* had no right to dispossess *A* and for injunction restraining *B* from interfering with his possession —Decision against *A*—Thereafter *B* suing *A* for possession after more than twelve years of adverse possession by *A*—*Held*, that suit was barred by limitation which began to run when *A's* possession became adverse to *B* and not from the date of decision in suit by *A* against *B*.)

('24) 11 AIR 1924 Lah 40 (40, 41) : 71 Ind Cas 495 : 4 Lah 90 (DB), *Hukam Chand* v. *Shahab Din.* (*A*, a mortgagee, entitled to sue mortgagor for possession on certain date—Subsequently mortgagor dispossessed by prior mortgagee—Mortgagor again recovering possession — *Held* that in the circumstances of the case, *A's* cause of action was not suspended during the interval.)

('66) 6 Suth W R 269 (275, 276) (DB), *Khelut Chunder Ghose* v. *Tarachurn Koondoo Chowdhry.* (In a suit to recover possession of land under a mortgage deed, limitation will count as against the mortgagee from the date of default, and the pendency of a foreclosure suit will not prevent limitation from running.)

Note 12

[1] ('16) 3 AIR 1916 Oudh 290 (292) : 32 I. C. 729, *Abdul Hasan* v. *Mt. Jagwanta.*

[2] ('23) 10 AIR 1923 Mad 461 (462) ; 72 Ind Cas 5 : 46 Mad 579 (DB), *Nataraja Desikar* v. *Govinda Rao.*

where a debtor is executor under the will left by the creditor, the law will presume that he pays to the estate the debt due by him and limitation for a suit for the recovery of such debt will cease to run. When, subsequently, the legatee sues the executor for the debt, his cause of action is distinct and is for recovery of his *share in the assets* left by the deceased and not for the recovery of the *debt*. Such cause of action arises when his legacy falls due.[3]

After the execution of a mortgage, the interest of the mortgagee became vested in a Hindu lady who became entitled to a widow's interest in such mortgage right. The widow then transferred the mortgagee interest to A, in whom was vested also the equity of redemption. Subsequently, after the widow's death, the transfer by the widow was set aside and A sued for redemption. It was held that in computing the period of limitation for such suit, the period during which the mortgagee's interest was vested in A, under the transfer effected by the widow, could not be *excluded* as there was no provision in the Act for such exclusion. It was held further that as the mortgagee's interest, which became vested in A, was only the limited interest of a Hindu widow, there was no *fusion* of the interests of the mortgagor and mortgagee so as to furnish a fresh cause of action on the separation of the two interests.[4]

13. Agreement to refer dispute to arbitration, whether puts an end to cause of action. — Under paras. 18 and 22 of Sch. II of the Civil Procedure Code, now repealed by the Arbitration Act, X of 1940, an agreement to refer a matter to arbitration did not *bar* a suit in respect of such matter. Such agreement was merely a ground for *staying* such suit. Hence, where such an agreement was entered into in respect of a cause of action that had accrued, there was no *cessation* of such cause of action so as to affect the running of limitation.[1] The legal position is not changed under the Arbitration Act, X of 1940. (See S. 34 of the Act.)

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3. ('18) 5 AIR 1918 Mad 526 (528, 529) : 41 Ind Cas 605 (DB), *Lakshmi Narayana* v. *Venkata Subba Rao.*

('09) 4 Ind Cas 462 (465) (Cal), *Basir Ali* v. *Hafiz Nazir Ali.*

('08) 10 Bom L R 346 (349, 350, 351), *Yakub Ebrahim Sayani* v. *Bai Rahimatbai.* (Section 10 applied.)

('07) 31 Bom 418 (428, 429) : 9 Bom L R 287, *Narrondas Ramji* v. *Narrondas Ramji.* (Principle applied where same person was one of the executors both in respect of will of the debtor, as well as that of the creditor.)

[*See* ('04) 31 Cal 519 (527, 529) : 8 Cal W N 500 (DB), *Administrator-General of Bengal* v. *Kristo Kaminee Dassee.* (Affirming 7 C W N 476.)

('06) 33 Cal 1047 (1060, 1061) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rup Chand.* (Principle applied to executor *de son tort.*)]

[But see ('09) 4 I. C. 283 (284, 285) (Bom), *Damodar Khimji* v. *Dayal Mawji.*]

4. ('13) 19 Ind Cas 291 (293, 295, 296) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram* v. *Kanhaiya Lal.* (On appeal from 8 Ind Cas 725.)

Note 13

1. ('17) 4 AIR 1917 Mad 892 (894) : 35 Ind Cas 575 : 44 Mad 701 (DB), *Bollapragada Ramamurthi* v. *Thammanna Gopayya.*

Section 9
Notes 14–15

14. Limitation only applies to institution of proceedings and not their continuation. — As seen in Note 32 under section 3, limitation only applies to the institution of proceedings, and not their continuation.

Illustration.

After an execution sale was confirmed, the auction-purchaser applied for delivery of possession. Pending the application, a suit was filed by a third person claiming the property to be his and attacking the execution sale. The suit was decreed in the trial Court but dismissed by the appellate Court. In the meanwhile, the auction-purchaser's application was dismissed "for default." After the termination of the suit by the third party in favour of the auction-purchaser, he again applied for delivery of possession. It was held that, in the circumstances of the case, his subsequent application must be deemed as only an application to *continue* his original application and not as a *fresh* application and therefore the fact that the period of limitation under Art. 180 had expired at the date of the new application did not bar it.[1]

15. Repeal of statute and running of limitation. — The rule that time that has once begun to run cannot stop is dependent on the continuance in force of the enactment under which time has been running. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old or substitute some new rule of limitation.[1]

Section 10

Suits against express trustees and their representatives.

10.* Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns

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*** Act of 1877 : S. 10.**

Suits against express trustees and their representatives.

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.

('21) 8 AIR 1921 Pat 166 (171, 172) : 6 Pat L Jour 273 : 61 I. C. 807 (DB), *Shaikh Abdul Rahim* v. *Mt. Barira.* (The proper test to see whether arbitration proceedings cause right to sue to be in suspense, is whether plaintiff could have brought an action notwithstanding the fact that arbitration proceedings were pending.)

[See however ('18) 5 AIR 1918 Mad 548 (549, 550) : 41 Ind Cas 581 (DB), *Doraisami Padayachi* v. *Vaithilinga Padayhchi.* (Prior to enactment of Para. 22, Sch. 2, C. P. C., such an agreement was a *bar* to a suit and affected the cause of action which revived on failure of the arbitration proceedings.)]

Note 14

1. ('35) 22 AIR 1935 Cal 333 (334, 335, 336) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra* v. *Rebatee Mohan Das.*

Note 15

1. ('76) 1 Bom 295 (303, 304) : 1 Ind Jur 128 (DB), *Abdul Karim* v. *Manji.*

for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

[a][For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.]

[a] This paragraph was inserted by S. 2 of the Indian Limitation (Amendment) Act, 1929 (I of 1929). This Act came into force on 1-1-1929.

Synopsis

1. Analogous law.
2. Legislative changes.
3. Scope of the section.
4. "Property."
5. "Vested," meaning of.
6. "Trust," meaning of.
7. "Trust for a specific purpose."
8. Form of trust for specific purpose.
9. Alleged trustee must be owner of trust property.
10. Owner of property must be under obligation to hold it for another's benefit.
11. Obligation must arise out of confidence.
12. Trust must be one created by act of parties. See Note 7.
13. Instances of trust for specific purpose.
14. Mortgagee in possession after the mortgage has been discharged is not a trustee.
15. Benamidar is not trustee.
16. Executor or administrator not specific trustee.
17. Trustee de son tort, whether specific trustee.
18. Deposit of money.
19. Deposit of specific moveable property.
20. "Legal representative," meaning of.
21. "Assigns (not being assigns for valuable consideration)."
22. "For the purpose of following in his or their hands such property or the proceeds thereof."
23. Suit for account.
24. Persons entitled to benefit of section.
25. Property comprised in Hindu or Muhammadan religious or charitable endowment, whether property vested in trust for a specific purpose.
26. Property comprised in Parsi religious endowment.
27. Limitation for suits for recovery of trust property from strangers.
28. Limitation for suits against trustees by operation of law.

Act of 1871 : S. 10.

Suits against express trustees and their representatives.

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives for the purpose of following in his or their hands such property, shall be barred by any length of time.

Explanation. — A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

Other Topics (miscellaneous)

Adverse possession. See Notes 27 and 28.
Case covered by S. 10—Article 98 will not apply. See Note 3.
Section applies to express trust only. See Notes 6, 7, 11, 13 and 17.
Suit for office or removal of trustee. See Note 22.
Who are not trustees —
  Banker or depositee. See Notes 11 and 18.
Directors of company. See Note 9.
Government. See Note 9.
Guardian and ward or minor. See Note 9.
Manager of religious endowment. See Note 9.
Receiver. See Note 9.
Shebait or mahant or dharmakarta. See Note 6.
Solicitors and agents. See Notes 9, 11 and 18.

1. Analogous law. — The effect of the analogous provisions of the English statutes of limitation as to suits against express trustees has been summarized in Halsbury's Laws of England[1] as follows:

> "The fact that the defendant is an express trustee for the plaintiff will prevent the action from being barred by lapse of time, whether the claim is to recover land, or personal estate, or is in respect of a breach of trust, if the defendant still retains the property or has converted it to his use or if the claim is founded on fraud. In other cases, the existence of an express trust does not prevent the action being barred by lapse of time and in the case of money (including a legacy) charged on land, or arrears of interest on money so charged, or arrears of rent, the mere existence of an express trust does not prevent time running."

2. Legislative changes.

Differences between Acts of 1859 and 1871:

(a) The corresponding section (viz., S. 2) of the Act of 1859 referred to a suit against a *trustee,* whereas the section in the Act of 1871 referred to a suit against "*a person in whom property has become vested in trust for a specific purpose.*"

(b) The section in the Act of 1859 spoke of a suit against a trustee *in his lifetime.* The words "in his lifetime" were omitted in the later Act.

(c) The section in the Act of 1859 as well as that in the Act of 1871 covered suits against *representatives* of the trustee (in addition to suits against *trustees*). But the section in the Act of 1871 contained an explanation to the effect that a purchaser in good faith for value from a trustee was not his representative

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Act of 1859 : S. 2.

Suits against trustees and their representatives for breach of trust, &c.

2. No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee: Provided that nothing herein contained shall prevent a co-trustee from enforcing against the estate of a deceased trustee, any claim for contribution if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

Section 10 — Note 1

[1] Halsbury's Laws of England, 1911, Vol. 19, page 161.

within the meaning of the section, so that the exemption from limitation under the section would not apply to a suit against such a purchaser. There was no such express provision in the Act of 1859. But, S. 5 of the Act clearly implied that a suit against a purchaser in good faith for value from a trustee was not exempt from limitation. (See S. 5 which is reproduced under Article 134.)

Differences between Acts of 1871 and 1877 :

As seen already, the section in the Act of 1871 covered (in addition to suits against trustees) suits against the *representatives* of the trustee and there was an explanation to the section which excluded from the category of such "representatives" a purchaser in good faith for value from a trustee. In the Act of 1877, the words "legal representatives or assigns (not being *assigns for valuable consideration*)" were substituted for the word "representatives" which occurred in the Act of 1871, and at the same time, the explanation which occurred in the previous section was omitted. The result of this change was that in the case of suits against transferees of the trust property from the trustee, the section applied only where the transfer was *gratuitous*. The section did not apply if the transfer was for *valuable consideration* irrespective of the question whether the transferee was a transferee in *good faith*. But under the previous law, the section was applicable not only to *gratuitous* transferees but also to transferees for *consideration* who were not transferees in *good faith*.

Differences between Acts of 1877 and 1908 :

Whereas the previous section referred in terms only to a suit for the purpose of *following the trust property* in the hands of the trustee or his representative, the section was widened so as to include also suits for following the proceeds of trust property or for an *account* of such property or proceeds. The amendment set at rest the conflict of decisions which obtained under the Act of 1877 as to whether a suit for *accounts* was within the section. (See Note 23.)

Amendment after 1908 :

By Act I of 1929, the second paragraph of this section was added. (See Note 25.)

3. Scope of the section.—This section grants a *total* exemption from the bar of limitation in regard to the suits mentioned therein.[1] The conditions for the applicability of the section are as follows :

(1) There must be property which has become vested in a person in trust for a specific purpose.

Note 3

[1] ('26) 13 AIR 1926 Pat 321 (324) : 94 I. C. 433 : 5 Pat 539 (DB), *Mt. Khursaidi Begum v. Secy. of State.*
(1864) 1864 Suth W R (Gap) 171 (172) (DB), *Buzl Rahim v. Lutafut Hossein.*
('82) 6 Mad 54 (59) : 6 Ind Jur 629 (DB), *Virasamy Nayudu v. Subba Rao.*
('35) 22 AIR 1935 Nag 35 (42) : 31 Nag L R 188 : 157 Ind Cas 17 (DB), *Ram Swaroop v. Thakur Ramchandraji Mandir.*
('11) 11 Ind Cas 447 (449) : 34 Mad 257 : 38 Ind App 129 (PC), *Srinivasa Moorthy v. Venkatavarada Iyengar.*

(2) The suit must be against such person or his legal representatives or assigns (not being assigns for valuable consideration).

(3) The suit must be for the purpose of following in the hands of such person the trust property or its proceeds or for an account of such property or proceeds.

Article 98 provides the period of limitation for a suit to make good from the estate of a deceased trustee the loss occasioned by a breach of trust. The words of this article may cover a suit against the legal representative of a trustee for following in his hands trust property or its proceeds or for an account of such property or proceeds. But, as the articles in the first schedule must be read subject to the provisions of sections 4 to 25 (*vide* S. 3), where a case is covered by this section, the above article will not apply and the suit will not be barred by any length of time.[2]

4. **"Property."** — A trust does not necessarily import that the trustee is the owner of the *entire* interest in any property. Even a *limited* interest in property may be subject to a trust, so that such limited interest also may be *property* vested in trust within the meaning of this section. (See Notes 5 and 9.)

5. **"Vested," meaning of.** — The expression "vested" in this section must be read along with the words "in trust for any specific purpose" which follow the expression. As will be seen in Note 9, the expression "trust for a specific purpose" necessarily implies the vesting of *ownership* in the alleged trustee.[1] But such ownership refers to the particular right or interest which is the subject-matter of the trust. The ownership need not be of the *entire* interest in any property. The subject-matter of trust may be a *limited* interest in property. Thus, a mere *right to possession* may be the subject of a trust and the owner of such a right will be a trustee if such right is vested in him for the benefit of another.[2] But, where a person in possession has no *right*

('71) 14 Moo Ind App 289 (305) : 10 Beng L R 19 : 17 Suth W R 41 : 2 Suther 512 : 3 Sar 23 (PC), *Jugutmoheenee Dossee* v. *Sokheemonee Dossee.*

[2] ('28) 15 AIR 1928 Bom 58 (59) : 107 I. C. 705 : 52 Bom 184 (DB), *Chintaman Raoji* v. *Khanderao Pandurang.* (32 Bom 394, relied on.)
('38) 25 AIR 1938 Nag 30 (33) : I L R (1940) Nag 94 : 176 Ind Cas 57 (DB), *Mt. Sahaudra Bai* v. *Shree Deo Radha Ballabhji.*
See also Art. 98 Note 1.

Note 5

[1] *See* ('39) 26 AIR 1939 Bom 126 (127) : I L R (1939) Bom 154 : 181 Ind Cas 375 (DB), *Malojirao* v. *Keshav.* (The words "vested in trust" if they do not necessarily imply a transfer of ownership in the strict sense, do, at any rate, imply something more than mere possession and temporary control.)
('38) 25 AIR 1938 Cal 673 (676) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kalipada De* v. *Hari Dasi Dasi.*

[2] ('34) 21 AIR 1934 Cal 87 (89) : 150 Ind Cas 398 : 61 Cal 119 (DB), *Bibhu Bhusan Dutta* v. *Anadi Nath Dutt.* (While transfer of *proprietary rights* is not intended, mere transferring of management or control is not enough to satisfy the requirements of 'vesting' as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the 'vesting'.)

to possession and is in possession merely as the agent or manager of another, he is not the owner of any interest or right in the property and no property can be said to be *vested* in him.[3]

6. "Trust," meaning of. — The expression "trust" is used in this section in a technical sense and denotes an obligation which would be a trust in the *strict* sense of the term under the law. Hence, the mere fact that a person is *loosely* called a trustee for the sake of convenience and has obligations analogous to those of a trustee will not make him a trustee under this section.[1] Thus, the *shebait* of an idol, the *mahant* of a *mutt*, the *dharmakarta* of a temple, etc., may be loosely called a trustee (*vide* Religious Endowments Act of 1863) and may have duties and obligations analogous to those of a trustee. Still, they would not necessarily have been trustees under this section but for the special provision enacted in the second paragraph of the section, which makes them "trustees" for the purpose of this section irrespective of the question of their fulfilling the character of a trustee in the strict sense of the term under the law.

The section contemplates a subsisting trust and does not apply to a case where a trust has been created but has been duly revoked.[2]

For the meaning of the expression "trust," see Note 1 under section 2 clause 11.

7. "Trust for a specific purpose." — In *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*,[1] which was a case under S. 10, Straits Settlements Ordinance, VI of 1896, corresponding to this section, their Lordships of the Privy Council observed as follows :

('23) 10 AIR 1923 Mad 578 (579, 581) : 72 Ind Cas 842 (DB), *Kishtappa Chetty* v. *Lakshmi Ammal.* (The word 'vested' in S. 10 of the Limitation Act means no more than properly having control of the property.)

('26) 13 AIR 1926 Mad 109 (110, 112) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetti* v. *Sivakami Ammal.* (A I R 1922 Mad 57 distinguished.)

('35) 62 Cal 393 (398), *Mahomed Habeeb Alum* v. *Anjuman Ara Begum.*

In the above four cases, the facts are also consistent with the view that the ownership of the property itself and not merely a right of possession becomes vested in the alleged trustee.

('72) 4 N W P H C R 33 (34) (DB), *Soomrun Rai* v. *Mahesh Dutt.*

[3] ('34) 21 AIR 1934 Cal 87 (89) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan Dutta* v. *Anadi Nath Dutt.*

('35) 62 Cal 393 (397), *Mahomed Habeeb Alum* v. *Anjuman Ara Begum.*

See also Trusts Act, S. 90, illustration (a) which shows that a lessee may be under an obligation in the nature of a trust.

Note 6

[1] ('22) 9 AIR 1922 P C 123 (130, 131) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi Thirtha Swamigal* v. *Baluswami Iyyar.*

('28) 15 AIR 1928 All 689 (694, 696) : 114 Ind Cas 734 (DB), *Rengacharya* v. *Guru Revti Raman Acharya.*

[2] ('09) 1 I.C. 347 (348) (All) (DB), *Syed Zakir Ali* v. *Mt. Umatul Habib Begum.*

('25) 12 AIR 1925 Pat 68 (89, 92) : 93 Ind Cas 454 (FB), *Harihar Prasad Singh* v. *Kesho Prasad Singh.*

Note 7

[1] ('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (P C).

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Note 7

> "A 'specific purpose,' within the meaning of S. 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the will or settlement itself, or a purpose which, from the specified terms, can be certainly affirmed."

This was followed in the undermentioned cases.[2]

It follows from the above that the expression "specific purpose" in this section simply means a purpose which is specified or expressed;[3] and is merely a more expanded mode of expressing the idea conveyed by the expression "express trust" in English law,[4] namely a trust created *by the act of a party.*

The expression will not apply to a trust arising by *operation of law.*[5] For, in such cases, the purpose of the trust is not *specified* but

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[2] ('38) 25 AIR 1938 Cal 673 (676) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De* v. *Hari Dasi Dasi.*

('34) 21 AIR 1934 Cal 87 (89) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan Dutta* v. *Anadi Nath Dutt.*

('27) 14 AIR 1927 Bom 398 (398) : 103 Ind Cas 418 (DB), *Mahomedsa Kadersa* v. *Kadirsa Hajisa.*

('23) 10 AIR 1923 Mad 667 (670) : 46 Mad 259 : 74 Ind Cas 785 (DB), *Secretary of State* v. *Radhika Prasad.*

('31) 18 AIR 1931 P C 9 (12) : 8 Rang 645 : 130 Ind Cas 609 : 58 Ind App 1 (P C), *Annamalai Chettiar* v. *Muthukaruppan Chettiar.*

[3] ('12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Md. Ibrahim* v. *Abdul Latif.*

('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (P C), *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh.*

('14) 1 AIR 1914 Sind 81 (82) : 8 Sind L R 132 : 27 I. C. 332, *Lekhraj Visumal* v. *Assamal Tarumal.* ("Will" creates trust in favour of heir of the residue—Obiter.)

('79) 4 Cal 455 (465, 470) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherodemoney Dossee* v. *Doorgamoney Dossee.* (Affirming 2 Cal L R 112.)

[4] ('08) 32 Bom 394 (399) : 10 Bom L R 540 (DB), *Bhurabhai* v. *Bai Ruxmani.*

('30) 17 AIR 1930 All 96 (97) : 124 Ind Cas 18, *Lachhmi Prasad* v. *Ganesh Din.* (A I R 1925 Rang 289 distinguished.)

('82) 4 All 187 (189) : 1882 All W N 3 (DB), *Barkat* v. *Daulat.*

('27) 14 AIR 1927 Bom 424 (425) : 103 Ind Cas 225, *Jamnadas Gordhandas* v. *Damodardas Chunilal.*

('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambar Haldar* v. *Giribala Dasi.*

('29) 16 AIR 1929 Lah 753 (757) : 122 Ind Cas 467 : 11 Lah 325 (DB), *H. P. Robson* v. *Administrator-General of Punjab.*

('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 899 (DB), *The Bank of Multan Ltd.* v. *Hukam Chand.*

('07) 1907 Pun W R No. 173 p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal* v. *Kishan Chand.*

('32) 19 AIR 1932 Mad 685 (686) : 139 Ind Cas 164 (DB), *Subbiah Chetty* v. *Visalakshi Achi.*

('23) 10 AIR 1923 Mad 578 (579, 581) : 72 Ind Cas 842 (DB), *Kishtappa Chetty* v. *Lakshmi Ammal.*

('22) 9 AIR 1922 Mad 57 (59) : 45 Mad 415 : 66 Ind Cas 858 (DB), *Krishnan Pattar* v. *Lakshmi.*

('29) 16 AIR 1929 Nag 298 (302) : 116 Ind Cas 70, *Gourishankar* v. *Ibrahim Ali.*

('18) 5 AIR 1918 Bom 183 (184) : 46 I. C. 19 (DB), *Ramacharya* v. *Shrinivasacharya.*

[5] ('22) 9 AIR 1922 Mad 57 (58, 59) : 45 Mad 415 : 66 I. C. 858 (DB), *Krishnan Patter* v. *Lakshmi.* (Sale in name of *A* reciting that it was on behalf of *B*—Trust is only a constructive one and S. 10 does not apply.)

('39) 26 AIR 1939 Mad 722 (723) : 189 Ind Cas 316 (DB), *Chandra Kesavalu* v. *Perumal Chettiar.* (Section has no application to constructive trusts or obligations in the nature of trust where there is no transfer of ownership.)

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has to be deduced by applying the provisions of the law to the facts and circumstances of the case.[6]

('38) 25 AIR 1938 Cal 673 (676) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De* v. *Hari Dasi Dasi.* (Trusts which have not been declared by any specific words but which the law would imply from the existence of particular facts or fiduciary relations are excluded from the operation of the section.)
('12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Md. Ibrahim* v. *Abdul Latif.*
('14) 1 AIR 1914 Sind 81 (82) : 27 Ind Cas 332 : 8 Sind L R 132, *Lekhraj Visumal* v. *Assamal Tarumal.*
('79) 4 Cal 897 (917) : 4 Cal L R 193 : 4 Ind Jur 287 (DB), *Greender Chunder Ghose* v. *Makintosh.*
('30) 17 AIR 1930 All 96 (97) : 124 Ind Cas 18, *Lachhmi Prasad* v. *Ganesh Din.* (The words "for any specific purpose" merely indicate an express trust, i.e., a trust that is not constructive or one arising by implication of law or such that there is no doubt as to its specified terms nor any uncertainty as to affirming them.)
('28) 15 AIR 1928 All 689 (696) : 114 Ind Cas 734 (DB), *Rangacharya* v. *Guru Reoti Raman Acharya.* (Express trust contemplates the vesting of the property in certain person on trust either declared in explicit terms or otherwise stated in language indicative of the fact that the legal and beneficial ownership is held by different juridical entities. Hence, in absence of any evidence, written or verbal to prove the existence of such express trust, section does not apply.)
('82) 4 All 187 (189) : 1882 All W N 3 (DB), *Barkat* v. *Daulat.*
('08) 32 Bom 394 (399) : 10 Bom L R 540 (DB), *Bhurabhai* v. *Bai Ruxmani.*
('95) 19 Bom 352 (359), *Dorabji Jehangir Randiva* v. *Muncherji Bomanji.*
('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Bishwambar Halder* v. *Giribala Dasi.*
('29) 16 AIR 1929 Lah 753 (757) : 122 Ind Cas 467 : 11 Lah 325 (DB), *H. P. Robson* v. *The Administrator-General of Punjab.*
('27) 14 AIR 1927 Lah 773 (774) : 105 Ind Cas 721 (DB), *Mt. Kishan Dei* v. *Ram Chand.* (The defendant took possession of plaintiff's father-in-law's estate, on the death of the said father-in-law—Section 10 did not apply.)
('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 899 (DB), *Bank of Multan Ltd.* v. *Hukam Chand.* (Section 10, Limitation Act, does not apply to directors of companies as they are not persons in whom the property of the company is vested.)
('07) 1907 Pun W R No. 173 p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal* v. *Kishan Chand.*
('32) 19 AIR 1932 Mad 685 (686) : 139 I. C. 164, *Subbiah Chetty* v. *Visalakshi Achi.*
('23) 10 AIR 1923 Mad 578 (579) : 72 Ind Cas 842 (DB), *Kishtappa Chetty* v. *Lakshmi Ammal.*
('21) 8 AIR 1921 Mad 125 (125) : 44 Mad 277 : 61 Ind Cas 907 (DB), *Rajah Rajeswara Dorai* v. *Ponnusami Tevar.* (Money paid by trustee to creditor in breach of trust — Creditor receiving with knowledge of breach — Suit to recover money from creditor—Section 10 does not apply.)
('29) 16 AIR 1929 Nag 298 (302) : 116 Ind Cas 70, *Gourishankar* v. *Ibrahim Ali.* (*N* in possession of property of *K*—Contract by *K* of sale of property to *M*—Subsequently *K* selling it to *N* — *Held N* takes possession in his own right and not under any express trust for benefit of *M* merely because *N* has notice of his prior contract of purchase.)
('25) 12 AIR 1925 Pat 68 (87) : 93 Ind Cas 454 (FB), *Harihar Prasad Singh* v. *Kesho Prasad Singh.* (*A* directs *B* to acquire property for him and furnishes some money—Afterwards *A* withdraws from the venture completely—*B* continues his exertions and acquires the property—There is only a constructive trust.)
('21) 61 Ind Cas 393 (393) (Lah) (DB), *Shamsul Nisa* v. *Yakub Bakhsh.* (It cannot be said that the cosharers in possession have been holding the profits "in trust for a specific purpose".)
('11) 12 Ind Cas 225 (231, 232) : 36 Bom 214, *Casamali* v. *Currimbhoy Ebrahim.* (4 Cal 455 explained.)

[6] Lewin's "Law of Trusts," 12th Edition, page 1125.
Snell's "Principles of Equity," 12th Edition, page 127.

There is also an alternative way in which the expression "trust for specific purpose" may be identified with an express trust or trust created by act of parties.

In the explanation suggested above, the word "specific" is treated as equivalent to *specified* and the word "purpose" is taken to refer to the person or cause intended to be benefited. A different meaning can be attributed to these two words and the same result may be arrived at. The word "specific" may be taken to have been used in contradistinction with the word "*general;*" and the word "purpose" may be taken to stand for the *object with which* the trust is created as distinguished from the object which is *intended to be benefited.*[6a] In this view also, a trust created by act of parties will be a trust for a specific purpose, while a trust arising by operation of law will be a trust for a *general purpose.* The reason is that in the former case, the author's object or the view with which he creates the trust is specific inasmuch as it is directed to a particular person or cause. But, in the case of a trust arising by operation of law, the aim of the law giving authority is not *specific* in the above sense, it not being conceived with reference to any particularised individual or cause but only in a *general* way. For, in providing that a trust shall arise in favour of such and such persons where such and such circumstances exist, it is not the aim of the law giving authority to confer a benefit on any particular individual or cause. The aim is simply to benefit all persons or objects in *general* where certain circumstances exist without any reference to any particular person or object.

But, the former view is the one which has been accepted and followed in the bulk of the decisions bearing on this section.

Illustrations.

1. *A* transfers certain property to *B* without declaring any trust but, at the same time, without intending that the transfer should be for the benefit of *B*. Under these circumstances, *B* will be a resulting trustee for *A* in regard to the property.[7] The trust will not be one for a *specific purpose* as it would be one arising by operation of law.[8]

2. *A* contracts to sell his immovable property to *B*. *C* buys the property from *A* although he has notice of such a contract. Under these circumstances, the *law* makes *C* a trustee for *B*.[9] But as the trust arises by *operation of law* and not by act of parties, it is not a trust for a specific purpose within the meaning of this section.[10]

[6a] ('79) 4 Cal 897 (918, 923) : 4 Cal L R 193 : 4 Ind Jur 287 (DB), *Greender Chunder Ghose* v. *Mackintosh.* (4 Cal 455 followed.)

[7] See Trusts Act, Section 81.
('77) 1 All 403 (409) (DB), *Param Singh* v. *Lalji Mal.*

[8] ('36) 23 AIR 1936 Bom 30 (33, 34) : 160 Ind Cas 612 (DB), *Shirinbai Dinshaw* v. *Navroji Pestonji.* ((1889) 42 Ch D 312 relied on.)

[9] See Trusts Act, Section 91 and Specific Relief Act, Section 3, Illustration (g).

[10] ('29) 16 AIR 1929 Nag 298 (303) : 116 I. C. 70, *Gourishankar* v. *Ibrahim Ali.* [*See* ('31) 18 AIR 1931 P C 196 (202) : 58 Ind App 279 : 10 Pat 851 : 133 Ind Cas 705 (PC), *Chhatra Kumari Devi* v. *Mohan Bikram Shah.* (Testator contracting with *A* that he will bequeath all his properties to him but afterwards bequeathing them to *B*—*B* is not trustee for specific purpose for *A*.)]

3. Where money which ought to be received by *A* is received by *B*, *B* will only be a *constructive* trustee for *A* under the law in regard to such money. Thus, where on partition of joint family properties between *A* and *B*, a debt due from *C*, a third party, is allotted to *A* but is subsequently received by *B*, the latter will be a *constructive* trustee for *A* in respect of such debt. This section does not apply to such a trust.[11]

4. Where property is transferred to *A* for a consideration paid by *B* who did not intend to pay such consideration for the benefit of the transferee, *A*, the latter is a *constructive* trustee for *B*, because the *law* raises a trust in such cases. But such a trust will not be one for a specific purpose under this section.[12] As S. 2 cl. 11 expressly excludes a benamidar from the category of " trustees," *A*, in the above case, will not even be a *trustee* under this Act, though ordinarily he will be a *constructive* trustee.

5. *A* is express trustee for *B*. *C*, with notice of the trust, takes a mortgage of the trust property and receives from *A* interest on the mortgage. *C* is only a *constructive* trustee for *B* in regard to the interest received by him.[13]

6. Where one of several co-owners of immovable property receives the rents and profits of the property, he is (if a trustee at all) only a *constructive* trustee for the other co-owners in respect of such rents and profits.[14]

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[11] ('83) 6 Mad 402 (403) (DB), *Arunanchalla Pillai* v. *Ramasamy Pillai.*
('96) 24 Cal 309 (315) (DB), *Banoo Tewary* v. *Doona Tewary.* (If after partition of the family, one of the members collects any money belonging to all the members, he is not a trustee for the others in respect of the money.)

[12] ('22) 9 AIR 1922 Mad 57 (58, 59) : 66 Ind Cas 858 : 45 Mad 415 (DB), *Krishna Patter* v. *Lakshmi.*
('16) 3 AIR 1916 Mad 524 (525) : 28 Ind Cas 495 (DB), *Narayanan* v. *Rangasami.*
('84) 7 All 25 (27) : 1884 All W N 219 (DB), *Muhammed Habibullah* v. *Safdar Husain.* (Joint purchase by two persons—One of them paying his share of consideration subsequently — Other not specific trustee.)

[13] ('21) 8 AIR 1921 Mad 125 (126) : 61 Ind Cas 907 : 44 Mad 277 (DB), *Rajah Rajeswara Dorai* v. *Ponnusamy Tevar.*

[14] ('21) 61 Ind Cas 393 (393) (Lah), *Mt. Shamsul-Nisa* v. *Yakub Bakhsh.*
('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambar Halder* v. *Giribala Dasi.* (Karta of Hindu joint family not express trustee.)
('89) 16 Cal 161 (169) : 15 Ind App 220 : 5 Sar 224 : 12 Ind Jur 416 (PC), *Mahomed Abdur Kadir* v. *Amtal Karim Banu.* (The sons, by reason of their having managed their late father's estate, should not be regarded as trustees.)
('15) 2 AIR 1915 All 12 (13, 14) : 37 All 233 : 27 Ind Cas 712 (DB), *Amina Bibi* v. *Najmunnissa.* (One heir recovering mortgage money on behalf of all heirs of a deceased person—No specific trust.)
[See however (1864) 1864 Suth W R (Gap) 377 (378) (DB), *Bacharam Chowdhry* v. *Mahatab Beebee.* (Under Act of 1859 it was held that he was a trustee within Section 2 of the Act.)]

Co-sharer in village in U. P. and Punjab absconding leaving his land—Another co-sharer taking possession of such land — Entry in village papers that the land would be returned to the absconding co-sharer on his return—There is no specific trust :
('79) 2 All 394 (396) (DB), *Piarey Lal* v. *Saliga.* (Suit against purchaser from co-sharer.)
('79) 2 All 460 (463, 464) (DB), *Kamal Singh* v. *Batul Fatima.* (Do.)
('80) 2 All 493 (495, 496) (DB), *Harbhaj* v. *Gumani.* (The village administration paper could not be regarded as evidence of a pre-existing trust between co-sharers, nor as an admission of such a trust by such occupiers.)
('81) 3 All 458 (464, 466) (DB), *Sardar Sainey* v. *Piran Singh.* (Per Spankie, J.)
('82) 4 All 187 (189, 190) : 1882 All W N 3 (DB), *Barkat* v. *Daulat.*

See also the undermentioned cases.[15]

Where, *on the face of the instrument* creating a trust, the purposes specified are not adequate to exhaust the property transferred in trust, it has been held in England that the author of the trust will be taken to have expressed a trust in respect of the balance also that such balance should be held by the trustees for the benefit of the author of the trust or of his heir at law or next of kin, and that consequently, the trust in respect of the balance is also an *express* trust.[16] This view has been followed in this country also and the trust in respect of such balance is regarded as a "trust for a specific purpose" within the meaning of this section.[17]

('09) 3 Ind Cas 599 (599) : 1909 Pun Re No. 85 (DB), *Dhan Singh* v. *Har Narain.* (1871 Pun Re No. 5 and 1874 Pun Re No. 73 distinguished.)

('76) 1876 Pun Re No. 49, *Jaimal* v. *Yadu.*

[But see ('74) 1874 Pun Re No. 84, *Haji Ahmad* v. *Shekh Ahmad.*

('74) 1874 Pun Re No. 73, *Ghodar* v. *Gurbaksh.*

('71) 1871 Pun Re No. 5, *Ruldo* v. *Kaisara Singh.*]

[15] ('17) 4 AIR 1917 Pat 608 (609) : 41 Ind Cas 533 (DB), *Sheo Narain Ojha* v. *Ram Jatan Ojha.* (Sale of equity of redemption contrary to O. 34 R. 14, C. P. C. — Suit for redemption by mortgagor—Section does not apply.)

(1900) 24 Bom 23 (28, 30) : 1 Bom L R 472 (DB), *Secretary of State* v. *Sakharam.* (Assumption of the control or possession of a khoti village for nearly fifty years —Suit for the recovery of the possession of the village by Sardesais brought after the period—No specific trust.)

('31) 18 AIR 1931 P C 9 (12) : 58 Ind App 1 : 8 Rang 645 : 130 Ind Cas 609 (PC), *Annamalai Chettiar* v. *Muthukaruppan Chettiar.* (Mere liability in equity to account for moneys received is not trust for specific purpose.)

('85) 8 Mad 525 (532) : 12 Ind App 120 : 4 Sar 644 : 9 Ind Jur 275 (PC), *Viziaramarazu* v. *Secretary of State.* (Where a person is convicted for treason and Government takes possession of certain property which was in his possession as forfeited property but really the property was of some other person, the Government is not a specific trustee with regard to such person.)

('25) 12 AIR 1925 Pat 68 (87) : 93 Ind Cas 454 (FB), *Harihar Prasad* v. *Kesho Prasad Singh.* (Where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after sometime he withdraws from the venture completely but the person directed continues his exertions, and as their result, acquires the property, there is only a *constructive trust* and S. 10 does not apply.)

('16) 3 AIR 1916 Mad 415 (417) : 29 Ind Cas 168 (DB), *Ratna Bai* v. *The Official Assignee of Madras.* (View of Sadasiva Iyer, J. in this case that an insolvent is, under statutory provisions, an express trustee for the Official Receiver is not correct.)

('20) 7 AIR 1920 Cal 363 (366, 373) : 47 Cal 377 : 55 Ind Cas 157 (FB), *Uttam Chandra Daw* v. *Raj Krishna Dalal.* (Sale of equity of redemption contrary to O. 34, R. 14, C. P. C.—Suit for redemption by mortgagor—Section does not apply.)

('27) 14 AIR 1927 Mad 1135 (1136) : 101 Ind Cas 89, *Chinnakannu Padayachi* v. *Paramasiva Mudaliar.* (Do.)

[16] (1838) 1 Dr & Wal 668 : 56 R R 222, *Salter* v. *Cavanagh.*

(1890) 59 L J Q B 7 (11) : 61 L T 686 : L R 24 Q B D 128, *Patrick* v. *Simpson.*

[17] ('77) 2 Bom 388 (415, 416) (FB), *Lallubhai Bapubhai* v. *Mankuvarbai.* (1 Dr & Wal 668, *Salter* v. *Cavanagh,* followed.)

('14) 1 AIR 1914 Sind 81 (82) : 8 Sind L R 132 : 27 I C 332, *Lekhraj Visumal* v. *Assamal Tarumal.* (The principle stated in 1 Dr & Wal 668 accepted but was held not to be applicable to trust created by deeds of composition.)

('97) 21 Bom 646 (664) (DB), *Vundravandas* v. *Cursondas.*

('10) 8 Ind Cas 635 (636, 637) : 35 Bom 49 (DB), *Mojilal Premanand* v. *Gourishankar Khushalji.* (21 Bom 646 followed.)

Section 10
Notes 7–8

But this principle will not apply where the trust *fails or is avoided* wholly or partly and the purpose expressed is defeated to that extent, with the consequence that a resulting trust arises by *operation of law* in favour of the author of the trust or of his heir at law or of his next of kin. Such a trust is purely a creation of law and is, in fact, in *disregard* of the purpose specified by the author of the trust. This section will not apply to such cases.[18]

8. Form of trust for specific purpose. — No particular form is necessary to create a trust for a specific purpose.[1] That such a trust has been created can be gathered from facts and circumstances of the case.[2]

('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek* **v.** *Chuah Hooi.*

[Compare S. 81 of the Trusts Act of 1882 and Illustration (b) to that section. The difference between the above Illustration and the case given above in the Note is that in the Illustration the author of the trust has not declared any intention as to the property transferred, whereas in the case given above, the author has clearly declared a trust in respect of the property transferred but has not specified the beneficiary with reference to a portion of the property. Under such circumstances, the inference is made that he *intended* **that such portion must be held in trust for himself and his legal representatives.]**

[18] **('39) 26 AIR 1939 Rang 365 (369) : 1940 Rang L R 136 : 186 I. C. 210 (DB),** *Daw Ein* **v.** *Daw Chan Tha.* **(Trust declared invalid for want of registration—Suit for account of rents of property held under trust—Section does not apply.)**

('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek* **v.** *Chuah Hooi.*

('79) 4 Cal 455 (465, 470) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherode Monee Dossee* **v.** *Doorgamoney Dossee.* **(Affirming 2 Cal L R 112.)**

('07) 31 Bom 222 (232, 233) : 8 Bom L R 328, *Mathuradas* **v.** *Vandrawandas.*

('36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612 (DB), *Shirinbai Dinshaw* **v.** *Nawroji Pestonji.*

('97) 21 Bom 646 (664, 665) (DB), *Vundrawandas* **v.** *Cursondas.*

('96) 20 Bom 511 (516, 517), *Cowasji Nowroji* **v.** *Rustomji Dossabhoy.*

('90) 14 Bom 476 (480, 481), *Nana Lal Lallubhoy* **v.** *Harlochand Jagusha.*

('12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Mohamad Ibrahim* **v.** *Abdul Latif.* **(12 Ind Cas 225 dissented from.)**

('05) 7 Bom L R 324 (329), *Dady* **v.** *Advocate-General.*

('82) 8 Cal 788 (800, 801) : 11 Cal L R 370 : 7 Ind Jur 17 (DB), *Hemangini Dasi* **v.** *Nobinchand Ghose.*

('07) 1907 Pun W R No. 173, p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal* **v.** *Kishan Chand.*

('82) 4 Mad 404 (409), *Manickavelu Mudali* **v.** *Arbuthnot and Co.*

('94) 16 All 256 (258) : 1894 All W N 73 (DB), *Jasoda Bibi* **v.** *Permanand.* **(6 All 1 followed.)**

Note 8

[1] **Lewin's "Law of Trusts," 12th Edition, pages 1125, 1126.**

('36) 23 AIR 1936 Mad 876 (877) : 169 Ind Cas 362 (DB), *Vairavan Chetty* **v.** *Chettichi Achi.* **(Hundi issued in defendant's favour for payment of debts of third person—Balance to be paid to third person—Such arrangement constitutes trust for specific purpose.)**

('26) 13 AIR 1926 Mad 109 (110, 111) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty* **v.** *Sivakami Ammal.* **(Registered instrument is not necessary for creating trust of money or moveable property.)**

[2] **('25) 12 AIR 1925 Pat 68 (89, 90) : 93 Ind Cas 454 (FB),** *Harihar Prasad Singh* **v.** *Kesho Prasad Singh.*

('35) 62 Cal 893 (897), *Mahomed Habeeb Alum* **v.** *Anjuman Ara Begum.*

A transaction may be a trust although the trustee himself is partly entitled to the benefit of the trust.[3]

9. Alleged trustee must be owner of trust property.— A trust being, as has been seen in Note 1 to S. 2, cl. 11, an obligation annexed to the *ownership* of property, unless the alleged trustee is the *owner* of the property to which the trust relates, there will be no trust and therefore no trust for a specific purpose.[1] But the subject-matter of a trust need not necessarily be the *entire* interest in any property. There may be a trust even in respect of a *limited* interest or right in property. Thus, even a right of possession may be vested in trust for another's benefit. (See Note 5.) But, it will be noted that even in such cases the trustee is the *owner* of the right which is the subject-matter of the trust. Where the alleged trustee is not the *owner* of the interest which is said to be subject to a trust, there can be no trust.

Illustrations.

1. A person who is merely in possession of property on behalf of another as his manager or agent is not a *trustee* for him in regard to the property.[2] The

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('26) 13 AIR 1926 Mad 109 (110, 111) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty* v. *Sivakami Ammal.*

[3] ('27) 14 AIR 1927 Mad 1134 (1134) : 100 Ind Cas 506, *Kutty Pokker* v. *Ussan Mayan.* (A I R 1923 Mad 667 and A I R 1918 Mad 674 followed.)
See definition of "trust" in Section 3, Trusts Act, 1882.

Note 9

[1] ('40) 27 AIR 1940 Pat 90 (91) : 186 Ind Cas 859 (DB), *Kamiruddin Khan* v. *Badrunnissa Bibi.*
('29) 16 AIR 1929 P C 77 (80) : 114 Ind Cas 565 (PC), *Hariram* v. *Madan Gopal.* (Trust retains the actual ownership in the trustee.)
('22) 9 AIR 1922 P C 123 (126, 127) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi* v. *Balaswami Iyer.*
See also Section 3, Trusts Act, which defines trust as an obligation annexed to ownership of property.
See also Snell's "Principles of Equity," 11th Edition, page 51, where "trust" is defined as a beneficial interest in or beneficial ownership of real or personal property unattended with the legal ownership thereof.
See also Lewin in his treatise on the "Law of Trusts," 12th Edition, page 11, where he defines a trust as a confidence reposed in some other. . . . *annexed in privity to the estate of the land.* . . . . .
See also Salmond's "Jurisprudence," 8th Edition, page 287.

[2] See Salmond's "Jurisprudence," 8th Edition, page 287.
('41) 28 AIR 1941 Nag 181 (185) (DB), *Shri Mahadeoji* v. *Baldeo Prasad.* (Property entrusted to *A* by a specific trustee for safe custody and management and eventual return is not property vested in *A* for a specific purpose.)
('40) 27 AIR 1940 Pat 90 (91) : 186 Ind Cas 859 (DB), *Kamiruddin Khan* v. *Badrunnissa Bibi.* (Persons by executing deed entrusting their property to another person for good management with powers to sell—Executants reserving to themselves power to sell or mortgage with manager's consent — Deed held did not vest property in manager as trustee—Suit for rendition of accounts held governed by Article 89 and not by Section 10.)
('38) 25 AIR 1938 Cal 673 (677) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De* v. *Hari Dasi Dasi.* (Where a person being unable to look after the properties himself left the management to his nephews who continued in management after his death, even if it be supposed that a fiduciary relationship was created under the circumstances after his death, such a relationship can by no stretch of language be deemed a trust for a specific purpose within the meaning of Section 10.)

Section 10
Note 9

reason is that such a manager or agent is not the owner of any *interest* in regard to which he can be said to be a trustee.

2. The guardian of an infant who is in possession of the infant's property on the latter's behalf is not a trustee as he is not the *owner* of the property.[3]

3. Although the directors of a company are *quasi* trustees they are not trustees of the property of the company within the meaning of this section because the property of the company is not vested in such directors as *owners*.[4]

4. The statutory liability of the Government under the provisions of Bengal Act XI of 1859 to return to the owner of land sold for arrears of revenue the surplus proceeds of such sale, is not the liability of a *trustee* because the surplus sale proceeds do not vest in the Government as owner. The owner of the land continues to be the owner of such proceeds.[5]

5. When a Court of Wards takes charge of an estate, the Government does not become a trustee for the rightful owners because the *ownership* of the estate is not transferred to the Government in such cases.[6]

6. Property comprised in a Hindu or Mahomedan religious endowment is generally vested in the deity or the institution which is regarded as a juristic person capable of owning property. The manager of the endowment, although he may be called a trustee, is not really one in the eye of the law. Hence, a suit against such manager would not have fallen within the scope of this section but for the special provisions contained in the second paragraph of this section which makes such person a trustee for the purposes of this section. (See Note 25.)

('98) 1898 Pun Re No. 34, *The Rajah of Faridkote* v. *Sardar Gurdayal Singh*. (Section 10 does not apply to suit brought against a khazanchi to recover moneys said to have been misappropriated by him from money in his charge—Such money is not vested in trust for any specific purpose with khazanchi.)

The following decisions under the Act of 1859 which seem to lay down a different view are not correct.

('76) 1876 Bom P J 124 (DB), *Bai Chandan* v. *Dulabhram*.

(1864) 1 Suth W R 126 (127) (DB), *Shaw Gholam Nujjuff* v. *Toossoodduck*.

('68) 10 Suth W R 174 (174) : 1 Beng L R (S N) 11 (d) (DB), *Narain Dass* v. *Mahatab Chunder*.

[3] ('25) 12 AIR 1925 Rang 289 (289, 290): 3 Rang 206 : 86 Ind Cas 297 (DB), *Ma Thein May* v. *U Po Kin*. (18 Bom 119 followed.)

('37) 24 AIR 1937 Bom 334 (335, 336) : 170 I. C. 647 : ILR (1937) Bom 636 (DB), *Kisandas Laxmandas* v. *Godavaribai Govinddas*. (Court guardian is not express trustee—At the most he is a constructive trustee.)

[*See also* ('15) 2 AIR 1915 All 121 (122) : 28 I. C. 861 (DB), *Mt. Munna Kunwar* v. *Venaik Ram*. (Doubted if time would run at all in favour of guardian.)]

[But see ('15) 2 AIR 1915 Low Bur 132 (133) : 26 Ind Cas 700, *Maung Yin* v. *Ma Saw Myaing*. (Position of holder of certificate under Minors Act (Bengal Act 40 of 1858) is that of express trustee.)]

[4] ('38) 25 AIR 1938 Mad 60 (62) : 180 Ind Cas 462 (DB), *Venkatasubramania Ayyar* v. *Sivagurunatha Chettiar*.

('31) 18 AIR 1931 Mad 58 (59, 60) : 128 I. C. 477 : 54 Mad 153 (DB), *Narasimha Aiyangar* v. *Official Assignee of Madras*. (A I R 1926 Mad 109 distinguished.)

('24) 11 AIR 1924 Lah 435 (437) : 5 Lah 27 : 79 I. C. 740 (DB), *Daulat Ram* v. *Bharat National Bank Ltd., Delhi*.

('94) 18 Bom 119 (130, 131) (DB), *Kathiawar Trading Co.* v. *Virchand Dipchand*.

('23) 10 AIR 1923 Lah 58 (59, 60) : 71 I. C. 899 (DB), *The Bank of Multan Ltd.* v. *Hukam Chand*.

[5] ('91) 18 Cal 234 (240, 241) (DB), *Secy. of State* v. *Fazal Ali*. (Overruled in 20 Cal 51 (FB) on another point.)

('93) 20 Cal 51 (57, 60) (FB), *Secy. of State* v. *Guru Proshad Dhur*.

[6] ('82) 5 Mad 91 (105, 106) (FB), *Viziaramaraзu Virabahu* v. *Secy. of State*.

7. The manager of a Hindu joint family is not a trustee for the other members of the family as the shares of the latter are not vested in the manager as owner though he is entitled to manage the whole property.[7] (See also Note 10.)

8. A receiver of property appointed by a Court is not a trustee as the title to the property does not vest in him and his possession is on behalf of the rightful owner.[8]

See also the undermentioned cases,[9] and Notes 18 and 19.

10. Owner of property must be under obligation to hold it for another's benefit. — It is of the essence of a trust that a person who is the owner of property must be under an *obligation* to hold such property for the benefit of another. Thus, it has been held that the mere fact that a Hindu husband dies desiring his widow to adopt a son, does not impose any *obligation* on the widow to hold her husband's estate for the benefit of the son to be adopted by her.[1] Similarly, it has been held that merely because a property is purchased

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7. ('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambhar Halder* v. *Giribala Dasi.*
[*See also* ('40) 27 AIR 1940 Cal 51 (53) : ILR (1940) 1 Cal 183 : 186 Ind Cas 546 (DB), *Benoy Krishna* v. *Atul Krishna.* (Suit for accounts against karta of Dayabhaga joint family by a junior cosharer — S. 10 is not applicable.)]

8. ('26) 13 AIR 1926 Cal 385 (392, 393) : 52 Cal 914 : 90 I. C. 851 (DB), *Eastern Mortgage & Agency Co.* v. *Muhammad Fazlul Karim.*
[*See also* ('36) 23 AIR 1936 Mad 170 (170, 171) : 161 I. C. 843, *Sitaramaswamy* v. *Mahalakshamamma.* (Receiver appointed by private arrangement between parties to litigation.)]

9. ('39) 26 AIR 1939 Bom 126 (128) : ILR (1939) Bom 154 : 181 I. C. 375 (DB), *Malojirao* v. *Keshav.* (*Ajahat gumastas* appointed for the purpose of collecting fees and emoluments and paying those over to the plaintiff, Deshmukh of the villages, are not trustees for specific purpose as the money collected does not vest in them.)
('39) 26 AIR 1939 Mad 722 (723) : 189 I. C. 316 (DB), *Chandra Kesavalu* v. *Perumal Chettiar.* (Vendor leaving a portion of purchase money in the hands of vendee for the purpose of paying the same to his minor son after he attains majority — There is no trust as the money does not vest in the vendee.)
('38) 25 AIR 1938 Mad 295 (297, 298), *Seshagiri Rao* v. *Venkataramayya Appa Rao Bahadur.* (The statutory right conferred on zamindar by S. 34, cl. (6) of the Madras Regulation (28 of 1802) to manage the property of the defaulting tenant until the amount due is discharged does not create the relationship of a trustee and *cestui que trust* between them as there is no transfer of the tenure and no right of disposal over the land.)
('25) 12 AIR 1925 Pat 68 (89) : 93 I. C. 454 (FB), *Harihar Prasad* v. *Kesho Prasad.*
('11) 9 I. C. 391 (393) : 38 I. A. 23 : 33 All 125 : 14 Oudh Cas 95 (PC), *Muhammad Bakar* v. *Muhammad Bakar Ali Khan.* (Land claimed by *X* as malik—*Y* claiming to be entitled to possession till certain dues of his were paid — Land settled with *Y* in accordance with possession and *X* directed to redeem by paying the dues — *Y* held was not a trustee.)
('37) 24 AIR 1937 Bom 433 (441) : 171 Ind Cas 844 (DB), *Vithalrao* v. *Baswant Bisto.* (Mere assumption of management by Sovereign power on default of watandar to pay fixed judi is not tantamount to vesting in trust for specific purpose.)
('37) 24 AIR 1937 Mad 787 (787) : 177 Ind Cas 163, *Secy. of State* v. *Lokanatha.* (Magistrate appointing some one to cultivate land attached under S. 146, Cr. P. C., and to deposit sale proceeds of the crops in treasury — Government though not trustee is stakeholder.)

Note 10

1. ('69) 2 Beng L R A C 313 (314) (DB), *Gobinda Chandra* v. *Anand Mohan.*

in the name of a Hindu idol from funds belonging to the purchaser, he is not under an *obligation* to hold the property for the benefit of the idol.[2]

Where A transfers his estate to B in trust for himself (i.e., A) for the purpose of discharging his debts, B is a trustee only for A and not for A's *creditors*, and is under no obligation to hold the estate for *their* benefit.[3]

11. Obligation must arise out of confidence. — A trust denotes an obligation based on *confidence*. Hence, an obligation based on *contract*[1] cannot give rise to a trust.

Illustrations.

1. A contract for the sale of immovable property creates an obligation annexed to the ownership of property.[1a] But such obligation being based on *contract* and not confidence, does not give rise to a trust.[2]

2. *A* enters into a contract with *B* for the payment of a certain sum of money to *C*. This does not give rise to a *trust* in favour of *C*. Thus, where *A* mortgages or sells his immovable property to *B* and a part of the consideration is left with *B* under a contract that the latter should pay it to *A*'s creditors, no trust is created and the latter cannot sue *B* for the amount as there is no privity of contract between *B* and them.[3]

3. The liability of a Muhammadan husband to pay dower to his wife is based on *contract* and consequently the husband is not a trustee for such dower.[4]

4. The relationship between a debtor and creditor is based on *contract* and hence the debtor is not a trustee for the creditor.[5]

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2. ('69) 11 Suth W R 13 (14) : 2 Beng L R A C 155 (DB), *Brojo Sundari Debia* v. *Rani Luchmee Koonwaree.*

3. ('98) 25 Cal 642 (647, 648) : 2 Cal W N 469, *William Robert Fink* v. *Maharaj Bahadur Singh.*
See also Note 22.

Note 11

1. (1880) 29 W R (Eng.) 269 (273) : L R 5 Q B D 518 : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson* v. *Lord Bury.*

1a. See Section 40, Transfer of Property Act.

2. ('76) 2 Cal 323 (326) (DB), *Ahmed Muhamed* v. *Adjein Dooply.* (Sale of shares.)

3. ('39) 26 AIR 1939 Mad 722 (723) : 189 Ind Cas 316 (DB), *Chandra Kesavalu* v. *Perumal Chettiar.* (Vendor leaving a portion of purchase money with the vendee for the purpose of paying it to his minor son after attaining majority—Vendor undertaking to pay interest on same—*Held* that there was no trust and the transaction was in the nature of a loan.)
('19) 6 AIR 1919 Pat 344 (345) : 51 Ind Cas 320, *Mukhi Singh* v. *Kishun Singh.*
('11) 9 Ind Cas 988 (989) (Cal), *Deb Narain Dutt* v. *Ram Sadhan Mandal.*

4. ('69) 11 Suth W R 212 (214) : 2 Beng L R A C 306 (DB), *Meer Meher Ali* v. *Mt. Amanee.*

5. ('1880) L R 5 Q B D 518 (530, 531) : 29 W R (Eng.) 269 (273) : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson* v. *Lord Bury.* (The plaintiffs had deposited a certain sum with the company of which the defendants were the directors.)
('25) 12 AIR 1925 Nag 115 (116, 117) : 81 I. C. 505 (DB), *Bhaiyalal* v. *Rai Beharilal.*
('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal* v. *Lakshmammal.* (A mere deposit of moveables or money by *A* with *B* would not make *B* the trustee of *A* on an express trust.)
[*See* ('05) 32 Cal 799 (813) : 9 Cal W N 443, *Chandra Kally Deby* v. *Edmund-pelly Chapman.* (Officers charged with payment of Government debts are *not* trustees.)]

5. A banker is ordinarily not a trustee for his customer in respect of the latter's moneys in the hands of the banker, the reason being *inter alia* that the relationship between the parties is based on *contract* and not confidence.[6] (See Note 18.)

6. An agent is not a trustee for his principal in respect of the latter's moneys that may come into his hands, the reason being that the agent's obligations to his principal are based on contract and not confidence.[7]

7. A company does not hold the dividends declared on shares in trust for the share-holders. The right of the share-holders to recover such shares is based on *contract*.[7a]

Every trust implies an obligation based on confidence. Such confidence may be *actually* reposed by one party in another and accepted by him or it may be raised by *implication of law*.[8] In the former case, the trust would be one arising by *act of parties* or a trust for a specific purpose within the meaning of this section. In the latter case, the trust will be one arising by *operation of law* and will be outside the purview of this section. See Note 7.

It may also be noted that every obligation in respect of property which is based on confidence and not on contract need not give rise to a trust. Thus, in the undermentioned case,[9] where the defendant was appointed by private arrangement between the parties to a suit to collect the income of the suit property to be handed over to the successful party in the end, it was held in the circumstances of the case that there was no *contract* of agency and that the defendant was only in the position of a receiver or administrator. At the same time it was held that there was no properly constituted *trust* so as to attract the operation of this section.

12. Trust must be one created by act of parties. — See Note 7.

13. Instances of trust for specific purpose.—The following are some instances of a trust for a specific purpose as explained in Note 7 above:

(1) On the occasion of a betrothal, the bridegroom's father made over a sum of money to the keeping of the bride's father as a fund constituting her *palla* or dowry in accordance with the usual

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[6] (1880) 29 W R (Eng) 269 (273) : L R 5 Q B D 518 : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson* v. *Lord Bury*.

[7] ('39) 26 AIR 1939 Bom 126 (128) : I L R (1939) Bom 154 : 181 Ind Cas 375 (DB), *Malojirao* v. *Keshav*. (Plaintiff, Deshmukh of villages entitled to fees and emoluments from revenues thereof — Defendants who were *ajahat gumastas* appointed by Peshwas, making collections for plaintiff — Collections made not paid to plaintiff since 1922 — Plaintiff suing to recover collection — *Held* that S. 10 did not apply as defendants were to be regarded as agents of plaintiff and no fiduciary relation existed between them.)
('25) 12 AIR 1925 Nag 115 (116, 117) : 81 Ind Cas 505 (DB), *Bhaiyalal* v. *Bai Beharilal*.

[7a] ('24) 11 AIR 1924 Mad 721 (722) : 79 I. C. 947, *Gurunatha Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Bezwada*.

[8] Lewin's "Law of Trusts," 12th Edition, page 12.

[9] ('36) 23 AIR 1936 Mad 170 (170, 171) : 161 Ind Cas 843, *Sitaramaswami* v. *Mahalakshmamma*.

practice of the caste. It was held that a trust was created for a specific purpose, viz., for the provision of the customary dowry of the betrothed girl.[1]

(2) Where a Hindu widow who was the natural guardian of her minor sons handed over a sum of money to her brother for the benefit and education of her sons, it was held that she constituted the brother a trustee for a specific purpose.[2]

(3) One of the terms of a family arrangement was that a certain sum should be set apart from the family funds for the payment of the debts of a certain member, V. It was also arranged that a sum of money should be placed with D who should discharge the debts and pay the balance to V. A hundi was given to D under the above arrangement and the hundi was cashed by him. It was held that D was constituted a trustee of the money for the specific purpose of paying the debts of V and the balance to V himself.[3]

(4) Where a father executed a settlement deed by which he gave certain properties to his son and directed him to pay a certain amount to the settlor's daughters, it was held that there was a specific trust in favour of the daughters.[4]

(5) A hands over certain sums of money to B in order that the latter should carry on a money-lending business in his own name, but for the benefit of A. This constitutes a trust for a specific purpose.[5]

(6) Where a person, in anticipation of his death, handed over his property to the defendant and directed him to pay certain specified debts out of such property and to apply the surplus for the support of his family, it was held that a specific trust was created for the benefit of the creditors whose debts were specified.[6]

(7) On the dissolution of a partnership between L and R, "it was arranged that the 3/16ths of the said L in the three anna share of the commission earned in the H mill should be continued and that the said R should receive the said three anna share of the commission as aforesaid and on receipt thereof hold 3/16ths for L." It was held that this created a trust for a specific purpose.[7]

Note 13

1. ('08) 32 Bom 394 (399, 400) : 10 Bom L R 540 (DB), *Bhurabhai Jamnadas* v. *Bai Ruxmani.* (The expression "trust for a specific purpose" was used like "express trust.")
2. ('28) 15 AIR 1928 Bom 58 (58) : 52 Bom 184 : 107 I. C. 705 (DB), *Chintaman* v. *Khanderao.* (32 Bom 394, relied on.)
3. ('36) 23 AIR 1936 Mad 876 (877) : 169 Ind Cas 362 (DB), *Vairavan Chetty* v. *Chettichi Achi.*
4. ('34) 21 AIR 1934 Mad 273 (273) : 148 Ind Cas 685, *Nachimuthu Ammal* v. *Muthusamy.* (A I R 1914 Mad 95, relied on.)
5. ('26) 13 AIR 1926 Mad 109 (110, 112) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty* v. *Sivakami Ammal.* (A I R 1922 Mad 57, distinguished.)
6. ('90) 17 Cal 620 (628, 629) (DB), *Suddasook Kootary* v. *Ram Chunder.*
7. ('07) 31 Bom 418 (426, 427): 9 Bom L R 287, *Narrondas Ramji* v. *Narrondas Ramji.* ((1893) 2 Q B 390 followed.)

Section 10
Note 13

(8) In the undermentioned case,[8] the East India Company on taking over the properties of a Native Raj entered into an agreement with the creditors of the Raj whereby the Company agreed to pay their debts and to set apart a sufficient portion of the revenues of the place for the payment of the debts. It was held that in the circumstances of the case, the above arrangement created a trust for a specific purpose.

See also the undermentioned cases.[9]

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[8] ('23) 10 AIR 1923 Mad 667 (670) : 46 Mad 259 : 74 Ind Cas 785 (DB), *Secy. of State* v. *Radhika Prasad.*

[9] ('40) 27 AIR 1940 P C 45 (46) : I L R (1940) 1 Cal 415 : I L R (1940) Kar P C 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhar Mullick* v. *Official Trustee of Bengal.* (*S*, a testator by his will appointed his son *R* and two other persons *A* and *B* to be executors and trustees of his will and bequeathed all the properties after providing for the maintenance of his widow—One moiety of the property was to be in trust for his son *R* upon his attaining 21 years of age and the other moiety in trust for the male issues of *R* — In case *R* died without male issues the moiety was to go to a certain trust fund — In case *R* died issueless before attaining 21 years of age his moiety was also to go to the trust fund—*Held* that there was a trust for specific purpose.)

('38) 25 AIR 1938 Cal 336 (337) : I L R (1938) 2 Cal 81 : 176 I. C. 681, *Kalipada Bhattacharjee* v. *Kali Kumar Pal.* (Money entrusted for the specific purpose of investment.)

('15) 2 AIR 1915 Bom 282 (283, 284) : 39 Bom 572 : 31 Ind Cas 277, *Secy. of State* v. *Bapuji.* (Money due from Satara Government to plaintiff — Satara Government taken over by British Government — Amount credited in favour of plaintiff in Government account books — *Held* from this and other facts that there was a trust for a specific purpose in plaintiff's favour.)

('23) 10 AIR 1923 Nag 90 (91), *Namdeo* v. *Keshee.* (Village pasture lands enjoyed by the khatedars as *trustees* for the villagers.)

('27) 14 AIR 1927 Mad 1134 (1134) : 100 Ind Cas 506, *Kutti Pokkar* v. *Ussan Mayan.* (A partition took place between members of a family; one of the parties receiving property of a higher value in consideration of his undertaking to pay a certain sum of money to a widow and daughter in the family and the document further providing that in case he failed to do so, he and the properties allotted to his share should be liable for the amount—In a suit to enforce the obligation, held that a charge was created and inasmuch as the obligation annexed to specific property arose out of a confidence reposed in and accepted by the owner, the person who undertook the obligation was a trustee and the party to whom the payment was due was a *cestui que trust.*)

('20) 7 AIR 1920 P C 208 (209) (PC), *Somasundaram Chetty* v. *Arunachallam Chetty.* (*Held* on construction of document that it created trust for specific purpose.)

('24) 11 AIR 1924 All 884 (886, 887) : 47 All 17 : 84 Ind Cas 631 (DB), *Behari Lal* v. *Shiv Narain.* (*A* providing by will that half the property should go to *B* and the other half should be in the custody and management of *B* or other persons who got the property from *B* but that the income arising from such half of the property should be devoted to certain religious objects—*Held*, that the persons who got the property as heirs of *B* after *B's* death, were express trustees.)

('74) 21 Suth W R 415 (416) (DB), *Syed Shah Alleh Ahmed* v. *Mt. Bibbee Nuseebun.* (Property vested in a person, partly for charitable purposes and partly for the benefit of others.)

('24) 11 AIR 1924 Mad 920 (920) : 85 Ind Cas 508, *Muhammad Mathir Rowthan* v. *Kasa Rowthan.* (Acknowledgment of trust for specific purpose.)

('70) 7 Bom H C R A C 149 (152) (DB), *Vithal Viswanath Prabhu* v. *Ramachandra Sadashiv Kirkire.* (Immovable property made over to defendant to sell and pay to plaintiff.)

14. Mortgagee in possession after the mortgage has been discharged is not a trustee. — Section 2 cl. (11) expressly excludes from the definition of "trustee" a mortgagee in possession after the mortgage has been discharged. Hence, this section will not apply to a suit against such mortgagee. Even if such mortgagee had not been excluded from the definition of trustee by S. 2 cl. (11), he would only be a *constructive* trustee and not an express trustee or a trustee for a specific purpose[1] and therefore this section would not have applied to him.

Although in the Act of 1859 there was no definition corresponding to S. 2 cl. (11) and although S. 2 of the Act only used the word "trustee," it was held under that section that a mortgagee in possession after the mortgage had been discharged was not a "trustee" within the meaning of the section.[2]

See also Article 105.

15. Benamidar is not trustee. — Section 2 cl. (11) expressly excludes a benamidar from the definition of "trustee." Hence, a benamidar is not a trustee for a specific purpose within the meaning of this section.[1] Even in the absence of the provision excluding a

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('77) 1877 Bom P J 195, *Harihar* v. *Shidheshvar*. (Partition decree—One member of the family *becoming trustee of shares* of the other members of the proceeds of property in his possession not actually divided by metes and bounds.)

(1900) 2 Bom L R 418 (419) (DB), *Girdhariji* v. *Shamabetti*. (Disposition which vests the possession of house in *S* for a specific purpose, namely, to realise the rents and after deducting outlays and expenses to keep half of the balance herself and pay the other half over to *N* for the purpose of performing services to the deity.)

('91) 14 Mad 61 (63) (DB), *Sethu* v. *Krishna*. (Property given by maternal grandfather to plaintiff's father in trust for plaintiff.)

('88) 11 Mad 274 (277, 278) (DB), *Sethu* v. *Subramanya*. (A dharmakarta of a pagoda is a trustee.)

('05) 2 All L Jour 247 (251, 252) : 1905 All W N 89 (DB), *Mitra Lal Sahi* v. *Rajib Lochan Sahai*. (Property made over to *A* in trust to be restored on demand to the *cestui que trust*.)

('69) 12 Suth W R 319 (319, 320) : 3 Beng L R A C 409 (DB), *Rakhal Das Madak* v. *Madhusudan Madak*. (Do.)

('18) 5 AIR 1918 Lah 351 (352) : 45 Ind Cas 325 : 1918 Pun Re No. 66, *Mt. Seoti* v. *Bhagirath*. (When land is assigned for a fixed term, a suit for its recovery on expiry of the term is governed by S. 10.)

('10) 6 Ind Cas 781 (781) (Mad) (DB), *M. D. Tirumalai* v. *Rama Subbier*. (Suit by Kattalai manager for recovery of share of tasdik amount from temple trustee who received it from Government in trust for Kattalai.)

('27) 14 AIR 1927 Bom 398 (398, 399) : 103 I.C. 418 (DB), *Mahomedsa Khadirsa* v. *Khadersa*. (Trust to manage devasthanam lands and pay surplus to others.)

Note 14

[1] See Notes under S. 2 clause 11.
[*See also* ('19) 6 AIR 1919 Cal 809 (811) : 52 Ind Cas 902 (DB), *Kshetra Nath* v. *Durgapada Mandal*.]

[2] ('68) 9 Suth W R 187 (189) : Beng L R Sup Vol 901 (F B), *Baboo Lall Doss* v. *Jamal Ali*.
See also Section 2 (11) Note 3

Note 15

[1] ('22) 9 AIR 1922 Mad 57 (59) : 45 Mad 415 : 66 Ind Cas 858 (DB), *Krishnan Patter* v. *Lakshmi*.

Section 10
Notes 15-16

benamidar from the definition of "trustee," he would only be a *constructive* trustee and not a trustee for a specific purpose[2] and hence this section would not have applied to him.

Although the Act of 1859 did not contain any definition corresponding to S. 2 cl. (11), and S. 2 of the Act only used the word "trustee," it was held that the section did not apply to a "benamidar."[3]

16. Executor or administrator not specific trustee. — It is well settled that the executor of a will is not *as such* a trustee for a specific purpose within the meaning of this section.[1] The reason is that although an executor is in law the owner of the deceased testator's properties and holds such properties for the benefit of others such as creditors of the deceased and legatees, the position and obligations of the executor arise by *operation of law* and not by act of parties. Thus, although a testator may appoint a certain person as executor, the properties of the testator vest in the executor by operation of law and not by the act of the testator.[2] Similarly, the obligations of the executor in favour of legatees and creditors of the testator arise by force of law and not by the act of the testator.[3]

But, where a testator appoints a person as executor and also *bequeaths* to him certain properties, directing him at the same time to pay out of such properties certain specified legacies or debts, the executor will be a trustee for a specific purpose.[4]

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[2] See Note 3 under S. 2 clause 11.

[3] ('69) 11 Suth W R 72 (76) : 2 Beng L R A C 284 (DB), *Uma Sunduree Dossee* v. *Dwarka Nath Roy.*

Note 16

[1] ('38) 25 AIR 1938 Pat 600 (602) : 17 Pat 350 : 181 I. C. 283 (DB), *Hemangini Devi* v. *Anil Krishna Banerjee.*

('27) 14 AIR 1927 Bom 424 (425) : 103 Ind Cas 225, *Jamnadas Goverdhandas* v. *Damodhardas Chunilal.*

('10) 8 Ind Cas 189 (190) (Bom), *Gajanan Vinayak* v. *Waman Sham Rao.*

('26) 13 AIR 1926 Cal 1 (52) : 93 I. C. 385 (DB), *Prayag Kumari Devi* v. *Shiva Prosad Singh.* (Executor is constructive trustee.)

('09) 1 Ind Cas 289 (301) (Cal) (DB), *Baroda Prosad* v. *Gajendra Nath.*

('79) 4 Cal 897 (919, 924) : 4 Cal L R 193 : 4 Ind Jur 287 (DB), *Greenchnuder Ghosh* v. *Mackintosh.* (2 Bom 388 distinguished.)

('75) 14 Beng L R 21 (45, 46) (DB), *Gopal Narain* v. *Muddomutty Guptee.*

('29) 16 AIR 1929 Lah 753 (757) : 122 I. C. 467 : 11 Lah 325 (DB), *H. P. Robson* v. *Administrator-General of Punjab.* (*A fortiori* executor *de son tort* is not specific trustee.)

('15) 2 AIR 1915 Mad 1184 (1188) : 27 Ind Cas 849, *Ramanathan* v. *Ragammal.*

('10) 5 Ind Cas 832 (833) (Mad), *Nagarathnammal* v. *Namasivaya Mudali.*

('36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612, *Shirinbai* v. *Nowroji.*

('79) 4 Cal 455 (465, 470) : 3 Cal L R 315 (DB), *Kherodemoney Dossee* v. *Doorgamoney Dossee.* (Affirming 2 Cal L R 112.)

See also Snell's "Principles of Equity", 11th Edition, page 152.

Lewin's "Law of Trusts", 12th Edition, page 1126.

[2] See Succession Act (1925), Section 211.

[3] See Succession Act (1925), Sections 325 and 328.

[4] ('40) 27 AIR 1940 P C 45 (46) : ILR (1940) 1 Cal 415 : ILR (1940) Kar P C 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhur Mullick* v. *Official Trustee of Bengal.* (*S*, a testator by his will appointed his son *R* and two other persons *A* and *B* to be executors and trustees of his will and bequeathed all the properties

Where a debtor of the testator becomes the executor under his will, the executor will be a *constructive* trustee in regard to such debt for the persons interested in the debt.[5] Hence, he will not be a trustee for a specific purpose in regard to such debt.

A person to whom letters of administration to the estate of a deceased person have been granted is not a trustee for a specific purpose, although the estate vests in him under the law for the benefit of others.[6] The reason is that the rights and obligations of such a person arise by operation of law and not by act of parties.

See also Article 123 Note 8.

17. Trustee de son tort, whether specific trustee. — A person who by mistake or otherwise assumes the character of a trustee when it really does not belong to him is a trustee *de son tort*.[1] Thus,

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after providing for the maintenance of his widow. One moiety of the property was to be in trust for his son *R* upon his attaining 21 years of age and the other moiety in trust for male issues of *R*, but in case *R* died without any issue the moiety was to go to the trust fund known as Rupchand Dhar Trust estate — *Held* that *R* was a trustee for specific purpose.)

('81) 7 Cal 772 (775, 776) : 9 Cal L R 327 (DB), *Anund Moye Dabi* v. *Grish Chunder Myti.* (*Scott* v. *Jones*, 4 C & F 382 and *Williamson* v. *Naylor*, 3 Y & C; Ex., 208 followed.)

('03) 30 Cal 369 (384, 386) : 7 Cal W N 353 (DB), *Nistarini Dassee* v. *Nundo Lal.* (Affirmed on appeal in 33 Cal 180 (PC).)

('05) 29 Bom 267 (280, 281, 282) : 7 Bom L R 45, *Moosabhoy* v. *Yakubbhai.* (Will validating and confirming prior trust deed — Executor not appointed trustee but directed to carry out the provisions of the trust deed—*Held* he was express trustee.)

('76) 2 Cal 45 (56), *Treepoorasoondery Dossee* v. *Dabendra Nath Tagore.*

('10) 9 Ind Cas 951 (953) (Bom) (DB), *Jehangir Dadabhai* v. *Kaikhusru Kavasha.*
[*See* ('01) 25 Bom 429 (432) : 3 Bom L R 45 (DB), *Ramdhan* v. *Manibhai.*]
[*See also* ('38) 25 AIR 1938 Mad 60 (64) : 180 Ind Cas 462 (DB), *Venkatasubramania Ayyar* v. *Sivagurunatha Chettiar.* (Where persons named as executors in a will were not merely executors but were charged with the duty of managing the property and pay one-third of the income to charity and two-third of the income to the charity after a certain event, it was held that the executors were trustees.)]

[5] **('09) 4 Ind Cas 283 (285) (Bom),** *Damodar* v. *Dayal Mowji.*
See Section 87, Trusts Act.

The view expressed in the following cases that there is a trust for a specific purpose is not correct.

('08) 10 Bom L R 346 (351), *Yakub Ibrahim Sayani* v. *Bai Rahimatbai.*

('09) 4 Ind Cas 462 (464, 465) (Cal), *Basir Ali* v. *Hafiz Nazir Ali.*

[6] **('17) 4 AIR 1917 Pat 74 (76) : 2 Pat L Jour 642 : 40 I. C. 860 (DB),** *Janardhan Prosad* v. *Mt. Jankibati Thakurain.*

('10) 5 Ind Cas 832 (833) (Mad), *Nagarathnammal* v. *Namasivaya Mudali.*

('29) 16 AIR 1929 Lah 753 (757) . 122 Ind Cas 467 : 11 Lah 325 (DB), *H. P. Robson* v. *Administrator-General of Punjab.* (Suit by admistrator against executor *de son tort.*)

See also cases in foot-note (1) above.

Note 17

[1] **Person by mistake or otherwise assuming the character of trustee when it really does not belong to him and so becoming a trustee *de son tort*, may be called to account by the *cestui que trust* for the moneys he received under colour of trust: Lewin's "Law of Trusts," 12th Edition, page 231.**

where A transfers certain property to B in trust for C, and D, a stranger, dispossesses B and begins to hold the property with the professed object of doing so for the benefit of C, D becomes a trustee *de son tort* and is subject under the law to all the liabilities to which the trustee is liable. But, a trustee *de son tort* is not a trustee for a *specific purpose* within the meaning of this section. The reason is that his obligation to hold the property for the benefit of the *cestui que trust* does not arise out of the *intention* of the author of the trust but as a matter of *law*. Hence, this section cannot apply to a suit against a trustee *de son tort*. But, there is a conflict of decisions on the point. The Allahabad[2] and Bombay[3] High Courts and the Chief Court of Oudh[3a] hold that the section does not apply to such a suit, while the contrary view is held by the Calcutta[4] and Madras[5] High Courts. It is submitted that the latter view is not correct.[6]

18. Deposit of money.—A deposit of money by A with B under which B is constituted the owner of the money and is entitled to use it for his own purposes, subject only to the liability of returning an equivalent sum to the depositor, does not amount to a *trust*, as there is no obligation to use the money for the depositor's benefit.[1] The relationship of a banker and customer is ordinarily of the above kind and hence, a banker is not a trustee for the customer in regard to the customer's moneys in his hands.[2] (See Note 11.)

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[2] ('41) 28 AIR 1941 All 1 (8) : ILR (1940) All 815 : 193 I. C. 697 (DB), *Dharam Narain* v. *Suraj Narain*. (Suit for account against trustee *de son tort*—Article 120 applies.)

('24) 11 AIR 1924 All 884 (887) : 47 All 17 : 84 Ind Cas 631 (DB), *Behari Lal* v. *Shiva Narain*.

[3] ('25) 12 AIR 1925 Bom 148 (150) : 88 Ind Cas 975 (DB), *Girjabai Shivdeorao* v. *Narayanarao Ganpatrao*.

[But see ('05) 29 Bom 267 (280, 283) : 7 Bom L R 45, *Moosabhoy* v. *Yakubbhai*. ((1893) 2 Q B 390 followed.)]

[3a] ('37) 24 AIR 1937 Oudh 373 (377) : 13 Luck 344 : 168 Ind Cas 593 (DB), *Chandrika Bakhsh Singh* v. *Bhola Singh*. (A I R 1920 Cal 558 distinguished.)

[4] ('38) 25 AIR 1938 Cal 673 (677) : ILR (1938) 1 Cal 652 : 181 I. C. 190, *Kalipada De* v. *Hari Dasi Dasi*. (The existence of a trust must be first established before the section can be applied to trustees *de son tort*.)

('20) 7 AIR 1920 Cal 558 (560) : 57 Ind Cas 805 (DB), *Dhanpat Singh* v. *Mohesh Nath Tewari*.

('24) 11 AIR 1924 Cal 160 (163) : 74 Ind Cas 373 (DB), *Peary Mohan Mookerjee* v. *Manohar Mookerjee*. (*Obiter*.)

[*See* ('25) 12 AIR 1925 Cal 1244 (1245) : 89 I. C. 133 (DB), *Ananta Dew Adhikar Goswami* v. *Joydeb*. (Setting up a new idol in place of old, on old trust property, does not constitute a person a trustee *de son tort* and S. 10 does not apply.)]

[5] ('16) 3 AIR 1916 Mad 57 (63) : 28 Ind Cas 290 : 38 Mad 260 (DB), *Kaliba Mavulvija* v. *Saran Bivi Saila*. (Per Sadasiva Iyer, J.)

('13) 21 Ind Cas 421 (423) (Mad) (DB), *Subramaniya Iyar* v. *Subba Nayudu*. (Suit on behalf of *devasthanam* which was properly represented by the legal trustee against a former trustee, whether the latter's right to the office was legally valid or otherwise, the section applies and defendant cannot rely on bar of limitation.)

[6] See Illustration (b) to S. 94, Trusts Act, which shows that the Act treats such a case as not a case of trust at all.

Note 18

[1] ('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal* v. *Lakshmammal*.

('19) 6 AIR 1919 Lah 322 (323) : 47 Ind Cas 592 : 1919 Pun Re No. 4, *Dalipa* v. *Labhu Ram*.

Where money is deposited with a solicitor or other person already standing in a fiduciary relationship to the depositor and it is intended to vest the ownership in the depositary, the parties may be presumed to intend that the depositary should hold the money for the benefit of the depositor and hence, a trust for a specific purpose may arise in such cases.[3]

A deposit of money with another as security for some purpose does not make the depositary the *owner* of the money and hence, he is not a trustee for the depositor.[4]

Where money was left with the defendant for being paid to a third person, it was held that the money did not *vest* in the defendant and, therefore, he was not a trustee.[5]

19. Deposit of specific moveable property. — Where moveable property is deposited by one person with another for a specific purpose on the understanding that it must be returned to the depositor in specie, the depositary is not thereby constituted a trustee for a specific purpose. The reason is that the depositary is not made the *owner* of the property deposited.[1] Moreover, the obligation of the depositary is based on *contract* and not on confidence. (See Note 11.)

('32) 19 AIR 1932 Mad 685 (686) : 139 Ind Cas 164 (DB), *Subbiah Chetty* v. *Visalakshi Achi.*

See also Notes under Article 60.

[2] ('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal* v. *Lakshmammal.*

('09) 1 Ind Cas 712 (714) : 32 Mad 68 (DB), *The Official Assignee of Madras* v. *G. Smith.*

('89) 16 Cal 25 (31) (DB), *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi.*

(1880) 29 W R (Eng.) 269 (273) : 45 J P 420 : 50 L J Q B 90 : L R 5 Q B D 518, *Wilson* v. *Lord Bury.*

[3] (1893) L R 2 Q B 390 (394, 395) : 4 R 602 : 69 L T 585 : 42 W R 165, *Soar* v. *Ashwell.*

[See however ('14) 1 AIR 1914 Mad 171 (173) : 22 Ind Cas 936 (DB), *Rajammal* v. *Lakshmammal.* (The relation between son-in-law and father-in-law is not similar to the relation between solicitor and his client.)]

[4] ('19) 6 AIR 1919 Cal 519 (520) : 52 Ind Cas 65 (DB), *Nanda Lal Bose* v. *Ashutosh Ghose.* (Savings Bank pass-book deposited as security for filling the post of gumasta to manager of Court of Wards—Manager having no authority to withdraw amount without gumasta's consent is not a trustee.)

('10) 8 Ind Cas 870 (871) : 13 Oudh Cas 286, *Sakhawat Ali* v. *Baldeo Sahai.* (Money deposited with lessor as security to ensure payment of rent payable under a contract of lease.)

[5] ('04) 1 All L Jour 422 (423), *Mukhta Prasad* v. *Gajraj Singh.*

[*See also* ('36) 23 AIR 1936 Bom 412 (414, 415) : 165 Ind Cas 1001 (DB), *Annappa Ramchadra* v. *Krishna Narayan.*]

Note 19

[1] ('19) 6 AIR 1919 All 102 (103) : 55 Ind Cas 45 : 41 All 643 (DB), *Kalyan Mal* v. *Kishen Chand.*

[But see ('27) 14 AIR 1927 Oudh 614 (615) : 101 Ind Cas 427, *Akbar Singh* v. *Raj Bahadur Singh.* (Moveable property entrusted to supurdar—*Held* on construction of supurdanama that trust for specific purpose was created.)]

Section 10
Notes 20–21

20. "Legal representative," meaning of. — The expression "legal representative" in this section refers to the person who succeeds to the *private* estate of a deceased trustee and not to a person who succeeds to his *office* as trustee.

Illustration.

A is a trustee of two trusts, *X* and *Y*. *A* dies, and upon his death, *B* is appointed trustee of trust *X* and not of trust *Y*. *B* is not the legal representative of *A* within the meaning of this section. If *B*, notwithstanding the fact that he is not trustee with reference to trust *Y*, gets into possession of the properties of *Y*, such properties are not properties in the hands of the *legal representative* of *A*, the former trustee of *Y*. Hence, a suit against *B* for recovery of such properties on behalf of trust *Y*, will not be governed by this section.[1]

21. "Assigns (not being assigns for valuable consideration)." — This section applies, *inter alia*, to suits against assigns who are not assigns for valuable consideration. In other words, this section applies, *inter alia*, to suits against gratuitous transferees of the trust property.[1] It does not apply to suits against transferees for *consideration*, such suits being expressly excluded from the operation of the section.[2] As to the period of limitation applicable to such suits, see Articles 134 to 134C.

The mere fact of a transfer being for *valuable consideration* is enough to exclude from the section a suit against the transferee. The question as to the transferee having taken the transfer with *notice of*

Note 20

[1] ('17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (DB), *Manikkam Pillai* v. *Thannikachalam Pillai*.

Note 21

[1] ('40) 27 AIR 1940 P C 45 (46) : I L R (1940) 1 Cal 415 : I L R (1940) Kar P C 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhur Mullick* v. *Official Trustee of Bengal*.
'19) 6 AIR 1919 Lah 410 (411) : 1919 Pun Re No. 109 : 53 Ind Cas 577, *Jamiat Singh* v. *Mt. Raji*.
('82) 1882 Bom P J 252 (DB), *Gavrishankar* v. *Durga Shankar*.
('14) 1 AIR 1914 Mad 708 (710) : 38 Mad 1064 : 24 Ind Cas 369 (DB), *Venkatachella Reddiar* v. *Collector of Trichinopoly*.
[*See also* ('22) 9 AIR 1922 P C 123 (128, 134) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi* v. *Baluswami Ayyar*. (Shebait—Lease by, for no necessity is not valid beyond his life.)]

[2] ('40) 27 AIR 1940 Cal 228 (232) : 190 Ind Cas 405, *Srikissen Khanna* v. *Tarachand Ghanshyamdas*. (Lease.)
('23) 10 AIR 1923 P C 175 (177, 178) : 50 Ind App 295 : 46 Mad 751 : 74 Ind Cas 492 (PC), *Subbaiya Pandaram* v. *Mohamad Mustapha Maracayar*. (Purchaser in execution sale will be an assignee for valuable consideration.)
('09) 4 Ind Cas 449 (451) : 36 Cal 1003 : 36 Ind App 148 (PC), *Abhiram Goswami Mohant* v. *Shyama Charan Nandi*.
('25) 12 AIR 1925 All 822 (822) : 89 Ind Cas 483 (DB), *Hulasi* v. *Narain Das*.
('12) 16 Ind Cas 53 (55) (Mad)(DB), *Narsaya Udpa* v. *Venkataramana Bhatta*. (Trust property permanently leased to the defendant on condition of paying *yearly rent*.)
('23) 10 AIR 1923 Cal 1 (5, 7) : 74 Ind Cas 630 : 50 Cal 49 (DB), *Charu Chandra Pramanik* v. *Nahush Chandra Kundu*. (Time runs from date of assignment.)
See also Article 134 Note 6.

the trust is not material for the purposes of this section.[3]

Under the corresponding provisions in the Acts of 1859 and 1871, the exemption from limitation under the section applied not only to suits against a *gratuitous* transferee of the trust property but also to suits against transferees for *consideration* who were not transferees in *good faith*. Under the present Act and the Act of 1877, the question of *good faith* is not material in determining whether a suit against a transferee of the trust property is governed by the section. The fact that the transfer is one for *consideration* is enough to take the case out of this section. Hence, the decisions[4] under the previous Acts as to whether *notice of the trust* would affect the question of the good faith of the transferee are only of academic interest now.

The assignment for valuable consideration referred to in this section will include *every* kind of transfer of the trust property for consideration. Thus, a mortgage,[5] a lease,[6] an exchange[7] or a purchase in execution[8] will be an assignment for consideration within the meaning of this section. See also the undermentioned case.[9]

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[3] ('23) 10 AIR 1923 P C 175 (177, 178) : 50 Ind App 295 : 46 Mad 751 : 74 Ind Cas 492 (PC), *Subbaiya Pandaram* v. *Mahomad Mustapha Marcayar*. (Affirming A I R 1918 Mad 974.)
('06) 33 Cal 511 (527, 528) : 3 Cal L Jour 306 : 10 Cal W N 738 (DB), *Shyama Charan* v. *Abhiram Goswami*. (Reversed in 36 Cal 1003 (PC), on another point.)
('05) 2 Cal L Jour 546 (552, 553) (DB), *Ram Kanai Ghosh* v. *Raja Sri Hari Narayan Singh*. (9 Bom 475 cited in support.)
('24) 11 AIR 1924 Oudh 44 (45) : 26 Oudh Cas 197 : 77 Ind Cas 737, *Gomti Misra* v. *Deota Din*.
(14) 1 AIR 1914 Mad 708 (710) : 24 Ind Cas 369 : 38 Mad 1064 (DB), *Venkatachella Reddiar* v. *Collector of Trichinopoly*.
[See however ('40) 27 AIR 1940 Cal 228 (232) : 190 Ind Cas 405, *Srikissen Khanna* v. *Tarachand Ghanshyamdas*. (It was held in this case that where trust property is leased by trustee in derogation of the trust Section 10 does not apply if the lessees are assigns for valuable consideration and are not aware that the property was affected by any possible trust when the lease was executed — Note: The observation as to the lessee's want of knowledge was unnecessary.)]
See also Article 134 Note 10.

[4] ('79) 2 All 394 (396) (DB), *Piarey Lal* v. *Saliga*. (1871 Act.)
('79) 2 All 460 (465) (DB), *Kamal Singh* v. *Batul Fatima*. (Do.)
('76) 1 Bom 269 (279, 280), *Maniklal Atmaram* v. *Manchershi Dinsha*. (Do.)
('66) 5 Suth W R 120 (121) (DB), *Luteefun* v. *Bego Jan*. (1859 Act.)
('66) 5 Suth W R 238 (240) (DB), *Mt. Khyroonissa* v. *Saleehoonissa Khatoon*. (Do.)

[5] ('98) 20 All 482 (485) : 1898 All W N 123 (FB), *Behari Lal* v. *Md. Muttaki*.
('36) 23 AIR 1936 Lah 784 (784): 165 Ind Cas 48 (DB), *Dwarka Das* v. *Rikhi Ram*.

[6] ('40) 27 AIR 1940 Cal 228 (232) : 190 I. C. 405, *Srikissen* v. *Tarachand*.
('12) 16 Ind Cas 53 (55) (Mad), *Narsaya Udpa* v. *Venkataramana Bhatta*. (Lessee holding in consideration of paying annual rent is assign for valuable consideration.)
[*See* ('22) 9 AIR 1922 PC 123 (134) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi* v. *Baluswami Ayyar*. (Permanent lease for a quit rent of Rs. 24 per annum — *Held* that it would be ridiculous to hold that the rent reserved was "valuable consideration.")]

[7] ('07) 30 Mad 316 (317) : 17 Mad L Jour 149 (DB), *Rajagopalan* v. *Somasundara Thambiran*. (An exchange is nevertheless a transfer for valuable consideration because the consideration subsequently fails.)

[8] ('23) 10 AIR 1923 P C 175 (177, 178) : 74 Ind Cas 492 : 50 Ind App 295 : 46 Mad 751 (PC), *Subbaya Pandaram* v. *Muhammad Mustapha*. (Affirming A I R 1918 Mad 974.)

22. **"For the purpose of following in his or their hands such property or the proceeds thereof."** — The expression "following trust property" necessarily implies that in order to bring a suit within the expression, the object of the suit must be to restore to the trust, property which rightfully belongs to it but which has been improperly removed from it.[1]

Illustrations.

1. Where certain properties are disposed of on trust by a testator but the testator's heirs sue the trustee for such properties on the ground that the trust is void and that therefore, they, the heirs, are entitled as on intestacy to the properties, the section does not apply.[2] The reason is that the suit proceeds on a denial of the specific trust created by the testator. Assuming that on failure of the trust created by the testator there is a resulting trust in favour of his heirs, such a trust would only be a constructive trust and not a trust for a specific purpose. (See Note 7.) Hence, the claim of the heirs against the trustee in such a case would not be within the section.

2. Where the trust properties have not been removed from the purposes of the trust but the plaintiff only sues for the establishment of his own right to the office of trustee or to control the management of the trust, the section will not apply.[3] In such a case the trust properties have not been removed from the trust

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('26) 13 AIR 1926 Cal 913 (914, 915): 95 Ind Cas 644 (DB), *Manindra Narain* v. *Executors to the estate of late Bhuban Chandra.* (AIR 1922 P C 123 distinguished.)

('88) 15 Cal 703 (705, 706) (DB), *Chintamoni Mahapatro* v. *Sarupse.*

[9] ('18) 5 AIR 1918 Bom 183 (183, 184) : 46 Ind Cas 19 (DB), *Ramacharya* v. *Srinivasacharya.* (Gift of temple property in consideration of services to be performed is assignment for consideration.)

Note 22

[1] ('38) 25 AIR 1938 Cal 673 (677) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De* v. *Hari Dasi Dasi.*

('83) 6 All 1 (9) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (PC), *Balwant Rao* v. *Puran Mal.*

('34) 21 AIR 1934 Cal 87 (89, 90) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan* v. *Anadi Nath.*

('27) 14 AIR 1927 Bom 398 (398) : 103 Ind Cas 418 (DB), *Mahomedsa* v. *Khadirsa.*

[2] ('22) 9 AIR 1922 P C 212 (214, 215) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh.*

('96) 20 Bom 511 (517, 518), *Cowasji N. Pochkhanawalla* v. *R. D. Setna.*

('08) 32 Bom 364 (371, 373) : 10 Bom L R 117, *Ayshabai* v. *Ebrahim Haji Jacob.*

('05) 7 Bom L R 324 (329), *Dady* v. *Advocate-General.*

('12) 17 Ind Cas 689 (694, 695) : 37 Bom 447 (DB), *Md. Ibrahim* v. *Abdul Latif.*

('94) 16 All 256 (258) : 1894 All W N 73 (DB), *Jasoda Bibi* v. *Parmanand.*

('79) 4 Cal 455 (465) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherodemoney Dossee* v. *Doorgamoney Dossee.* (Affirming 2 Cal L R 112.)

('36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612 (DB), *Shirinbai Dinshaw* v. *Navroji Pestonji.* ((1889) 42 Ch D 312, relied on.)

('34) 21 AIR 1934 Cal 87 (90) : 150 Ind Cas 398 : 61 Cal 119 (DB), *Bibhu Bhusan* v. *Anadi Nath.* (Suit on ground that purpose for which trust was created has been completed and that plaintiff is entitled to the property on such completion.)

[3] ('83) 6 All 1 (10) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (PC), *Balwant Rao* v. *Puran Mal.*

('19) 6 AIR 1919 P C 62 (68, 69) : 43 Mad 253 : 46 Ind App 204 : 53 Ind Cas 288 (PC), *Arunachallam Chetty* v. *Venkatachalapathy Guruswamigal.*

at all and there is no occasion for a suit for their restoration to the trust. In other words, there is no question of following trust properties in such cases.

3. Where the suit is not for recovery of any property from the trustee but only for removal of the trustee and the appointment of fresh trustees, the suit not being one for following trust property the section will not apply.[4] In the undermentioned cases,[5] however, it was held that where such a suit is based on the ground that the defendant has been misappropriating trust property, the suit is really for preventing a misapplication of trust funds and for the *protection* of the trust property and hence would be a suit for following trust property. It is submitted that such a view is not correct, as a prevention of misapplication of trust property is not the same thing as recovering for the trust what has been misapplied.

4. Where there is no question of restoring trust properties to the trust but the suit is only by the plaintiff as a *third* person against the trustee as representing the trust for recovery of moneys due to the plaintiff out of trust funds, the section does not apply. Thus, a suit against the trustee for remuneration for services rendered by the plaintiff in connection with the purposes of the trust is not within the section.[6] Similarly, where *A* transfers properties to *B* in trust for *himself* for the purpose of liquidating his debts, there is no trust in favour of

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('21) 8 AIR 1921 P C 97 (100) : 43 Mad 665 : 47 Ind App 191 : 56 Ind Cas 730 (PC), *Ambalavana Pandara Sannadhi* v. *Sri Minakshi Sundareswara Devasthanam of Madura.*
('98) 21 Mad 278 (286, 287) (DB), *Alagirisamy Naicker* v. *Sundareswara Iyer.*
('97) 20 Mad 398 (403) (DB), *Ranga Pai* v. *Baba.* (A suit between co-trustees does not come within Section 10.)
('84) 7 Mad 337 (338) (DB), *Kannan* v. *Nilakandan.*
('84) 7 Mad 417 (418) (DB), *Karimshah* v. *Nattan.*
('18) 5 AIR 1918 Pat 570 (573, 575) : 3 Pat L Jour 327 : 47 I. C. 290 (DB), *Nathe Pujari* v. *Radha Binode Naik.*
('05) 27 All 513 (515) : 1905 All W N 69 : 2 All L Jour 304 (DB), *Jadunath Prasad* v. *Girdhar Das.*
('28) 15 AIR 1928 Cal 670 (674) : 112 Ind Cas 496 : 55 Cal 903, *Aurabindo Nath* v. *Manorama Debi.*
('93) 16 Mad 456 (459) (DB), *Sankaran* v. *Krishna.*
('91) 14 Mad 153 (162) (DB), *Nilakandan* v. *Padmanabha.* (Affirmed on appeal to the Privy Council in 18 Mad 1.)
('87) 10 Mad 375 (477) (DB), *Gnanasambanda Pandara Sannadhi* v. *Kandaswami Tambiran.*
('15) 2 AIR 1915 Mad 1003 (1009, 1021) : 26 Ind Cas 841 (DB), *Ambalavana Pandara Sannadhi* v. *Minakshi Sundareswara Devasthanam.*
[But see ('24) 11 AIR 1924 Mad 125 (125, 126) : 74 I. C. 120 (DB), *Shanmugappa* v. *Sangarayya Chetty.* (Section 10 applies to a suit by one of two co-trustees against the other for joint possession and joint management of the trust property —Submitted view not correct.)]
See also Article 120, Note 4 and Article 124, Note 2.

[4] ('83) 6 All 1 (9, 10) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (P C), *Balwant Rao* v. *Puran Mal.*
('83) 5 All 294 (296) : 1883 All W N 40 (DB), *Muhammad Baksh* v. *Mahomed Ali.* (Suit for removal of trustee—Compromise decree—Suit to set aside decree is not within section.)

[5] ('91) 14 Mad 1 (8) (DB), *Sathappayyar* v. *Periasami.*
('83) 12 Cal L R 370 (374), *Sreenath Bose* v. *Radha Nath Bose.*
('22) 9 AIR 1922 Mad 394 (397) : 69 I. C. 15 (DB), *Gopu Nataraja* v. *Rajammal.*

[6] ('26) 13 AIR 1926 Pat 205 (205, 206) : 94 Ind Cas 826 : 5 Pat 249 (DB), *Baidyanath Jiu* v. *Har Dutt Dwari.* (Suit to recover remuneration as *dwaris* of temple is not covered by S. 10.)

A's creditors. Hence, a suit by such creditors against *B* (assuming such a suit will lie) will not be governed by this section.[7] See also the undermentioned cases.[8]

5. A suit for recovering from the trustee trust property misappropriated by him[9] or for charging certain properties with certain alleged specific trusts[10] is within the section.

23. **Suit for account.** — A suit for *following* trust property implies that the property sought to be followed is in the hands of the defendant. Where the property sought to be recovered is not in the hands of the defendant and it is sought to make him liable on the footing that certain property came into his hands and that he is liable to account for such property and to make good such portion of it as he does not duly account for, the suit would not be one for *following* trust property but one for *accounts*. Such a suit is expressly included in this section.[1]

The corresponding section in the Act of 1877 did not expressly apply to a suit for accounts but only applied to a suit for following trust property. Hence, there was a conflict of decisions as to whether this section applied to a suit for *accounts* against the trustee or his representative, some cases holding that the section applied to such suits[2] and other cases holding to the contrary.[2a] The amendment of the section in the present Act gives effect to the former view.

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[7] ('98) 25 Cal 642 (648) : 2 Cal W N 469, *William Robert Fink* v. *Maharaj Bahadur Singh*.
See also Note 10.

[8] ('38) 25 AIR 1938 Pat 600 (602) : 17 Pat 350 : 181 Ind Cas 283 (DB), *Hemangini Devi* v. *Anil Krishna Banerjee*. (Suit for recovery of arrears of annuity under will against executor is governed by Art. 123—S. 10 does not apply to such suit.)
('01) 3 Bom L R 422 (424) (DB), *Anant* v. *Kashinath*. (Suit for recovery of share in the balance of the income after meeting expenses of worship of idol for which trust has been created. Section does not apply.)
('73) 19 Suth W R 35 (36, 37) (DB), *Mohamaya Dossee* v. *Bindoo Bashinee*. (Do.)

[9] ('08) 32 Bom 394 (401, 402) : 10 Bom L R 540 (DB), *Bhurabhai Jamandas* v. *Bai Ruxmani*. (Suit for recovery of money misappropriated by trustee and applied to other objects unconnected with the trust—Suit is within this section.)
('28) 15 AIR 1928 Bom 58 (58, 59) : 107 Ind Cas 705 : 52 Bom 184, *Chintaman Raoji* v. *Khanderao Pandurang*.
('88) 11 Mad 274 (279, 280), *Sethu* v. *Subramanya*. (Suit for sums misappropriated by former dharmakarta.)
('13) 21 Ind Cas 421 (423) (Mad) (DB), *Subramani Iyer* v. *Subba Naidu*. (Do.)
('94) 18 Bom 551 (562), *Advocate-General of Bombay* v. *Bai Punjabai*. (Trustees misapplying funds to other trusts — Suit for recovery of such moneys is within section.)

[10] ('82) 8 Cal 766 (768) : 6 Ind Jur 635, *Hurro Coomaree* v. *Tarini Churn*.

Note 23

[1] ('20) 7 AIR 1920 Cal 558 (560) : 57 I. C. 805 (DB), *Dhanpat Singh* v. *Mohesh Nath Tewari*.
('24) 11 AIR 1924 Cal 160 (163) : 74 Ind Cas 373 (DB), *Peary Mohan Mookerjee* v. *Manohar Mookerjee*. *(Obiter.)*
('22) 9 AIR 1922 Mad 409 (409, 412) : 70 I. C. 87 (DB), *Doraivelu* v. *Audikesavalu*.
('16) 3 AIR 1916 Mad 720 (723, 726) : 39 Mad 365 : 28 I. C. 221 (DB), *Chidambara Mudaliar* v. *Krishnaswamy Pillai*. (Decree may be given to trustee if the accounts should turn out to be in his favour.)
('28) 15 AIR 1928 Bom 58 (58, 59) : 52 Bom 184 : 107 I. C. 705 (DB), *Chintaman* v. *Khanderao*. (Suit for account and refund of the amount is not barred by lapse of time.)
[But see ('38) 25 AIR 1938 Nag 30 (33) : ILR (1940) Nag 94 : 176 I. C. 57 (DB), *Mt. Sahaudra Bai* v. *Sri Deo Radha Ballabhji*. (The view expressed in this case that this section cannot apply at all where the trust property or its proceeds are not in the hands of the defendant is not correct.)]

But, the section is limited to suits for account in regard to property which *has become* vested in trust for a specific purpose. Hence, a suit to enforce the liability of the trustee or his representative for property which never came into his hands but which would have come into his hands but for his wilful default or negligence will not be within the section.[3]

24. Persons entitled to benefit of section. — There is no restriction as to the persons who are entitled to the benefit of the section. A suit of the kind defined in the section by whomsoever brought will be governed by the section.[1] It is not necessary that the plaintiff must be a *beneficiary* under the trust. Thus, a suit by one co-trustee against another[2] or by a present trustee against a past

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2. ('82) 8 Cal 766 (768), *Hurro Coomaree Dossee* v. *Tarini Churn Bysack.* (A suit for the purpose of charging certain properties with the trust and for an account is a suit to follow trust property and is not barred by any lapse of time.)
('84) 8 Bom 432 (468, 469), *Thakersey* v. *Hurbhum Nursey.*
('88) 11 Mad 274 (279, 280) (DB), *Sethu* v. *Subramanya.* (Suit against dharmakarta of temple to recover money misappropriated.)
('03) 30 Cal 369 (384, 386) : 7 Cal W N 353 (DB), *Nistarini Dasi* v. *Nando Lal Bose.* (Affirmed on appeal in 33 Cal 180 (PC).)
[*See* ('10) 8 Ind Cas 189 (189, 190) (Bom), *Gajanan* v. *Waman.* (If the plaintiff is admittedly following trust property then he cannot be excluded from the benefit of this section merely because he frames his suit as one for accounts.)]

2a. ('86) 10 Bom 242 (246, 247, 248), *Shapoorji Nowroji Pochaji* v. *Bhikaji.* (Suit for an account against an executor or his representative.)
('08) 32 Bom 364 (371, 373): 10 Bom L R 117, *Ayshabai* v. *Ebrahim Haji Jacob.* (Do.)
('80) 5 Cal 910 (914) : 6 Cal L R 195 (DB), *Saroda Pershad* v. *Brojo Nath.*
('09) 1 Ind Cas 289 (301, 302) (Cal) (DB), *Baroda Prosad Banerjee* v. *Gajendra Nath Banerji.* (8 Cal 766 distinguished.)

3. ('40) 27 AIR 1940 Rang 207 (211) : 1940 Rang L R 273 : 193 Ind Cas 61 (DB), *Official Trustee* v. *Mrs. Raeburn.* (A claim for an account of an interest which the trustee ought to have earned for the trust funds but failed to earn is not governed by the section but by Art. 120.)
('18) 5 AIR 1918 Mad 624 (625, 626) : 42 I. C. 544 : 41 Mad 319 (DB), *Tholasingam Chetty* v. *Vedachalla Aiyah.*
('36) 23 AIR 1936 Bom 30 (34, 35) : 160 Ind Cas 612 (DB), *Shirinbai* v. *Navroji.*
('22) 9 AIR 1922 Mad 409 (409, 412) : 70 I. C. 87 (DB), *Doraivelu* v. *Audikesavalu.*
('94) 18 Bom 401 (423, 424), *Advocate-General of Bombay* v. *Moulvi Abdul Kadar.*
('85) 9 Bom 373 (399, 400), *The New Fleming Spinning and Weaving Co., Ltd.* v. *Kessowji Naik.* (Director's want of vigilance in not seeing to the agent's fulfilment of his duty—S. 10 not applicable.)
('97) 21 Bom 257 (264, 267) (DB), *Sayad Hussein Miyan* v. *Collector of Kaira.*

Note 24

1. ('36) 23 AIR 1936 Mad 876 (877, 878) : 169 I. C. 362 (DB), *Vairavan Chetty* v. *Chettichi Achi.* (Money paid to *A* in trust for payment of debts of *B*—*B* can sue for accounts of such money and his suit will be within section.)

2. ('20) 7 AIR 1920 Cal 558 (560) : 57 I. C. 805 (DB), *Dhanpat Singh* v. *Mohesh Nath Tewari.*
[But see ('27) 14 AIR 1927 Bom 424 (425, 426) : 103 Ind Cas 225, *Jamnadas* v. *Damodardas.* (Not correct.)]

Section 10
Notes 24-25

trustee[3] will be within the section.

25. Property comprised in Hindu or Muhammadan religious or charitable endowment, whether property vested in trust for a specific purpose. — Before the decision of the Privy Council in *Vidya Varuthi* v. *Baluswami*,[1] there was a conflict of decisions on the question whether property comprised in a Hindu or Muhammadan religious or charitable endowment was property vested in trust for a specific purpose within the meaning of this section.[2] The above decision of the Privy Council set at rest this conflict and decided that there is no *trust* at all in such cases.[3] The

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3. ('95) 18 Mad 266 (272, 273) : 4 Mad L Jour 223 (DB), *Sathianama Bharathi* v. *Saravanabagi Ammal.* (Grant by the head of the mutt to his brother for his maintenance — Suit by a successor to recover the land.)

('88) 11 Mad 274 (279, 280), *Sethu* v. *Subramanya.* (Suit against dharmakarta of temple to recover money misappropriated.)

'13) 21 Ind Cas 421 (423) (Mad) (DB), *Subramania Iyer* v. *Subba Naidu.*

Note 25

1. ('22) 9 AIR 1922 P C 123 (126, 127) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (P C).

2. ***Cases holding that manager is trustee.***

('19) 6 AIR 1919 Mad 571 (571) : 52 I. C. 914 (DB), *Deivasikamani* v. *Valliammal.*

('13) 21 Ind Cas 421 (423) (Mad), *Subramania Iyer* v. *Subba Naidu.*

('88) 11 Mad 274 (277, 278) (DB), *Sethu* v. *Subramaniya.*

('83) 6 Mad 54 (59) : 6 Ind Jur 629 (DB), *Virasami* v. *Subba Rau.*

('83) 12 Cal L R 370 (374), *Sreenath Bose* v. *Radha Nath Bose.*

('05) 2 Cal L Jour 546 (550, 551) (DB), *Ram Kanai Ghosh* v. *Hari Narain Singh.*

('04) 31 Cal 314 (317) (DB), *Jagamba Goswamini* v. *Ram Chandra Goswami.*

('03) 27 Bom 363 (369, 372) : 4 Bom L R 743, *Dattagiri* v. *Dattatraya.* (20 All. 482 (F B) followed.)

('18) 5 AIR 1918 Cal 580 (580, 581) : 44 Ind Cas 567 (DB), *Monmotho Nath* v. *Annoda Prosad Roy.*

('16) 3 AIR 1916 P C 256 (257) : 43 Cal 707 : 43 Ind App 73 : 33 Ind Cas 583 (P C), *Ram Parkash Das* v. *Anand Das.*

[*See also* ('19) 6 AIR 1919 P C 62 (68, 69) : 43 Mad 253 : 46 Ind App 204 : 53 I. C. 288 (P C), *Arunachellam* v. *Venkatachalapathy.* (Trustee in loose sense.)]

Case holding manager of endowment was not trustee.

('74) 21 Suth W R 415 (416) (DB), *Syed Shah Alleh Ahmed* v. *Mt. Bibee Nusseebun.*

3. ('41) 28 AIR 1941 All 1 (8) : I L R (1940) All 815 : 193 I. C. 697 (DB), *Dharam Narain* v. *Suraj Narain.*

('38) 25 AIR 1938 Pat 273 (275) : 176 I. C. 209 (DB), *Urmila Debi* v. *Baidyanatha Jee.* (The mere fact that the manager is called a trustee or by any other name cannot alter the nature of the endowment and the position of the manager so as to make it a 'trust' within the meaning of S. 10.)

('23) 10 AIR 1923 P C 44 (46) : 71 Ind Cas 646 : 50 Ind App 84 : 50 Cal 329 (P C), *Abdur Rahim* v. *Narayan Das.* (Mutawalli or manager is not trustee.)

('34) 21 AIR 1934 P C 77 (79) : 56 All 111 : 61 Ind App 50 : 147 Ind Cas 887 (P C), *Allah Rakhi* v. *Shah Muhammad Abdur Rahim.* (Do.)

('28) 15 AIR 1928 All 689 (693, 696) : 114 I. C. 734 (DB), *Rangacharya* v. *Guru Revati Raman Acharya.*

('28) 15 AIR 1928 All 134 (136) : 108 Ind Cas 452 : 50 All 265 (DB), *Jaisth Madho* v. *Gat Ashram Narainji.*

('22) 9 AIR 1922 Lah 271 (272, 273) : 65 Ind Cas 722, *Diwan Singh* v. *Sham Das.* (A I R 1922 P C 123 followed.)

reasoning on which the decision proceeded was, that where property was dedicated to a Hindu idol or *mutt* or to a Muhammadan *wakf*, the property vested in the idol or the institution or God directly and the *shebait*, *mahant*, *mutawalli* or other person who was in charge of the institution was simply a manager on behalf of the institution and that, as a trust implied an obligation annexed to the *ownership* of property, there was no *trust* in such cases. The second paragraph of this section has been added by Act I of 1929 in order to get over the effect of the above decision and to extend the applicability of this section to suits with reference to property comprised in Hindu and Muhammadan religious or charitable endowments. The effect of the provision is that although under the *general law* there may be no trust for a specific purpose in such cases, *for the purposes of this section*, property comprised in Hindu, Muhammadan or Buddhist religious or charitable endowments should be treated as property vested in trust for a specific purpose and the manager of such property should be treated as a trustee thereof.[4] As to the retrospective effect of the provision, see the undermentioned cases.[5]

It is only the *manager* of the religious endowment that is a trustee under the second paragraph of the section. A person to whom such manager entrusts endowed property for safe custody and management is not a trustee.[5a]

Where property is specifically transferred to a person to be held by him in trust for an idol or religious institution, there is clearly a trust for a specific purpose even without recourse to the special provision contained in the second paragraph of this section.[6]

See also Art. 134 Note 5 and Art. 134A to Art. 134C Note 5.

('28) 15 AIR 1928 Cal 130 (135) : 105 Ind Cas 647 : 55 Cal 448 (DB), ***Mt. Rukeya Banu* v. *Mt. Nazira Banu*.**

('26) 13 AIR 1926 Cal 568 (575) : 94 I. C. 235 (DB), ***Gangaprosad* v. *Kuladananda*.**

('34) 21 AIR 1934 Mad 542 (543) : 152 Ind Cas 345, ***Krishna Kudva* v. *Sri Venkataramana Temple*.**

('26) 13 AIR 1926 Mad 769 (770) : 49 Mad 543 : 96 Ind Cas 371 (DB), ***Rama Reddy* v. *Ranga Dassan*.**

('26) 13 AIR 1926 Pat 239 (240) : 5 Pat 341 : 93 Ind Cas 303 (DB), ***Badri Narayan Singh* v. *Kailash Gir*.**

('34) 21 AIR 1934 Oudh 96 (96, 97) : 9 Luck 384 : 147 Ind Cas 607 (DB), ***Chinkan Pande* v. *Durga Bharathi*.**

[4] **('35) 22 AIR 1935 Mad 483 (485) : 157 Ind Cas 181 (DB),** ***Manickammal* v. *Murugappa Gramani*.**

[5] **('38) 25 AIR 1938 Pat 273 (274) : 176 Ind Cas 209 (DB),** ***Urmila Debi* v. *Baidyanatha Jee*.** **(Act I of 1929 not retrospective—AIR 1934 P C 77 followed.)**

('34) 21 AIR 1934 P C 77 (78) : 61 Ind App 50 : 56 All 111 : 147 Ind Cas 887 (PC), ***Allah Rakhi* v. *Shah Mohamed Abdur Rahim*.** **(Act I of 1929 not applicable to suit instituted before coming into force of Act but pending at such date.)**

('35) 22 AIR 1935 Mad 483 (485) : 157 Ind Cas 181, ***Manickammal* v. *Murugappa*.** **(Act I of 1929 applicable to all suits instituted after coming into force of Act although endowment was created before.)**

[5a] **('41) 28 AIR 1941 Nag 181 (185, 186) (DB),** ***Shri Mahadeoji* v. *Baldeo Prasad*.**

[6] **('22) 9 AIR 1922 P C 123 (130) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC),** ***Vidya Varuthi* v. *Baluswami*.**

Section 10
Notes 26–27

26. Property comprised in Parsi religious endowment. — In the undermentioned case[1] it was held that the *vahivatdars* of a *Parsi anjuman* were trustees for a specific purpose within the meaning of this section.

27. Limitation for suits for recovery of trust property from strangers. — This section only applies to suits against trustees, their legal representatives or assigns (not being assigns for valuable consideration). Hence, the exemption from limitation under this section is confined to suits against such persons and does not apply to suits against *other* persons who may have improperly got into possession of trust property. Thus, suits against transferees for consideration (Note 21) and strangers who have acquired possession by dispossessing the trustee are subject to the ordinary law of limitation.[1]

Trustees of Hindu religious institutions form one continuous representation of the idol or institution and hence, when limitation for a suit for recovery of trust property from a stranger has commenced to run during the lifetime of one trustee, there is no fresh start of limitation when he dies and another trustee succeeds to the office. See Articles 142 and 144 Note 49.

('18) 5 AIR 1918 Bom 183 (183, 184) : 46 I. C. 19 (DB), *Ramacharya* v. *Shrinivasacharya.*

('23) 10 AIR 1923 Cal 1 (7) : 50 Cal 49 : 74 Ind Cas 630 (DB), *Charu Chandra* v. *Nahush Chandra.*

('18) 5 AIR 1918 P C 37 (40) : 45 I. C. 818 (PC), *Basudeo Roy* v. *Jugal Kishwar.* (A I R 1916 P C 256 referred.)

('27) 14 AIR 1927 Bom 398 (398, 399) : 103 Ind Cas 418 (DB), *Mahomedsa Khadirsa* v. *Khadirsa Hajisa.* (A I R 1922 P C 212 followed.)

('08) 1908 Pun W R No. 123, p. 418 (420, 422) : 1908 Pun Re No. 127 (FB), *Har Gian Dev* v. *Baldeo Dass.*

Note 26

[1] ('34) 21 AIR 1934 Bom 1 (4, 5) : 149 Ind Cas 317 (DB), *Jamshedji Pestonji* v. *Dorabji Kuverji.* (A I R 1922 P C 123 distinguished.)

Note 27

[1] ('35) 22 AIR 1935 Mad 483 (485) : 157 Ind Cas 181 (DB), *Manickammal* v. *Murugappa Gramani.*

('96) 23 Cal 536 (545) (DB), *Nilmony Singh* v. *Jagabandhu Roy.*

('05) 32 Cal 129 (140, 141) : 31 Ind App 203 : 6 Bom L R 765 : 1 All L Jour 585 : 8 Cal W N 809 : 8 Sar 698 (PC), *Jagadindra Nath Roy* v. *Hemanta Kumari Debi.*

('94) 18 Bom 507 (511, 512) (DB), *Vithalbowa* v. *Narayan Daji Thite.*

('23) 10 AIR 1923 Cal 142 (144, 145) : 50 Cal 292 : 74 Ind Cas 793, *Anandachandra Chakravarty* v. *Brojalal Singh.* (Adverse possession on behalf of another trust.)

('29) 16 AIR 1929 All 315 (318) : 51 All 621 : 116 Ind Cas 433 (DB), *Dasami Sahu* v. *Param Shameshwar.* (Property dedicated to Hindu idol can be acquired by adverse possession.)

('26) 13 AIR 1926 All 392 (393, 394) : 48 All 348 : 93 Ind Cas 652 (DB), *Chitar Mal* v. *Panchulal.* (Do).

('33) 20 AIR 1933 Cal 295 (302) : 60 Cal 54 : 144 Ind Cas 792 (DB), *Surendrakrishna Roy* v. *Ishwar Bhubaneshwari Thakurani.* (AIR 1922 P C 123 followed.) [*See also* ('41) 28 AIR 1941 P C 1 (6) : 67 Ind App 448 : I L R (1941) Mad 175 : 192 Ind Cas 1, *Firm O. Rm. O. M. Sp.* v. *Nagappa Chettiar.* (Suit against Bank in which trust funds were invested—Article 120 applies.)]

See also Articles 142 and 144 Notes 47 and 80.

Section 10
Note 28

28. Limitation for suits against trustees by operation of law. — As seen already, this section does not apply to suits against trustees by operation of law. Hence, such suits are not exempt from the bar of limitation. But, where a constructive trustee purports to be in possession of property *on behalf* of the person for whose benefit he is constructive trustee, his possession is not *adverse* to the latter and under Art. 144, limitation for a suit for possession against the constructive trustee will not begin to run so long as he purports to hold the property in the above manner.[1] Further, where the suit against the constructive trustee is based on a breach of the constructive trust, every fresh breach will give a new cause of action for the suit.[2]

Note 28

[1] *See the following cases :*

('14) 1 AIR 1914 Mad 477 (480, 481) : 14 Ind Cas 168 (171) : 37 Mad 373 (DB), *Pattaikara Manakkal Kuppen* v. *Munde Kottil.*

('99) 21 All 329 (340) : (1899) All W N 106 (DB), *Muhammad Munawar Ali* v. *Rasulan Bibi.* (The waqf having failed, the mutwalli held the property as trustee for those entitled.)

('83) 7 Bom 34 (38, 39) (DB), *Dadoba* v. *Krishna.* (While there subsisted any contract, express or implied, between the parties in and out of possession to which the possession might be referred as legal and proper, it could not be pronounced adverse.)

('79) 2 All 361 (364, 365) (DB), *Durga Prasad* v. *Asa Ram.*

('23) 10 AIR 1923 Mad 153 (158) : 74 I. C. 27 (DB), *Abuvakkar* v. *Kunhikuttialli.* (Eldest male member of Thavazhi being also Karnavan — Possession by, cannot be adverse to tarwad.)

('30) 17 AIR 1930 Mad 563 (565, 567) : 125 I. C. 227, *Kalatty Mudali* v. *Mangapathy Mudali.*

('99) 23 Bom 659 (664, 665) : 1 Bom L R 118 (DB), *Jugal Kishore* v. *Lakshmandas.* (2 App Cas 544 and 16 Sim 297 applied.)

('97) 24 Cal 77 (81) (DB), *Sheo Shankar Gir* v. *Ram Shewak Chowdhri.* (The possession of manager cannot be treated as adverse to the endowment.)

('11) 12 Ind Cas 225 (233, 234) : 36 Bom 214, *Casamalli Jairajbhoy Peerbhoy* v. *Currimbhoy Ebrahim.* (4 Cal 455 explained and discussed.)

('21) 8 AIR 1921 Mad 528 (529): 63 I.C. 104 (DB), *Seerangathuni* v. *Vaithilinga Mudaliar.* (Possession by receiver appointed by Court.)

('90) 13 Mad 402 (403, 404), *Vedapuratti* v. *Vallabha.* (9 Mad 244 distinguished.)

('12) 13 Ind Cas 599 (603) : 36 Mad 418 (DB), *Ambalam Pakkiya Udayan* v. *Right Revd. J. M. Bathe.*

('10) 8 Ind Cas 578 (590) (All) (DB), *Fakhr-ud-din* v. *Kifayat-ul-lah.* (The members of a family, under whose management a waqf property is placed, cannot acquire title to such property by adverse possession.)

('11) 11 Ind Cas 447 (448) : 34 Mad 257 : 38 Ind App 129 (PC), *Srinivasa Moorthy* v. *Venkata Varada Iyengar.* (A person who has accepted the position of trustee cannot be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust.)

('33) 20 AIR 1933 Cal 295 (304, 305) : 60 Cal 54 : 144 I. C. 792 (DB), *Surendra Krishna Roy* v. *Ishwar Bhubaneshwari.* (A person who has accepted the position of a shebait of an idol cannot change the character of his possession into one which is adverse to the idol by repudiating the claim of the idol.)

See also Arts. 142 and 144 Note 46.

[2] ('99) 23 Bom 659 (664, 665) : 1 Bom L R 118 (DB), *Jugal Kishore* v. *Lakshmandas.*

11.* *(1)* Suits instituted in British India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

Suits on foreign contracts.

(2) No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

Synopsis

1. Suits on foreign contracts — Lex fori.
2. Applicability to execution applications.

Other Topics (miscellaneous)

Questions of limitation—Matters of procedure governed by *lex fori*. See Note 1.
Suit on foreign judgment. See Note 1.

1. Suits on foreign contracts—Lex fori. — It is a general principle of international law that a contract with reference to its form, validity, interpretation and the rights and liabilities of the parties to it, is governed by the *lex loci contractus*, or the law of the place where the contract is made, that is, the law which the parties have agreed or intended shall govern the contract or which they may be presumed to have so intended,[1] while all matters of *procedure* are governed only by *lex fori*, or the law of the forum in which the action is brought.[2] Questions of limitation of actions are thus governed only by the *lex fori* as they are essentially matters relating to procedure.[3]

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* Acts of 1877 and 1871.
Section 11 of Act of 1877 and Ss. 11 and 12 of Act of 1871 were same as above.

Act of 1859.
No corresponding provision.

Section 11 — Note 1

[1] Halsbury's Laws of England (Hailsham Edition), Vol. VI, pp. 261 and 263.
('76) 1 Cal 330 (334) : 3 Ind App 61 : 3 Sar 597 (PC), *Maung Shoay Att* v. *Ko Byaw*.

[2] Halsbury's Laws of England (Hailsham Edition), Vol. VI, p. 351.
(1835) 2 Bing (N C) 202 (210, 211, 212) : 42 R R 598 : 2 Scott 304 : 1 Hodges 206 : 2 Dowl P C 781 : 132 E R 80, *Huber* v. *Steiner*.

[3] (1851) 5 Moo Ind App 234 (267) : 8 Moo P C 4 : 1 Sar 423 (PC), *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*.
('16) 3 AIR 1916 Low Bur 67 (68) : 35 Ind Cas 741, *S. King* v. *D. J. Buchanan*.
('18) 5 AIR 1918 Mad 580 (585) : 40 Mad 1069 : 42 Ind Cas 294 (FB), *Peirce Leslie & Co., Ltd., Cochin* v. *E. J. Perumal*.
('16) 3 AIR 1916 Bom 200 (201, 202) : 36 Ind Cas 369 : 40 Bom 504 (DB), *Nabibhai Vazirbhai* v. *Dayabhai Amulakh*.
('81) 5 Ind Jur 288 (291).
(1880) 49 L J C P 781 (782) : L R 5 C P D 429 : 29 W R 306 : 44 J P 735, *Alliance Bank of Simla* v. *Carey*.
(1830) 10 B & C 903 (912) : 34 R R 595 (599) : 9 L J K B 213, *British Linen Co.* v. *Drummond*.

In *Huber* v. *Steiner*,[4] Tindal, C. J., observed as follows:

> "So much of the law as affects the rights and merit of the contract, all that relates '*ad litis decisionem*' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the '*lex fori*' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractus*, is evident from many authorities . . . Such being the general rule of law, a distinction has been sought to be engrafted on it by the learned counsel for the defendant, that 'where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, that in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment.' . . . . . It does indeed appear but reasonable that the part of the *lex loci contractus* which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to and regulates the construction of the contract."

This section merely reproduces the principles stated above. Thus, the mere fact that a suit on a foreign contract is not barred under that law will not enable the plaintiff to bring the suit on the claim barred in this country, as a person suing in this country should in matters of procedure "take the law as he finds it" here.[5] Similarly, it is no defence to rely on a foreign rule of limitation providing for a shorter period, even though the contract is made in the foreign country, for the reason that the rights of the parties not having been extinguished by the foreign rule of limitation are enforceable by the law of this country. If, however, the rights of the plaintiff have become *extinguished* under the foreign rule of limitation, the rights, no longer being available to the plaintiff, are not enforceable in India (sub-s. (2)).[6]

Where the plaintiff obtains judgment in a foreign Court on a claim which, though not barred under the foreign law, would be barred under the Indian Limitation Act, and brings a suit on that *judgment* in a British Indian Court, it would be no defence to rely on the plea of limitation as the foreign judgment is valid according to the *lex fori* and is conclusive. It could be impugned only on any of the grounds enumerated in S. 13 of the Civil Procedure Code.[7] The result would be the same even if the contract had been made originally in India.[8]

(1870) L R 4 Ch App 735 (738): 39 L J Ch 170: 20 L T 464 : 17 W R 419, *Pardo* v. *Bingham*.

(1870) 38 L J Q B 331 (334): L R 4 Q B 653: 10 B & S 644 : 20 L T 947: 17 W R 967, *Harris* v. *Quine*.

[4] (1835) 2 Bing (N C) 202 (210, 211, 212) : 42 R R 598 (605, 606) : 2 Scott 304 : 1 Hodges 206 : 2 Dowl P C 781 : 132 E R 80.

[5] (1830) 34 R R 595 (599) : 10 B & C 903 : 9 L J K B 213, *British Linen Co.* v. *Drummond*.

[6] See Halsbury's Laws of England (Hailsham Edition), Vol. VI, p. 355.

[7] ('24) 11 AIR 1924 All 161 (162): 46 All 119: 79 Ind Cas 332 (DB), *Gangaprasad* v. *Ganeshilal*.

(1865) 4 Suth W R 107 (108, 109) (DB), *Boloram Gooy* v. *Kameenee Dossee*.

('16) 3 AIR 1916 Low Bur 67 (68) : 35 Ind Cas 741, *King* v. *Buchanan*.

('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi* v. *Ponnusamy*.

('08) 2 Sind L R 51 (52), *Sir Henry Seymore King* v. *M. B. Braganza*.

[8] ('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi* v. *Ponnusamy*.

2. Applicability to execution applications. — The section is, in terms, applicable only to *suits*. The principle on which it is based is, however, of universal application. Hence, an application for execution of a decree of a Native Indian State in a British Indian Court under S. 44 of the Civil Procedure Code, is governed only by the Indian Limitation Act.[1] In the undermentioned case[2] a decree of the District Court of Mysore was transferred for execution to the High Court of Madras but was returned unexecuted owing to there being an attachment on the decree. On an application again to transfer the decree to the original side of the Madras High Court, the Mysore Court transmitted the decree holding that an application for transfer of the decree was a *step-in-aid* of execution and therefore the execution of the decree was not barred. The question arose whether the Madras High Court, in applying the Indian law of limitation, was entitled to go behind the order of the Mysore Court holding that an application for transfer of the decree is a *step-in-aid* of execution and to decide (following a previous Full Bench decision of the Madras High Court[3] as to the interpretation of Art. 182 cl. (5)) that it is not a step-in-aid of execution. Schwabe, C. J., observed :

> " The question to be considered is whether according to that system of law (Mysore), the step taken is or is not a step-in-aid of execution and in my judgment the law to be considered is that of the place where the application is made. . . . . . It follows that it is the law of Mysore that has to be considered. By S. 13 of the Civil Procedure Code, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties. There has in this case been a foreign judgment on this matter directly adjudicated upon between the same parties, namely, that according to the law of Mysore this is a setp-in-aid of execution and I think that under that section it is not open, whatever this Court might have said in such cases, to an unsuccessful party to the application in Mysore to contend here that the law of Mysore is otherwise. . . . . . It follows that as the step is to be a step which according to the law of Mysore is a step-in-aid, in my judgment we are bound to hold that this application to transmit the papers here was a step-in-aid of execution of the decree. "

See also Note 95 to Article 182.

Note 2

[1] ('83) 9 Cal 181 (182) : 11 Cal L R 34 : 5 Shome L R 135 (DB), *Mon Mohun Buksee* v. *Gunga Soondery Dabee.*

('16) 3 AIR 1916 Bom 200 (201, 202) : 36 Ind Cas 369 : 40 Bom 504 (DB), *Nabibhai Vazirbhai* v. *Dayabhai Amulakh.*

('68) 10 Suth W R 10 (12) : Beng L R Supp Vol 970 (FB), *T. Leake* v. *W. Daniel.* [*See* ('87) 14 Cal 570 (571) (DB), *Hukum Chand* v. *Gyanendar Chander.* (Law of limitation applied in this case is the law contained in S. 58 of Bengal Act VIII of 1869.)]

See also Section 3 Note 8.

[2] ('23) 10 AIR 1923 Mad 72 (73 to 76) : 45 Mad 1014 : 69 Ind Cas 932 (DB), *Srinivasa Iyengar* v. *Narayana Rao.*

[3] ('18) 5 AIR 1918 Mad 580 (584, 585) : 40 Mad 1069 : 42 Ind Cas 294 (FB), *Peirce Leslie & Co., Ltd., Cochin* v. *E. J. Perumal.* ("It is the British Court, that has to decide whether the conditions postulated by the Art. 182 are fulfilled and on this principle it will do so in accordance with its own law and without reference to other Codes which may include the provisions regarding the executability and methods of execution of decrees different from those in our own.")

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of time in legal proceedings.

12.* *(1)* In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

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* Act of 1877 : S. 12.

Exclusion of day on which right to sue accrues.

In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

Exclusion in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

Where a decree is appealed against, or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Act of 1871 : S. 13.

Exclusion of day on which right to sue accrues.

In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

Exclusion in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Act of 1859.

No corresponding provision.

Section 12

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Sub-section (1).
4. Sub-sections (2) to (4) — Applicability to proceedings not referred to in the Act.
5. Applicability of sub-sections (2) to (4) to proceedings under special or local laws.
6. Exclusion of day of pronouncing judgment.
7. Exclusion of time for copies.
8. In respect of what documents exclusion should be made.
9. Exclusion, where copies are obtained by stranger or for a different purpose.
10. "Time requisite," meaning of.
10a. Day of copy application and day on which copy is ready to be excluded.
11. Delay caused by application for copies made to wrong person.
12. Delay caused by defective application for copies.
13. Delay caused by separate application for copies of judgment and decree.
14. Delay in furnishing folios, stamps, etc.
15. Delay in taking delivery of copy.
16. Supply for folios before they are called for by Court.
17. Application struck off for non-compliance and subsequently revived.
18. Delay caused by despatch of copies by post.
19. Delay caused by getting a vernacular copy of decree or judgment.
20. Copies of same documents obtained on two different occasions—Time requisite to obtain which copy to be excluded.
21. Application for copy on date of judgment.
22. Application for copy mislaid by office.
23. Time between the date of the application for copies and the date of notice of requisition for stamp and folios for copies.
24. Holidays intervening between dates of judgment and copy application.
25. Interval between the judgment and the signing of the decree, if and when can be deducted.
25a. Delay caused by getting order varied and settled.
26. One common judgment in two suits · filed in two appeals against judgment.
27. Appeal from a judgment on review — Copy of original judgment.
28. Application for leave to appeal to the Privy Council.
29. Application for review.
30. Application to set aside award.
31. Filing of an appeal with a copy of judgment or decree alone.
32. Appeal in criminal cases.
33. Finding as to "time requisite" cannot be attacked in second appeal.
34. Evidentiary value of dates endorsed on certified copies.
35. Copies in appeals from orders.
36. Section 5 and "time requisite."

Other Topics (miscellaneous)

Acknowledgment of debt. See Note 3.

Application and copying fees sent by post. See Notes 9 and 14.

Application by prisoner for copies. See Note 32.

Application for revision — Section does not apply. See Note 4.

Application under S. 66 (3), Income-tax Act. See Note 5.

Computation of time in whole days and not in hours. See Note 14.

Copy obtained by another party or stranger. See Note 9.

Court closed when copy ready. See Note 15.

Letters Patent Appeal. See Note 5.

Purpose of copy immaterial. See Note 9.

Time for copy excluded even if copy not necessary. See Note 7.

Time for copies necessary but not referred to in section can be excluded under S. 5. See Note 8.

Time requisite — Question one of fact. See Notes 10 and 33.

1. Legislative changes.

(1) In sub-section (2) the words "an application for leave to appeal" have been substituted for the words "an application for leave to appeal as a pauper" occurring in the Act of 1877. The effect of the change is to extend the provision to all applications for leave to appeal, such as applications for leave to appeal to the Privy Council, and applications for leave to appeal in insolvency matters.[1] The decisions under the Act of 1877 holding that the section does not apply to applications for leave to appeal to the Privy Council are no longer law.[2]

(2) Under the Act of 1871, only the time for obtaining a copy of the *decree* could be excluded.[3] Under the later Acts, time requisite for obtaining copies of the decree *and judgment* can be excluded in computing the period of limitation for an appeal or application for review.

2. Scope of the section.—As has been seen in Note 2 to S. 6, the scheme of the Act is that, as a general rule, suits and other proceedings instituted after the lapse of the period prescribed by the first schedule should be barred, subject to several classes of exceptions recognized by the various sections in the body of the Act. One of such classes is that which provides for excluding certain periods in computing the period of limitation prescribed.

Section 12 — Note 1

[1] ('15) 2 AIR 1915 All 335 (336) : 38 All 82 : 31 Ind Cas 906 (DB), *Ram Sarup* v. *Jaswant Rai*.
[*See* ('95) 1895 Pun Re No. 33, *Mt. Moti Begam* v. *Mt. Satara Begam*. (Application for leave to appeal as pauper.)]

[2] ('06) 28 All 391 (392) : 1906 All W N 55 : 3 All L Jour 165 (DB), *Shib Singh* v. *Gandharp Singh*.
('78) 1 All 644 (646) (DB), *Jawahir Lal* v. *Narain Das*. (Spankie, J., dissenting.)
('95) 19 Bom 301 (302) (DB), *Moroba Ramchandra* v. *Ghansham Nilkant*.
('92) 15 Mad 169 (169) (DB), *Anderson* v. *Periaswamy*.
('87) 10 Mad 373 (374) (DB), *Lakshmanan* v. *Periaswamy*.

[3] ('75) 24 Suth W R 105 (105, 106) : 15 Beng L R 272 (FB), *Jagarnath Singh* v. *Shewrattan Singh*. (But Court may admit after limitation if it finds there is sufficient cause.)
('74) 21 Suth W R 308 (309) : 15 Beng L R 273 (Note), *Horil Pattuck* v. *Bhowaneeram*. (Appellant cannot claim to deduct as of right time spent in obtaining copy of judgment.)

This section is the first of the five sections (namely 12 to 16) which deal with the exclusion of time in reckoning the period of limitation, and provides for the exclusion of —

(1) the day from which the period of limitation is to be reckoned — sub-section (1). See Note 3.

(2) the time requisite for obtaining copies of certain documents in certain cases — sub-sections (2) to (4). See Note 4.

This section is one of the sections which, by virtue of S. 29 sub-s. (2), apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, in so far as and to the extent to which they are not expressly excluded by such special or local law.

The section does not apply to proceedings in foreign Courts inasmuch as the Act itself extends only to British India.[1]

3. Sub-section (1). — The word "from," as a general rule, excludes the day from which the time is to be reckoned except where the context requires the contrary rule to be adopted.[1] This rule is applicable whenever time has to be computed from a day specified, whether such time is fixed for the performance of contracts or is prescribed by law for the doing of an act or for the institution of proceedings in Courts of law. In *Webb* v. *Fairmaner*,[2] where goods were sold on the 5th of October to be paid for in two months from the date of sale, it was held that in computing the period of two months the 5th of October should be excluded and that an action for the price could not be commenced until after the expiration of the 5th of December. Baron Parke, in delivering the judgment in the case, relied on the observations of Sir W. Grant, M. R., in *Lester* v. *Garland*,[3] to the following effect :

> "Upon the technical reasoning, I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and, therefore, the act cannot properly be said to be passed until the day is passed."

The learned Baron also observed as follows :

> "So also, in *Pellew* v. *Inhabitants of Wonsford*,[4] the time was held to be exclusive; and a very reasonable rule was laid down by Lord Tenterden, which is a very good test to apply, viz., by reducing the time to one day, in which case the

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Note 2

[1] ('27) 14 AIR 1927 Lah 200 (208) : 8 Lah 54 : 102 Ind Cas 523, *Hari Singh* v. *Mahomed Said.* (8 Ind Cas 645 and A I R 1925 Nag 321 relied on.)

Note 3

[1] Wharton's Law Lexicon.

[2] (1838) 3 M & W 473 (477) : 6 D P C 549 : 7 L J Ex 140 : 49 R R 690 (691, 692, 693).

[3] (1808) 15 Ves 248 (257) : 10 R R 68.

[4] (1829) 9 B & Cr 134 (143, 144) : 7 L J (O S) M C 84 : 4 M & Ry 130.

party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at all in which to give notice."

As to the computation of time generally in matters dealt with in the Acts of the Legislature, S. 9 of the General Clauses Act, 1897, adopts the above mentioned general rule as follows :

> "In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from' and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

Sub-section (1) of S. 12 of this Act is also based upon the said general rule and applies to *suits*, *appeals* and *applications* referred to in the Act. Thus, where time is to be computed from the date of the cause of action, the day on which such cause of action arises is to be excluded.[5] If, in respect of a cause of action, there is an acknowledgment within the meaning of S. 19 of this Act, the day of the acknowledgment is to be excluded.[6] See also the undermentioned cases.[7]

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[5] ('73) 19 Suth W R 94 (94) (DB), *Durshun Lall Sahoo* v. *Asmutoonnissa.*
(1865) 4 Suth W R 105 (105) (DB), *Rumonee Soonduree Dossia* v. *Puncha Nun Bose.*
('87) 10 Mad 292 (294) (DB), *Ganapati* v. *Sitharama.*
('71) 6 Beng L R 292 (295), *Moonshi Abdul Ali* v. *Tarachand Ghose.*
('25) 90 Ind Cas 827 (828) (Cal) (DB), *Kumud Charan Roy* v. *Sambhu Chandra.*
('69) 4 Mad H C R 409 (410), *Chinna Comarappa Setti* v. *Ramaswamy Setti.*
[*See also* (1892) L R 1 Q B 161 (164) : 40 W R (Eng.) 63 : 65 L T 677 : 56 J P 262 : 61 L J M C 63, *Radcliffe* v. *Bartholomew.* (Day on which offence was committed to be excluded in computing time within which complaint to be made.)]
[But see (1864) 1864 Suth W R F B 45 (46) : Marsh 138 : 1 Hay 301 (FB), *Hurro Soonderee Debee* v. *Kally Mohun.*]

[6] ('23) 10 AIR 1923 Nag 143 (143) : 71 I. C. 556, *Jainarayan Bapu* v. *Vithoba.* See also Note 37 to S. 19.

[7] ('38) 25 AIR 1938 Bom 447 (447) : I L R (1938) Bom 734 : 178 Ind Cas 78, *Ramachandra Govind* v. *Laxman Savlaram.* (Judgment-debtors asked to deposit money within fifteen days from certain date—That date has to be excluded—Uniform interpretation to be given to judicial order and to statute.)
('04) 31 Cal 745 (751) (DB), *Upendra Chandra Singh* v. *Mohri Lal Marwari.* (Mortgage bond on 17-3-1899 stipulating for payment within six months—*Held* that in reckoning the period of six months date on which bond was executed must be excluded.)
('85) 1885 Bom P J 251 (DB), *Waman* v. *Mahadu.* (In computing limitation for suit on bond, date specified for payment cannot be excluded — Decision is not right in view of the clear language of the section.)
('88) 12 Bom 617 (619) : 13 Ind Jur 270 (DB), *Venkubai* v. *Lakshman.* (Bond payable in two years—Day of bond to be excluded in reckoning two years.)
('76) 1876 Pun Re No. 38, *Dulla Mall* v. *Bolaki.* (Stipulation to pay in one year.)
('76) 24 Suth W R 463 (464) (DB), *Ramchurn Dey* v. *Inna Sheik.* (In computing limitation for suit on bond, day specified for payment is to be excluded.)
('69) 6 Bom H C R A C 51 (53) (DB), *Lakshuman Sakharam* v. *Ranu Sidoji.* (Date on which contract is made is to be excluded.)
('68) 3 Agra H C R 319 (319) (DB), *Muhtab* v. *Ramdayal.* (Date of bond to be excluded in computing time for its performance.)
('69) 4 Mad H C R 330 (331) (DB), *In re Palaniandi Pillay.* (Day mentioned in bond for re-payment—Exclusion of day.)
('24) 11 AIR 1924 Lah 709 (710) : 78 I. C. 87 (DB), *Akhtar Beg* v. *Haq Nawaz.* (Where cause of action arose on 17-2-13 in the case of breach of contract not in writing and registered, a suit filed on 17th February 1916 is in time.)

Section 12
Note 4

4. Sub-sections (2) to (4)—Applicability to proceedings not referred to in the Act. — Sub-sections (2) to (4) apply only to one or some of the following proceedings[1]:

(1) appeals

(2) applications for leave to appeal

(3) applications for review of judgment

(4) applications to set aside an award.

Having regard to the words of the Preamble to this Act, namely, "Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts," it is clear that this section directly applies only to the applications and appeals *referred to in the Act.*[2] Thus, the word 'appeal' will refer

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('12) 18 Ind Cas 574 (575) : (1912) 1 Upp Bur Rul 146, *Nga Po Yin* v. *Mi Shan Nu.* (Pronote of 7th May 1907—Time commences to run on the expiration of the 7th May 1907.)

('71) 6 Beng L R 292 (295), *Abdul Ali* v. *Tarachand Ghose.* (Date of execution of promissory note to be excluded.)

('22) 9 AIR 1922 Nag 261 (262) : 69 Ind Cas 527, *Narayan Patel* v. *Abdulgani.* (Suit under S. 160, C. P. Land Revenue Act.)

('78) 2 Bom 673 (675) (DB), *V. K. Gujar* v. *V. D. Barve.* (Application for restitution—Day from which period is to be reckoned should be excluded.)

('74) 22 Suth W R 68 (68) (DB), *Kasheenath Shaha* v. *Jogendra Nath Baboo.* (The day on which the order under S. 246, Civil Procedure Code, 1859, was passed must be excluded in computing the period of year allowed by that section.)

(1864) 1864 Suth W R Gap 321 (321) (DB), *Petumber* v. *Kuroona Moyee.* (Do.)

(1865) 4 Suth W R Act X Rul 30 (30) (DB), *Radha Monee* v. *Bungshee Mohun.* (Suit to set aside an order—Day on which order was passed must be excluded.)

('72) 18 Suth W R 454 (454) (DB), *Bijoy Gobind Deb* v. *Muddin Ram Pal.* (Application for retrial of suit—Date of dismissal of suit to be excluded.)

('27) 14 AIR 1927 Bom 633 (635) : 106 Ind Cas 36 : 52 Bom 126, *In re Hyderbhai.* (Computation of twenty-one days under S. 9, Presidency Towns Insolvency Act, from date of attachment—Date of attachment should be excluded.)

('83) 13 Cal L R 153 (156), *Deb Narain Singh* v. *Ishan Chunder Malo.* (Date on which money became due on bond to be excluded.)

('68) 10 Suth W R 5 (5) : 1 Beng L R (S N) 1a (DB), *Braja Behari* v. *Kamal Ray.* (In computing the period of three years under S. 20, Act XIV of 1859, day on which application is made must be excluded.)

('77) 2 Cal 336 (340) (FB), *Dhonessur Kooer* v. *Roy Gooder Sahoy.*

[*See* ('12) 13 Ind Cas 900 (901, 902) (Cal) (DB), *Gopal Lal* v. *Bahorni.* (Order to pay deficit court-fee within a week — Date of order to be excluded when computing period.)

('80) 6 Cal 325 (328) (FB), *Kashikant Bhuttacharji* v. *Rohinikant Bhuttacharji.*]

Note 4

[1] ('32) 19 AIR 1932 All 598 (599) : 54 All 282 : 143 Ind Cas 111, *Kashi Parshad* v. *Notified Area, Mahoba.* (Section does not apply to application under Land Acquisition Act.)

('26) 93 Ind Cas 1023 (1023) (Lah), *Mohan Lal* v. *Sher Muhammad Khan.* (Application under O. 9, R. 9 Civil Procedure Code — Time spent in obtaining copy of order dismissing suit for default cannot be excluded.)

('96) 18 All 215 (219) : 1896 All W N 39 (DB), *Wall* v. *Howard.* (Proceeding under S. 214, Companies Act, 1882, not being either an appeal or application.)

[2] ('17) 4 AIR 1917 Low Bur 17 (17, 18) : 38 I. C. 563, *K. Hill* v. *M. M. Greenberg.* (Application not referred to in the Act at all is not governed by the Act and consequently by Section 12.)

to appeals referred to in the Act and will include appeals from the original side of the High Court which are dealt with in Arts. 151 and 156 of the first schedule.[3] Appeals from *appellate* side of the High Court are not dealt with by this Act, and are not directly governed therefore by S. 12. But the section applies to *criminal* appeals.[3a] An application for leave to appeal in *forma pauperis* is an application for leave to appeal and will be governed by this section.[4] An application for *revision* is not an application for which any limitation is provided for in this Act (Art. 181 being held inapplicable to such applications), nor is it an application of the kind specified in the section. But as a matter of practice, in computing the period fixed by the practice of the High Court for such applications, the time taken for obtaining a copy of the order sought to be revised is excluded.[5] The Madras High Court has held that the term 'appeal' in the section should be liberally construed and will include a proceeding in the nature of a revision petition.[5a]

Where a decree for pre-emption fixed a period for the plaintiff's depositing an amount into Court, it was held that the plaintiff could not claim to extend the time for the deposit on the ground that it was necessary to obtain a copy of the order and that the time spent in obtaining it should be excluded.[6]

5. Applicability of sub-sections (2) to (4) to proceedings under special or local laws. — Sub-section (2) of S. 29 makes this section, among others, applicable for the purpose of determining the period of limitation prescribed by any special or local

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('95) 18 Mad 484 (485) (DB), *Thurai Rajah* v. *Jainilabdeen Rowthan.* (Application to declare appeal admitted to Privy Council is not application for leave to appeal—Section 12 does not apply.)

[3] ('28) 15 AIR 1928 P C 103 (103) : 109 Ind Cas 1 : 6 Rang 302 : 55 Ind App 161 (PC), *Jijibhoy N. Surty* v. *T. S. Chettiyar Firm.* (Assumed.)

('22) 9 AIR 1922 P C 352 (352) : 49 Ind App 307 : 68 Ind Cas 900 : 49 Cal 999 (PC), *Pramatha Nath Roy* v. *William Arthur Lee.* (Do.)

('35) 22 AIR 1935 Rang 65 (66, 67) : 12 Rang 525 : 154 I. C. 852 (FB), *Mackenzie and Co., Ltd.* v. *Ah Win.* (Time for copy of decree can be allowed.)

[3a] ('92-96) 1 Upp Bur Rul 129 (129), *Nga Po Thaung* v. *Queen-Empress.*

('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi* v. *Queen-Empress.*

[4] ('23) 10 AIR 1923 Lah 684 (684) : 77 Ind Cas 908, *Ashraf Ali* v. *Rameshwar Nath.* (The petitioner in computing the period prescribed under Article 130 is entitled to deduct the time taken in obtaining copies of the judgment and decree appealed against.)

[*See* ('09) 4 Ind Cas 896 (897) : 1909 Pun Re No. 94 (DB), *Hari Singh* v. *Gurbakhsh Singh.* (So assumed.)]

[5] ('34) 21 AIR 1934 Pesh 9 (10) : 147 Ind Cas 1138 (DB), *Sainditta Ram* v. *Chhata Ram.* (Revision against appellate order—Time necessary for obtaining copies of trial Court's judgment is not excluded.)

[*See* ('06) 1906 Pun L R No. 146, p. 481 (481) : 1907 Pun W R No. 74, *Mehar Singh* v. *Gurbachan.* (Copy of judgment or decree not necessarily to be filed in Court.)]

[5a] *See also* ('41) 28 AIR 1941 Mad 589 (590) : (1941) 1 Mad L Jour 540 (542, 543), *Standard Type Foundry* v. *Venkataramaniah.* (Section applies to application under S. 73 of Madras Village Courts Act, I of 1889 to the District Munsif to set aside decree of Village Panchayat Court—A I R 1937 Mad 385 (FB) followed.)

[6] ('83) 1883 All W N 4 (5), *Karam Khan* v. *Nathan Khan.*

('81) 1881 All W N 165 (166), *Disa Singh* v. *Juala Singh.*

law, unless its applicability is expressly excluded by such law.[1] This however, does not mean that every provision of the section will necessarily apply to every case under the special or local law, irrespective of the question whether the particular sub-section sought to be applied is *in terms* applicable to such a case. Where, therefore, the section is applicable by virtue of section 29 to a special or local law, but the application in respect of which the limitation is sought to be computed is not one of the applications referred to in sub-sections (2) to (4) of this section, the time spent in getting copies cannot be excluded, in making such computation. Thus, the Provincial Insolvency Act is a special law to which S. 12 is applicable by virtue of S. 29, but an application under S. 68 of that Act is neither an appeal, nor an application for review, nor an application for leave to appeal, nor an application to set aside an award within the meaning of sub-ss. (2) to (4) of this section. Consequently, no period can be deducted for obtaining copies, in computing the period of limitation prescribed by that Act for such application.[1a] On similar grounds it has been held that in computing the period of limitation for an application under S. 18 of the Land Acquisition Act, 1894, the time taken to obtain a copy of the Collector's order (called the award) cannot be deducted.[2]

It has also been held by the High Court of Allahabad on the same grounds that the time spent in obtaining copies of the order passed under S. 66, sub-s. (2) of the Indian Income-tax Act, 1922, cannot be deducted in computing the limitation for an application under S. 66, sub-s. (3) of that Act.[3] The High Court of Lahore has, however, without adverting to the terms of this section, allowed such a deduction.[4] According to the High Court of Patna, S. 29 makes this section applicable to "*any* suit, appeal or application" for which a period of limitation is prescribed by any special or local law, and

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Note 5

[1] *See* ('39) 26 AIR 1939 All 403 (408) : ILR (1939) All 647 : 183 I. C. 242 (FB), *Durag Pal Singh* v. *Pancham Singh.* (The rules as to computation of period of limitation laid down in Part III of the Act are not intended by the Legislature to apply only to periods of limitation prescribed by the schedule but apply also to periods of limitation provided for by other enactments.)

[1a] ('15) 2 AIR 1915 Mad 360 (360) : 25 Ind Cas 610 (DB), *Duraisamy Iyengar* v. *Minakshi Sundara Iyer.* (A case under S. 22 of the Provincial Insolvency Act, III of 1907 which corresponds to S. 68 of Act V of 1920.)

[2] ('32) 19 AIR 1932 All 598 (599) : 54 All 282 : 143 Ind Cas 111, *Kashi Prasad* v. *Notified Area of Mahoba.*

('04) 1904 Pun Re No.79 : 1904 Pun L R No.133, *Bhagwan Das* v. *Collector of Lahore.*

('27) 14 AIR 1927 Lah 858 (859) : 9 Lah 244 : 104 Ind Cas 397 (DB), *Nafisuddin* v. *Secretary of State.*

[But see ('26) 13 AIR 1926 Rang 135 (136, 137) : 96 Ind. Cas. 110, *H. N. Burjorjee* v. *Special Collector of Rangoon.* (Section 29 of the Limitation Act as amended in 1922 was held to extend S. 12 to such an application — Submitted not correct.)]

[3] ('31) 18 AIR 1931 All 673 (673) : 133 Ind Cas 621 : 53 All 684 (DB), *Gulab Chand Chotey Lal, In re.*

[4] ('29) 16 AIR 1929 Lah 170 (170) : 117 Ind Cas 881 (DB), *Md. Hayat Haji Muhammad* v. *Commissioner of Income-tax, Punjab and N. W. F. P.*

though the section is in terms not applicable, the principle of the section applies to the case referred to above; hence the deduction must be allowed.[5] The High Court of Rangoon has, in a similar case, allowed such a deduction on *general principles*, and not upon any consideration of this section or of S. 29.[6] It is submitted that the Allahabad view is correct on principle.

The Madras High Court has held that the term "appeal" should be interpreted liberally and even a proceeding in the nature of a revision petition should be treated as an "appeal" for the purpose of this section. On this view it has held that an application to a District Munsif under S. 73 of the Madras Village Courts Act (I of 1889) to set aside a decree passed by a Village Panchayat Court is an "appeal" for the purpose of this section and that the time requisite for obtaining a copy of the decree sought to be set aside should be deducted in computing the period of limitation for the application.[7]

It has been seen in Note 4 that the section does not directly apply to appeals from the appellate side of the High Court. As to whether the section will apply to such appeals by virtue of S. 29, see Note 6 under section 29.

6. Exclusion of day of pronouncing judgment. — The date of the delivery of the judgment must be excluded[1] even though that day happens to be a holiday.[2]

When the date of the judgment is duly communicated to the pleaders for the parties, the limitation for appeal commences from the date of the judgment notwithstanding the absence of either the party or the pleader at the time of the delivery of the judgment.[3] But where the Judge signs the judgment on a particular date but does not pronounce it in accordance with the law of procedure and the party comes to know of the fact of the signing of the judgment only on a subsequent date, the latter date must be deemed to be the date of the pronouncing of judgment and limitation does not begin to run earlier.[4]

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[5] ('30) 17 AIR 1930 Pat 14 (19) : 9 Pat 172 : 122 Ind Cas 810 (DB), *Mohanlal Hardeo Das* v. *Commissioner of Income-tax, Bihar and Orissa.*

[6] ('28) 15 AIR 1928 Rang 152 (153) : 110 Ind Cas 601 : 6 Rang 175 (DB), *Ramanatha Reddiar* v. *Commissioner of Income-tax.*

[7] ('41) 28 AIR 1941 Mad 589 (590) : (1941) 1 Mad L J 540 (543), *Standard Type Foundry* v. *Venkataramaniah.* (AIR 1937 Mad 385 (FB) followed.)

Note 6

[1] ('85) 1885 All W N 257 (257), *Damru* v. *Murdan.*
('70) 13 Suth W R P C 17 (18) (PC), *In re Ramanoogra Narain.* (Appeal to Privy Council—Date of decree appealed from to be excluded.)
('26) 94 Ind Cas 121 (121) (Nag) (DB), *Kutubuddin* v. *Gulam Rabbani.* ("Pronounced"—Whole judgment need not be read out.)
(1900) 10 Mad L Jour 398 (400), *Ganne Kotappa* v. *Venkataramiah.* (Word 'from' in S. 69 of Act VIII of 1865 means 'after'.)

[2] ('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 Ind Cas 67 (DB), *Subramanyam* v. *Narasimham.* (Judgment delivered on first day of Christmas vacation.)

[3] ('27) 14 AIR 1927 Lah 59 (59) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co.* v. *Ram Sarup-Mahru Mal.*
('10) 8 Ind Cas 398 (399) : 34 Mad 151 (DB), *Secretary of State* v. *Gopisetty.* (Decision under Madras Surveys and Boundaries Act published by communication to parties—Date of communication is starting point for limitation.)
See also Note 3 to Art. 152.

7. Exclusion of time for copies. — Sub-sections (2) to (4) provide that the time requisite for obtaining the copies of the documents referred to therein shall be excluded in computing the period of limitation. The reason for the exclusion is to enable the appellant or the applicant, as the case may be, to have sufficient time to *consider the terms of the decree, judgment or order* before hurrying into a further proceeding in respect of it. In *Jijibhoy N. Surty* v. *T. S. Chettiyar*,[1] where the reason of the rule in sub-ss. (2) and (3) came to be discussed, their Lordships of the Privy Council observed as follows:

> "The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt, when the case does not come from up-country, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says,[2] the Legislature may not wish him to hurry to make a decision till he has well considered it."

It was accordingly held by their Lordships in *Jijibhoy's case*[3] that the time spent in obtaining copies of the judgment and decree must be excluded in computing the period of limitation for an appeal, even though such copies need not, according to the rules of the High Court, accompany the memorandum of appeal.

Their Lordships in the above case were dealing with the exclusion of time spent in obtaining copies for a *memorandum of appeal*. But the reasoning will apply also to *all* proceedings referred to in sub-ss. (2) to (4) of the section.[4] Thus, the fact that a review

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4. ('38) 25 AIR 1938 Lah 707 (708) : 182 Ind Cas 108, *Mahomed Zaman* v. *Hans Raj Shah*. (Court delivering judgment without having previously fixed date for the same—Defendant being absent, judgment informed to his counsel on some later day—Limitation for appeal runs from the later day.)

('23) 10 AIR 1923 Pat 129 (130) : 1 Pat 771 : 75 Ind Cas 879 (DB), *Sagarmal Marwadi* v. *Lachmi Saran Msssir*.

See also Note 3 to Art. 152 and Note 5 to Article 156.

Note 7

1. ('28) 15 AIR 1928 P C 103 (105) : 109 I C 1 : 6 Rang 302 : 55 I A 161 (PC).

2. ('95) 17 All 213 (216) : 1895 All W N 61 (FB), *Wajit Ali* v. *Nawal Kishore*.

3. ('28) 15 AIR 1928 P C 103 (105, 106) : 109 Ind Cas 1 : 6 Rang 302 : 55 Ind App 161 (PC), *Jijibhoy N. Surty* v. *T. S. Chettiar Firm*. (Reversing AIR 1927 Rang. 20.)

4. ('41) 28 AIR 1941 Mad 589 (590) : (1941) 1 Mad L J 540 (543), *Standard Type Foundry* v. *Venkhtaramaniah*. (Application under S. 73 of Madras Village Courts Act, 1 of 1889, to District Munsif to set aside decree of Village Court — Time required for obtaining copy of decree should be excluded although S. 73 does not require a copy of the decree to be filed along with the application. — *Note*: Such application was held to be an "appeal" for the purpose of the section.)

('34) 21 AIR 1934 All 367 (368) : 148 I. C. 290 : 56 All 591 (DB), *Gouri Shankar* v. *Kashi Nath*. (Review application — Time spent in obtaining copy of judgment to be excluded.)

[But see ('35) 22 AIR 1935 Rang 184 (185): 156 Ind Cas 733, *V. E. A. Chettiar Firm* v. *Karuppan Chettiar*. (A petitioner is not entitled to have the time application need not be accompanied by a copy of the judgment[5] or of the decree[6] will not deprive the applicant of his right to exclude the time spent in obtaining such copies in computing the limitation for such application. The contrary view taken in the undermentioned cases[7] is, in view of the Privy Council decision, no longer law.

But the mere fact that the reason is absent in any particular case will not, however, make the maxim *Cessante ratione legis cessat ipsa lex* (the reason of the law ceasing, the law itself ceases) applicable and disentitle a party from claiming to exclude the time requisite for obtaining the copies specified in the section. The reason is that the section enacts the rule of exclusion as a *positive direction*, although its object is to afford a party time to consider whether he will prefer an appeal or make an application.[8] Thus, where the copy of the *judgment* obtained by the party gives all the information necessary to enable him to decide whether he should appeal or not, he is nevertheless also entitled to exclude the time taken in obtaining a copy of the *decree*.[9] On the same principle it would follow that even in cases where a formal and final order is not necessary to be prepared, the party will be entitled to deduct the time taken for obtaining a copy thereof if such an order is *actually prepared*.[10]

The exclusion of any time in computing the period of limitation for a proceeding necessarily implies that such time must begin before

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spent in obtaining a copy, which he has not filed together with his application for review but which he has filed in another case, excluded in computing the period of limitation—Submitted not correct.]

[5] ('34) 21 AIR 1934 All 367 (368) : 148 Ind Cas 290 : 56 All 591 (DB), *Gauri Shankar* v. *Kashi Nath*. (Relying on AIR 1928 P C 103 and 17 All 213.)
('95) 17 All 213 (216): 1895 All W N 61 (FB), *Wajid Ali Shah* v. *Nawal Kishore*.
('21) 8 AIR 1921 Lah 124 (125): 60 Ind Cas 259, *Kanshi Ram* v. *Karam Narain*.
('18) 5 AIR 1918 Mad 418 (418) : 42 Ind Cas 504 (DB), *Ramalinga Annavi* v. *Narayana Annavi*. (17 All 213 and AIR 1917 Cal 320 relied on.)
('20) 7 AIR 1920 Mad 633 (634) : 55 Ind Cas 444 (DB), *Chokkalingam Chetty* v. *Lakshumanan Chetty*.

[6] ('17) 4 AIR 1917 Cal 320 (321) : 35 I. C. 348 (DB), *Gangadhar Karmakar* v. *Shekharbasini Dasya*.

[7] ('99) 1 Bom L R 112 (113) (DB), *Jadhoji* v. *Rajoo*. (Appeal.)
('35) 22 AIR 1935 Lah 341 (341) : 158 I. C. 120 (DB), *Hari Ram* v. *Prem Nath*. (Application for leave to appeal to Privy Council—Time requisite for decree copy held not to be excluded as no copy of decree need be produced with application.)
('97) 20 Mad 476 (478, 479), *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*. (Appeal under S. 69, Madras Rent Recovery Act.)
('72) 17 Suth W R 230 (232) (DB), *Jhubhoo Sahoo* v. *Mt. Jusoda Kooer*.
('79) 2 All 192 (192) (FB), *Fazal Muhammad* v. *Phul Kuar*. (Appeal under Cl. 10, Letters Patent.)

[8] ('28) 15 AIR 1928 P C 103 (105) : 109 I. C. 1 : 6 Rang 302 : 55 I. A. 161 (PC), *Jijibhoy N. Surty* v. *T. S. Chettiar Firm*.

[9] ('35) 22 AIR 1935 All 258 (259) : 157 Ind Cas 170 : 57 All 751 (DB), *Gaekwar, Baroda State Railway* v. *Hobibullah*. (Case of leave to appeal to the Privy Council.) [*See also* ('85) 1885 All W N 257 (257), *Damru* v. *Murdan*. (Though copy is granted on the same day of application for it one day is to be excluded.)]

[10] ('25) 12 AIR 1925 All 419 (419, 420) : 26 Cr. L. J. 961 : 87 I. C. 417 : 47 All 462, *Daulat Ram* v. *Kanhaiya Lal*. (Proceeding under S. 476, Cr. P. C., in a civil Court—Final order separately drawn up in fact—AIR 1920 Pat 844 followed.)

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the expiry of the period of limitation. Hence, as a general rule, in order to entitle an appellant to deduct the period required for obtaining the necessary copies, a proper application for copies must be made within the period of limitation for the appeal.[11] (As to how far this rule is subject to exceptions, see Notes 24 and 25.)

8. In respect of what documents exclusion should be made. — Only that period can be excluded under this section which has been spent in obtaining copies of —

(1) the decree *appealed from* or *sought to be reviewed*,
(2) the judgment *on which* the decree under the appeal or the review is founded,
(3) the award *which is sought to be set aside*.

In computing the period of limitation for an *appeal* or an *application for review*, the time requisite for obtaining *both* a copy of the *judgment* as well as a copy of the *decree*, should be excluded,[1] subject, however, to the obvious qualification that where the periods *overlap*, one of the overlapping periods should be left out of account.[2] In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the *award* only should be excluded.

Time spent in obtaining copies of documents *other* than those referred to above cannot be excluded even though, according to rules

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[11] ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram* v. *Ramchand.*

Note 8

[1] ('38) 25 AIR 1938 Lah 707 (708) : 182 Ind Cas 108, *Md. Zaman* v. *Hans Raj.*
('37) 24 AIR 1937 Oudh 65 (66) : 12 Luck 472 : 165 I. C. 578 (DB), *Lallu Ram* v. *Deputy Commissioner, Kheri.*
('37) 65 Cal L Jour 415 (416), *Girish Chandra Ghose* v. *Narayan Chandra Ghose.*
('36) 165 I. C. 712 (713) (Pesh) (DB), *Muhammad Akbar Khan* v. *Abdul Rahman.* (Provided that the overlapping period is not counted twice over.)
('30) 17 AIR 1930 Nag 113 (116) : 26 Nag L R 66 : 123 I. C. 470 (FB), *Badshah Miyan* v. *Pandurang.* (Days on which both copies were being prepared cannot be doubly excluded — 10 Ind Cas 866 overruled.)
('24) 11 AIR 1924 All 162 (162) : 74 Ind Cas 486, *Kidar Nath* v. *Nanak.*
('25) 12 AIR 1925 All 436 (436) : 87 I. C. 484 : 47 All 509 (DB), *Ramzan Bakhsh* v. *Muhammad Ishaq.*
('24) 11 AIR 1924 Bom 185 (186) : 48 Bom 292 : 87 Ind Cas 93 (DB), *Macmillan & Co. Ltd.* v. *K. & J. Cooper.* (Following 33 Mad 256 & AIR 1917 Cal 619.)
('17) 4 AIR 1917 Cal 619 (619) : 38 I. C. 66 (DB), *Rajani Nath* v. *Kali Mohan Das.*
('26) 13 AIR 1926 Lah 529 (529) : 95 I.C. 302, *Raja Ram* v. *Firm Nanhe Mal.*
('11) 10 Ind Cas 542 (542, 543) (Cal), *Tarabati Koer* v. *Jagdeo Narain.*
('12) 17 I. C. 393 (393) (Mad), *Narasimhulu* v. *Secy. of State.* (Following 33 Mad 256.)
('22) 66 I. C. 23 (24) : 41 Mad L Jour 273 (274), *Velliyammal Bibi* v. *Koolayanna Rowthen.* (Following 33 Mad 256 and 8 Mad L Jour 148.)
('11) 12 I. C. 677 (677, 678) (Cal) (DB), *Sunder Koer* v. *Lala Raghunath Sahai.* (Same period cannot be deducted twice over.)
('98) 8 Mad L Jour 148 (149) (DB), *Raman Chetti* v. *Kadirvalu.* (Except where these two periods overlap each other.)
('04) 28 Bom 643 (644) : 6 Bom L R 920, *Haji Hassan* v. *Noor Muhammad.*
[*See* ('08) 31 Mad 268 (270) : 4 Mad L Tim 77 (DB), *Settappa* v. *Muthia.*
('66) 5 Suth W R Misc 44 (44), *Lal Gopalnath Sahee Deo* v. *Mt. Pudum Koonwur.*]

[2] See cases cited in foot-note 1.

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of the Court, such copies have to be filed along with the appeal or application. Thus, in a *second* appeal the time spent in obtaining copies of the judgment and decree of the *first* Court cannot be excluded in computing the period of limitation for the second appeal.[3] The reason is that no rule of the Court can add to or modify the conditions and limitation laid down in the Act.[4]

The delay necessitated in obtaining copies necessary to be filed along with the proceeding, but which are not referred to in sub-ss. (2) to (4), may, however, be excused under S. 5 of the Limitation Act, where such provision is applicable and there is sufficient cause for excusing it. (See Note 33 to section 5.)

9. Exclusion, where copies are obtained by stranger or for a different purpose. — It is not necessary that, in order to claim the exclusion of time under this section, the application for copies should have been made by the party himself in person.[1] Thus, a party is entitled to use a copy obtained by *another party*[2] or even by a stranger[3] and claim exclusion of the time spent in obtaining that

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3. ('18) 5 AIR 1918 All 389 (390) : 42 Ind Cas 855 : 40 All 1 (FB), *Narsingh Sahai* v. *Sheo Prasad.*
('39) 26 AIR 1939 Lah 378 (379), *Prithi Pal Singh* v. *Hans Raj.* (But having regard to the fact that the appellant had actually made an application for a certified copy of the first Court's judgment before limitation for the second appeal had expired, High Court may allow the time spent in obtaining the copy—A I R 1927 Lah 717 followed.)
('28) 15 AIR 1928 All 416 (416) : 115 Ind Cas 880, *Banke Lal* v. *Bhola Nath.* (But it can be allowed under Section 5.)
('22) 9 AIR 1922 Lah 415 (415) : 72 I. C. 797 (DB), *Gurdit Singh* v. *Charan Das.*
('23) 10 AIR 1923 Lah 461 (461) : 73 Ind Cas 919, *Chuhar Mal* v. *Bira Ram.*
('27) 14 AIR 1927 Lah 717 (717) : 103 Ind Cas 498 (DB), *George Gowshala* v. *Balak Ram.* (Court may allow though the deduction cannot be claimed as of right.)
('27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu Singh* v. *Mangat Rai.*
('21) 8 AIR 1921 All 23 (28) : 43 All 660 : 63 Ind Cas 338 (FB), *Bhairon Ghulam* v. *Ram Autar Singh.* (Under rules of Allahabad High Court a second appeal without copies of first Court's judgment will not be proper presentation—Applicant can take advantage of Section 5.)
('23) 10 AIR 1923 Lah 96 (96) : 68 Ind Cas 777, *Madan Gopal* v. *Malawa Ram.*
('25) 12 AIR 1925 Rang 344 (344) : 3 Rang 310 : 90 Ind Cas 910 (DB), *Maung Po Aung* v. *U Bya.* (Court may in its discretion allow such time.)
('08) 32 Bom 14 (24, 25) : 9 Bom L R 1138, *Chunilal* v. *Dahyabhai.*

4. ('18) 5 AIR 1918 All 389 (390) : 42 I. C. 855 : 40 All 1 (FB), *Narsingh Sahai* v. *Sheo Prasad.*
('27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu* v. *Mangat Rai.*
('08) 32 Bom 14 (24, 25) : 9 Bom L R 1138 (FB), *Chunilal* v. *Dahyabhai.*

Note 9

1. ('34) 21 AIR 1934 Lah 135 (135) : 149 Ind Cas 1127, *Chandu* v. *Mast Ram.*

2. ('20) 7 AIR 1920 Mad 159 (159, 160) : 43 Mad 633 : 56 I. C. 73 (DB), *Aminudeen Sahib* v. *Pyari Bi.* (12 Mad L Jour 385 dissented from.)

3. ('07) 29 All 264 (265, 266) : 4 All L Jour 152 : 1907 All W N 67 (DB), *Ram Kishan Shastari* v. *Kashi Bai.* (Copy obtained by pleader's clerk on his own application—Affirming 1906 All W N 223.)
('14) 1 AIR 1914 Oudh 244 (244) : 23 Ind Cas 209, *Babu Rudra Pratap Singh* v. *Raghuraj Gir.* (Application made by applicant's pleader's clerk—Application not signed by vakil.)

copy. The application can be made through the party's agent (i. e., through the post office where, under the rules, an application through post is allowed), but in such cases, time will be excluded only from the date when the agent actually made the application to the proper officer.[4]

It is not also necessary to show, for the applicability of the section, that the copy was obtained *for the purpose of* the appeal or application in question.[5]

10. "Time requisite," meaning of. — There is no definition of the expression "time requisite" used in this section, but it has been held that it must be understood to mean time *properly and reasonably* required.[1] In *Pramatha Nath Roy* v. *William Arthur Lee*,[1a] their Lordships of the Privy Council observed that "no period can be regarded as requisite under the Act, which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain the order." And in *Jijibhoy N. Surty* v. *T. S. Chettyar*,[2] Lord Phillimore in delivering the judgment of the Privy Council observed as follows:

> "The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required.' It means 'properly required,' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

It follows from the above that the question what is the time requisite for obtaining copies in any particular case is one of fact and must be determined with reference to the facts and circumstances of that case[3] and in the light of the rules, if any, framed on the subject[4]

[See however ('32) 19 AIR 1932 Pat 103 (105) : 11 Pat 40 : 136 I. C. 302 (DB), *Basant Lal* v. *Commissioner of Income-tax.* (Case under Income-tax Act — Section 12 not applicable — Under the policy of the Act, no information could be furnished to a stranger — Copy applied for by stranger — Time not to be excluded — This decision has nothing to do with this section, and rests on special nature of Income-tax Act.)]

[4] ('34) 35 Pun L R 713 (714), *Mehr Ali Beg* v. *Sarwan.* (Time spent by copying agent in getting estimate etc., cannot be allowed.)

('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139 : 26 I. C. 819, *Raghu* v. *Madhgia.*

[5] ('07) 29 All 264 (265, 266) : 4 All L Jour 152 : 1907 All W N 67, *Ram Kishan Shastari* v. *Kashi Bai.*

Note 10

[1] ('40) 27 AIR 1940 Bom 415 (415) : 192 I. C. 275 (DB), *Balappa Tammanna* v. *Dyamappa Bhusappa.*

('38) 25 AIR 1938 Mad 823 (824) : 177 I. C. 33, *Ramaseshayya* v. *Venkatarathnam.*

('38) 25 AIR 1938 Nag 287 (288) : ILR (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai* v. *Indrabahadur Singh.*

('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 I. C. 67 (DB), *Subramanyan* v. *Narasimham.*

[*See also* ('40) 27 AIR 1940 Oudh 173 (174) : 15 Luck 376 : 186 Ind Cas 136 (DB), *Yusuf Ali* v. *Md. Kazim Ali.* (Object of this section is to exclude such time taken in obtaining a copy of a decree as is beyond the control of the appellant.)]

[1a] ('22) 9 AIR 1922 P C 352 (353) : 49 Ind App 307 : 68 I. C. 900 : 49 Cal 999 (PC).

[2] ('28) 15 AIR 1928 P C 103 (106) : 109 I. C. 1 : 6 Rang 302 : 55 Ind App 161 (PC).

[3] ('37) 24 AIR 1937 Bom 162 (164) : 168 Ind Cas 77 : ILR (1937) Bom 443 (FB), *Murlidhar Shrinivas* v. *Motilal.* (Per Beaumont, C. J.)

('17) 4 AIR 1917 All 323 (324) : 34 Ind Cas 204, *Ram Autar* v. *Bhagelu Sahai.*

[4] ('35) 22 AIR 1935 Lah 625 (625) : 160 I. C. 788 (DB), *Naul Mal* v. *Reru Mal.*

and of the practice of the Court.[5] It also follows that the "time requisite" is not always the time *actually* spent in securing the copies.[6] Delay caused by the appellant's carelessness or negligence cannot be considered "time requisite" and cannot be excluded.[7]

But delay by the office or the Court for which the appellant is not responsible, cannot be counted against him and will have to be excluded as being time requisite for obtaining the copies.[8] See also Notes 22 and 23.

Notes 11 to 15 deal with various classes of cases in which the question of the time requisite for copies may arise for decision.

10a. Day of copy application and day on which copy is ready to be excluded. — The date on which the application was made and the date on which copy was notified as ready must both be excluded.[1]

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[5] ('83) 12 Cal L R 541 (545) (DB), *Nobin Chunder* v. *Brojendro Coomar.*

[6] ('40) 27 AIR 1940 Bom 415 (415) : 192 Ind Cas 275 (DB), *Balappa Tammanna* v. *Dyamappa Bhusappa.*
('19) 6 AIR 1919 Lah 103 (104) : 50 Ind Cas 760, *Nur Muhammad* v. *Ram Das.* (Time during which copies lay ready but undelivered cannot be excluded.)
('37) 24 AIR 1937 Bom 64 (65) : 167 Ind Cas 664 : ILR (1937) Bom 421 (DB), *Nemichand Uttamchand* v. *Chaturbhuj Damji.*

[7] ('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati* v. *Bhola.*
('36) 23 AIR 1936 Sind 53 (56) : 29 Sind L R 445 : 163 Ind Cas 30 (DB), *Lachmibai* v. *Doulatram.*
('37) 24 AIR 1937 Bom 64 (65) : 167 Ind Cas 664 : ILR (1937) Bom 421 (DB), *Nemichand Uttamchand* v. *Chaturbhuj Damji.*

[8] ('36) 23 AIR 1936 Lah 120 (122) : 158 Ind Cas 736, *Labhu Ram* v. *Bansi Dhar.* (Delay due to negligence by copying department.)
('40) 27 AIR 1940 Oudh 173 (174) : 15 Luck 376 : 186 Ind Cas 136 (DB), *Yusuf Ali Khan* v. *Mohammad Kazim Ali.*
('14) 1 AIR 1914 Oudh 146 (147) : 25 Ind Cas 26, *Daljit* v. *Ram Rattan.* (Wrong copy given—Correct copy given after some time.)
('23) 10 AIR 1923 Lah 11 (12) : 70 I. C. 299 (DB), *Mt. Chhoto* v. *Mt. Sona Devi.* (Application for copies wrongly rejected—Rejection set aside by appellate Court—Subsequently application granted—Interval must be excluded.)
('26) 13 AIR 1926 Lah 455 (455) : 94 Ind Cas 1055, *Kalian Singh* v. *Fazal Din.*
('36) 23 AIR 1936 Lah 200 (201) : 159 Ind Cas 178, *Rura Mal* v. *Ram Chand.* (Delay owing to erroneous practice of copying department in not receiving deposit at the time of application.)
('36) 23 AIR 1936 Lah 550 (551) : 163 I. C. 223, *Piarelal* v. *Karta Ram.* (Copying department is not agent of public.)
('36) 23 AIR 1936 Lah 693 (694) : 165 I. C. 516, *Mani Singh* v. *Anand Parkash.* [*See also* ('26) 13 AIR 1926 Sind 114 (115) : 91 Ind Cas 406, *Gangaram Ghanshamdas* v. *Girdharimal Chetanmal.* (Time taken to obtain copies—Sum not legally payable, delay in payment of—Period of delay must be excluded—By due diligence, it should not be understood that a party should be ready and willing to pay any sums which are not legally leviable from him — Hence where there had been delay by non-payment of such sum, it was held that the plaintiff was entitled to claim exemption for the period of delay as well.)]

Note 10a

[1] ('39) 26 AIR 1939 Nag 150 (154) : ILR (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna Rajaram* v. *Baijnath Girdharilal.* (Day on which application for copies is filed.)

11. Delay caused by application for copies made to wrong person. — An application for copies must be made to the *proper officer* appointed under the rules to entertain such an application.[1] Time spent in making an application to a wrong person cannot be considered as time requisite for obtaining the copies.

As to who is the proper officer to whom an application ought to be made for copies in District Courts and Subordinate Courts in the Punjab, see the undermentioned cases.[2]

12. Delay caused by defective application for copies. — In order that a party may be entitled to deduct the period required for obtaining copies a *proper* application for copies must be made within the period of limitation.[1] Where an application for copies is defective and has to be returned for correction, the period of exclusion commences only from the date of its re-presentation after due correction, as it is impossible till then for the copying department to comply with the application for copies.[2] Even where the defect arises out of the wrong information supplied by the copying department itself, it has been held that the delay caused thereby in obtaining copies cannot, as of right, be excluded under S. 12, but that it is a matter falling under S. 5.[3]

('38) 25 AIR 1938 Mad 823 (824) : 177 I. C. 33, *Ramseshayya* v. *Venkatarathnam.* (Day on which copy is notified to be ready.)

(1864) 1864 Suth W R Gap 145 (145), *Moharajah Beer Chunder Joobraj* v. *Mohamed Asgur.*

Note 11

[1] ('14) 1 AIR 1914 Nag 60 (61) : 10 Nag L R 139 : 26 I. C. 819, *Raghu* v. *Madhgia.*
('36) 23 AIR 1936 Lah 771 (777) : 17 Lah 429 : 166 Ind Cas 467 (FB), *Kishore Chand* v. *Bahadur.* (AIR 1934 Lah 474 followed; AIR 1935 Lah 625 and AIR 1935 Lah 889 overruled.)

[2] ('36) 23 AIR 1936 Lah 771 (776) : 17 Lah 429 : 166 Ind Cas 467 (FB), *Kishore Chand* v. *Bahadur.* (9 Ind Cas 381, AIR 1928 Lah 16 and AIR 1935 Lah 682 referred to.)
('36) 23 AIR 1936 Lah 123 (123) : 161 Ind Cas 243, *Firm Surjan Das* v. *Firm Dwarka Das.*

Note 12

[1] ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram* v. *Ramchand.*

[2] ('30) 17 AIR 1930 Nag 129 (129, 130) : 121 Ind Cas 647 : 26 Nag L R 149, *Mahomed Khan* v. *Mt. Fatma Bai.*
('26) 91 Ind Cas 425 (426) (Oudh), *Babu Lal* v. *Rampher Singh.* (Defective application returned to party as it did not give date of judgment — Party filing fresh application rectifying defect—Exclusion begins from date of latter application.)
[*See* ('39) 26 AIR 1939 Mad 293 (293) : 189 Ind Cas 320, *Venkatarayulu Naidu* v. *Venkata Rattamma Garu.* (Application for copy of order filed on certain date — Memorandum asking decree to be drafted and copy of it to be furnished filed some days later—*Held*, first application was not one for copy of decree.)
('32) 1932 Mad W N 328 (329), *Poongavana Gramani* v. *Manicka Goundan.* (Copy application returned but not represented — Copies obtained on second application.)
('27) 14 AIR 1927 Lah 59 (59, 60) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co.* v. *Ram Sarup Mahru Mal.*]

[3] ('35) 22 AIR 1935 Nag 109 (110) : 155 I. C. 588, *Balwant Rao* v. *Balmukund.* (Appellant applied for and obtained judgment copy — This copy contained error with respect to the number of the suit — The error was repeated by appellant in his application for decree copy — Hence delay.)

Under rules in some Courts an application for copies has to be accompanied by cash deposit or deposit of copy papers or folios. A defect in complying with this requirement raises a question as to the time requisite for obtaining copies. On this point, see Note 14.

13. Delay caused by separate application for copies of judgment and decree. — It has been seen in Note 8 above that the appellant is entitled to the exclusion of the time taken for copies of both the judgment and the decree. It is, therefore, open to the appellant to make his applications for copies of the judgment and the decree on different dates; but the second application must be within the period of limitation as extended by the first.[1] In such cases, however, if the periods *overlap* each other, one of the overlapping periods alone can be excluded. (See Note 8.)

Illustration.

A decree was passed on the 12th of October. An application for a copy of the decree alone was made on the 18th of October and the copy was obtained on the 19th December. Subsequently, i.e., on the 22nd December, an application for a copy of the judgment was made and the copy was obtained on the 16th of February following. It was held that the period occupied for obtaining both the copies should be excluded, i.e., the period between the 18th October and the 19th December and that between the 22nd December and the 16th February.[2] The

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Note 13

1. ('17) 4 AIR 1917 Cal 619 (619) : 38 Ind Cas 66 (DB), *Rajani Nath* v. *Kali Mohan Das Kapali.* (8 Mad L Jour 148, 33 Mad 256 and 17 Ind Cas 393 relied on.)
('25) 12 AIR 1925 All 436 (436): 87 Ind Cas 484: 47 All 509 (DB), *Ramzan Baksh* v. *Mahomed Ishaq.* (AIR 1920 All 31 not followed.)
('24) 11 AIR 1924 Bom 425 (425, 426): 48 Bom 433 : 87 I. C. 545 (DB), *Timappa* v. *Manjaya.* (Case of two distinct and not overlapping periods.)
('26) 13 AIR 1926 Lah 529 (529): 95 I. C. 302, *Raja Ram* v. *Nanhe Mal Lala Mal.*
('20) 7 AIR 1920 Lah 409 (410) : 54 Ind Cas 879 : 1919 Pun Re No. 163 (DB), *Ali Mahomed* v. *Nathu.* (No overlapping — Separate applications — Application for copy of decree put in before expiry of time for appeal.)
('17) 4 AIR 1917 Lah 287 (288) : 39 I. C. 617 (DB), *Mahomed Amin* v. *Chiragh Beg.* (But in this case it was held that time spent in vernacular copy of decree which was unnecessary could not be excluded.)
('28) 15 AIR 1928 Nag 131 (132) : 106 Ind Cas 57, *Ramachandra Rao* v. *Mayaram.* (Obiter.)
('19) 6 AIR 1919 Nag 136 (137) : 49 Ind Cas 961, *Sheoram* v. *Chintoo.* (Law does not require that both copies must be applied for simultaneously.)
('16) 3 AIR 1916 Nag 116 (117) : 42 Ind Cas 965, *Bagmal* v. *Jamnadas Potdar.*
('15) 2 AIR 1915 Oudh 170 (171) : 28 Ind Cas 366 : 18 Oudh Cas 74, *Din Dayal* v. *Rameshar.* (8 Mad L Jour 148 relied on.)
('24) 11 AIR 1924 Pat 113 (113, 114) : 77 Ind Cas 401 (DB), *Jadunandan Sahay* v. *Hanuman Sahay.*
('36) 23 AIR 1936 Pesh 179 (180) : 164 Ind Cas 1069 (DB), *Gul Rahman* v. *Mt. Zar Jan.* (Copy of decree need not necessarily be applied for within period prescribed by first schedule, provided it is made within period as extended by application for copy of judgment.)
('36) 165 Ind Cas 712 (713) (Pesh) (DB), *Muhammad Akbar Khan* v. *Abdul Rahman.*
[*See* ('37) 24 AIR 1937 Oudh 65 (66) : 12 Luck 472 : 165 Ind Cas 578 (DB), *Lallu Ram* v. *Deputy Commissioner, Kheri.*]
[But see ('20) 7 AIR 1920 All 31 (31, 32) : 42 All 260 : 55 Ind Cas 315 (DB), *Moolraj* v. *Niadar Mal.* (Facts not fully stated in judgment.)]

2. ('09) 4 Ind Cas 301 (302) : 33 Mad 256 (DB), *Selamban Chetty* v. *Ramanadhan.*

fact that this would enable a party to apply for the copy of one record and then after obtaining it to apply for a copy of the other record and thus extend the time, while if he had applied for both the copies together the time requisite would be less, cannot prevail against the express right conferred by this section.[3]

In some cases[4] it has been held that the question of allowing the deduction of the separate periods depends on the facts of each case, that unless the applicant shows sufficient reason why he did not apply for copies of both the records at the same time, only one of the periods is to be allowed and that the separate periods so taken cannot be considered "requisite" for obtaining copies. It is submitted that this view is not correct.

Where copies of the judgment and decree are applied for on the *same day*, the longer of the two periods should be credited to the applicant and he is not entitled to add on to the longer period any time within the *terminus* of the longer period.[5]

14. Delay in furnishing folios, stamps, etc. — Where the rules of Court require that the application should be *accompanied* by a deposit of cash or stamps fixed by rules or estimated by the applicant, the question arises whether an application without such a deposit or with an insufficient deposit prevents running of time.

In some cases[1] it has been decided that the application is not a proper application until the deposit is made or the deficiency is made good. In other cases[2] it has been held that if such an application is accepted without any objection and without demand for the deposit with the application, it must be regarded as a proper application. In the undermentioned case,[3] where an application for copies was first refused not because there was no deposit but because the decree had not been then drafted and signed and the copy was subsequently granted without a fresh application, it was held that the whole period from the date of the application could be excluded.

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[3] ('09) 4 Ind Cas 301 (302) : 33 Mad 256 (DB), *Selamban Chetty* v. *Ramanadhan Chetty*.

('24) 11 AIR 1924 Pat 113 (113, 114) : 77 Ind Cas 401 (DB), *Jadunandan Sahay* v. *Hanuman Sahay*.

('28) 15 AIR 1928 Nag 131 (132) : 106 Ind Cas 57, *Ram Chandra Rao* v. *Mayaram*.

('37) 24 AIR 1937 Bom 162 (164) : 168 Ind Cas 77 : I L R (1937) Bom 443 (FB), *Murlidhar Shrinivas* v. *Moti Lal*. (23 Bom 442 and 20 Ind Cas 537 Overruled.)

('36) 23 AIR 1936 Pesh 179 (180) : 164 Ind Cas 1069, *Gul Rahman* v. *Mt. Zar Jan*.

[4] ('18) 5 AIR 1918 Lah 29 (29, 30) : 48 Ind Cas 31 : 1918 Pun Re No. 100, *Sher Singh* v. *Pem Raj*.

(1865) 2 Suth W R Misc 38 (39), *Baboo Nursingh Narain Singh* v. *Baboo Radhay Singh*. (He must not make unnecessary delay by asking for copies on separate dates.)

[5] ('95) 1895 All W N 101 (102), *Batasi* v. *Hari Das*.

('05) 12 Cal W N 25 (26) (DB), *Bishendut Tewari* v. *Nandan Pershad*. (Per Woodroffe, J.)

Note 14

[1] ('34) 35 Pun L R 713 (714), *Mehr Ali Beg* v. *Sarwan*.

('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139 : 26 I. C. 819, *Raghu* v. *Madhgia*. (Copy application and copying fees sent by post same day—Money-order reaching office later owing to holidays—Application deemed to be made on later date.)

('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas* v. *Manager of Encumbered Estates*. (No allowance can be made for time spent in making deposit.)

('36) 167 Ind Cas 250 (251) (DB) (Lah), *Atma Ram* v. *Ramchand*. (A I R 1934 Pat 4 distinguished.)

('11) 11 Ind Cas 387 (388) (DB) (Cal), *Sri Chandan Bhuya* v. *Haroo Sethi*. (Application is incomplete if it does not accompany sufficient number of folios.)

Under para. 389 of the Oudh Civil Digest, an application must be accompanied by stamped copying papers equal in value to the charge for the preparation of a copy, and it is for the applicant himself to compute the necessary charges. It is not the duty of the department to make the calculation for him but only to check the calculation made by him. A Full Bench of the Oudh Chief Court has accordingly held that where the application for copies was accompanied by an insufficient deposit and the deficiency was supplied after a requisition therefor by the office, the time requisite for obtaining the copy should be computed not from the date of the application but from the date on which the deficiency was made up as the delay in deposit was due to the error of the party.[4]

According to the undermentioned cases,[5] if the amount of deposit is not sufficient, the Court will have to cause the appearance of the applicant and inform him as to how much more money is necessary. If the copying department does not call for the applicant and give him that information, the time during which the copy could not be

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[2] ('36) 23 AIR 1936 Lah 693 (694) : 165 I. C. 516, *Mani Singh* v. *Anand Parkash*.
('36) 23 AIR 1936 Lah 123 (123, 124) : 161 I. C. 243, *Firm Surjan Das* v. *Firm Dwarka Das*.
('36) 23 AIR 1936 Lah 120 (122) : 158 Ind Cas 736, *Labhu Ram* v. *Bansi Dhar*.
('37) 167 Ind Cas 275 (275) : 17 Lah 574 (DB), *Mehtab Ali* v. *Din Mohammad*. (Where the applicant for copies of the judgment and the decree deposits Rs. 5 along with his application and also pays the further sum demanded without delay in accordance with the rules prescribed, the whole period from the date of the application to the date of the supply of the copies must be held to have been 'requisite' for obtaining the copies.)
[*See also* ('72-92) 1872-92 Low Bur Rul 425 (425), *Maung Tha Hnyin* v. *Naramen Chetty*. (Practice of beginning preparation of copies before charges are paid.)]

[3] ('13) 19 Ind Cas 671 (671) : 6 Sind L R 244 (DB), *Manager, Incumbered Estates in Sind* v. *Ganga Ram Bacho Mal*.

[4] ('27) 14 AIR 1927 Oudh 129 (130, 131) : 101 Ind Cas 136 : 2 Luck 447 (FB), *Gudar Pal Singh* v. *Nagishar Bakhsh Singh*. (A I R 1922 P C 352 relied on.)

[5] ('33) 20 AIR 1933 Nag 218 (218, 219) : 145 Ind Cas 742, *Gajpatilal* v. *Mauliprasad*. (A I R 1916 Nag 36 relied on.)
('36) 23 AIR 1936 Lah 550 (550) : 163 Ind Cas 223, *Piare Lal* v. *Karta Ram*.
('97) 3 Cal W N 55 (56) (DB), *Dulali Bewa* v. *Saroda Kinkar Pandit*.
[*See* ('21) 8 AIR 1921 Nag 141 (141) : 61 Ind Cas 889, *Gondaji* v. *Kisan*.
('36) 23 AIR 1936 Lah 670 (671) : 161 I. C. 215, *Abdul Ghani* v. *Maula Baksh*.
('38) 25 AIR 1938 Nag 287 (288) : I L R (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai* v. *Indrabahadursingh*. (Time during which copying is stopped for want of funds should be excluded as time required to get copy of decree, when extra charges are paid without delay — Delay caused by Court giving wrong number should also be excluded.)]

Section 12
Note 14

prepared on account of the deficiency cannot be reckoned against the applicant. If after such information is given to the applicant he is not diligent, the delay of course goes against him.[6]

The rules in Lahore Courts require the applicant to deposit money and folios. Notwithstanding the rules, the Lahore High Court by a Full Bench[7] has held that an application for copies, whether made in person or by post, which bears the necessary court-fee stamp and is addressed to the proper officer, is a valid application even if it is not accompanied by the full cost of preparation and certification of the copy. The time necessary for ascertaining the costs of preparing the copy was taken to be time "requisite for obtaining a copy," provided the deposit was made with due diligence when required by the copying department.

In computing the time for copies the day on which the folios are called for and the day on which they are supplied must be excluded, as time should be computed in whole days and not in hours.[8] Any intermediate delay in supplying folios should go against the appellant.[9] The time occupied in ascertaining the requisite number of folios, however, cannot be deducted.[9a]

Where time is being occupied for obtaining copy of one of the documents, either the decree or judgment, a delay during the same period in supplying folios in respect of the other document cannot be

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6. ('21) 8 AIR 1921 Nag 141 (142) : 61 Ind Cas 889, *Gondaji* v. *Kisan.*
('16) 3 AIR 1916 Nag 36 (37) : 34 I. C. 458 : 12 Nag L R 66, *Lachman* v. *Kalya.*
('19) 6 AIR 1916 Pat 38 (41) : 49 Ind Cas 1000 (DB), *Mt. Bibi Fakhrunissa* v. *Rambhanjan Singh.* (Where a part of the requisite stamped folios alone are supplied on notice and the rest only subsequently, the applicant is not entitled to exclusion of time till folios etc., are fully supplied.)
('16) 3 AIR 1916 Pat 267 (268) : 35 Ind Cas 868 : 1 Pat L Jour 573 (FB), *Ram Asray Singh* v. *Sheonandan Singh.*
[*See* ('38) 25 AIR 1938 Nag 287 (288) : I L R (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai* v. *Indrabahadursingh.* (If the time is wasted because of the appellant's own negligence, that time does not count.)]

7. ('36) 23 AIR 1936 Lah 771 (777) : 17 Lah 429 : 166 Ind Cas 467 (FB), *Kishore Chand* v. *Bahadur.* (A I R 1935 Lah 889 Overruled.)
[*See also* ('36) 23 AIR 1936 Lah 1007 (1008) : 169 Ind Cas 176, *Mt. Ghulam Aishan* v. *Mohammad Sharif.* (Applicant presenting application for copy with insufficient payment for costs—Further demand for deposit made — Delay of two or three days in making necessary deposit—No negligence on applicant's part — Delay construed as time requisite within meaning of this section and hence excused.)]

8. ('09) 2 Ind Cas 359 (361) : 5 Low Bur Rul 15, *Abdulla Kaka* v. *Palaneappa.*

9. ('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati* v. *Bhola.* (Time requisite means time taken by officer in preparing copy.)
('90) 12 All 461 (479) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan-Ullah Khan.*
('68) 9 Suth W R 138 (139), *Chumun Chowdhry* v. *Ali Azim.* (Delay in supply of required "plain paper" will also go against appellant.)
('26) 97 Ind Cas 728 (729) (Cal) (DB), *Mabarek Fakir* v. *Bhuban Mohan Ghose.* (A I R 1922 P C 352 followed.)
[*See* ('35) 157 Ind Cas 181 (181) (DB) (Lah), *Baij Nath* v. *Gapu Ram.*]

9a. ('86) 12 Cal 30 (33) (DB), *Gunga Das Dey* v. *Ramjoy Dey.*

counted against the appellant as the period of delay is already being counted in his favour.[10]

Where the day or days immediately after the date of notice for requisite folios happen to be holidays, such days will be excluded.[11] But the applicant must deposit the papers on the re-opening day.[12] If, however, arrangements are made for receiving the folios or printing charges during the holidays and this fact is duly notified, the applicant is not entitled to wait till the re-opening of the Court for making the requisite supply.[13]

In a Patna case[14] the decree appealed from was passed on 17-9-1919. The appellant applied for copies and the requisite folios were notified on 18-9-1919. The applicant supplied them on 19-9-1919 but they were short of the required number. The Court being closed for holidays re-opened on 27-10-1919, and on that date the deficiency in the folios was made up by the applicant. The High Court held that the thirty days time for appeal having expired during the holidays, the appellant was entitled to file an *application* for copies on the re-opening date, i. e., 27-10-1919 and that therefore he could very well supply the deficient folios on the re-opening day, thus keeping alive his application and claim the exclusion of the days of the application of the notice for folios and also 27-10-1919. It is submitted that the view that the period of limitation for the appeal is *extended* upto the re-opening day is not correct. (See S. 4 Note 10.) See Note 24 for fuller discussion of the effect of the intervention of holidays after judgment.

Where after making an application no delay has been caused by the applicant, the whole period between the date of the application

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10. ('22) 66 Ind Cas 23 (24) (Mad) (DB), *Valliammal Bibi* v. *Koolayanna.*

11. ('31) 18 AIR 1931 Cal 731 (732) : 58 Cal 969 : 134 Ind Cas 895, *Mahomed Ismail Chowdhury* v. *Kalicharan Singh.* (Calcutta High Court General Letter No. 16, Cls. 1 and 2.)

('13) 21 Ind Cas 192 (192) (Mad) (DB), *Ramasamy Chetty* v. *Ramanatha Chetty.* (Following 12 All 461.)

('03) 8 Cal W N 141 (142) (DB), *Nawab Syed Amir Hossain* v. *Tulsi Dass.* (Folios were called for during holidays and would not be received during the holidays.)

The same principle will apply to supplying information necessary for drawing up the copies :

('36) 23 AIR 1936 Nag 289 (289, 290) : 166 Ind Cas 965 : I L R (1938) Nag 342, *B. K. Rai* v. *Thunman Singh.* (A I R 1921 Nag 141 relied on.)

12. ('21) 8 AIR 1921 Nag 141 (141) : 61 Ind Cas 889, *Gondaji* v. *Kishan.*

13. ('19) 6 AIR 1919 Mad 581 (582) : 50 Ind Cas 518 (DB), *Kadir Moideen Sahib* v. *Abu Baker Sahib.* (Arrangements to 'deliver' copies during vacation imply arrangements to receive printing charges, etc.)

14. ('20) 7 AIR 1920 Pat 818 (819) : 60 Ind Cas 493, *Farzand Ali* v. *Abdul Hamid.* [*See also* ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram* v. *Ram Chand.* (Judgment delivered on 31-8-1933—Plaintiff applying for copy of judgment and decree on same day but failing to pay copying fee—Court closed from 1-9-'33 and re-opened on 2-10-'33 — Appellant depositing the necessary copying fee on 4-10-'33—*Held* that owing to the intervention of the holidays, the last day of limitation for the appeal was 2-10-'33 and that as the copying fee was not paid within that date, the appeal was time barred—It is submitted that the view that limitation is extended upto the reopening day is not correct—See S. 4 Note 10.)]

and the date of the copy being ready for delivery must be excluded.[15]

Where an application for copies is made with the requisite folios and stamps and the applicant is informed that the copies will be ready on a particular day, there is no further duty on the applicant or his lawyer to go to the Court on intervening days to ascertain from the register whether further stamps or folios are necessary. Where it is notified by a mere entry in the register that further stamps and folios are required but the applicant comes to know of it only on the date originally fixed for the delivery of the copies, the delay in supplying the stamps and folios ought not to be counted against him.[16]

15. Delay in taking delivery of copy. — The date on which the copy is ready should be excluded as time requisite for obtaining it.[1] But any delay of the party subsequent to that date in taking delivery of the same is not time "requisite for obtaining a copy" and consequently the time between the date on which the copy is ready and the date on which it is actually taken delivery of by the party cannot be excluded.[2]

In the absence of a notice or a communication to the party of the date on which the copies are ready for delivery, the delay in taking delivery cannot be counted against the appellant.[3] Where under

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15. ('17) 4 AIR 1917 Pat 701 (701) : 37 Ind Cas 211 : 1 Pat L Jour 163, *Kesho Prasad Singh Bahadur* v. *Harbans Raut.*

('19) 6 AIR 1919 Pat 38 (38) : 49 Ind Cas 1000 (DB), *Mt. Bibi Fakhrunissa* v. *Rambhanjan Singh.*

[*See* ('70) 13 Suth W R 245 (246, 247) : 4 Beng L R App 84 (DB), *Secy. of State* v. *Mutusawmy.*]

16. ('41) 28 AIR 1941 Cal 378 (379), *Jamadar Singh* v. *Sheikh Naiyab Ali.*

Note 15

1. ('39) 26 AIR 1939 Bom 46 (46) : 179 Ind Cas 645 (DB), *Raichand Chunilal* v. *Rahi Nana.*

('33) 20 AIR 1933 Nag 362 (363) : 147 Ind Cas 1113, *Shiva* v. *Dashrath.* (A I R 1914 Nag 60 relied on.)

('15) 2 AIR 1915 Nag 117 (118) : 29 Ind Cas 833 : 11 Nag L R 104, *Kashibai* v. *Kannoo.*

('37) 24 AIR 1937 Oudh 26 (27) : 165 Ind Cas 269 : 12 Luck 531, *Sukhnandan Prasad Shukla* v. *Raja Ahmed Ali Khan.*

2. ('19) 6 AIR 1919 Lah 103 (104): 50 Ind Cas 760, *Nurmuhammad* v. *Ram Das.* (Not time actually spent but time requisite can be deducted.)

('22) 9 AIR 1922 Lah 423 (423) : 67 Ind Cas 478, *Bawa Singh* v. *Thakur Singh.*

('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tolaram* v. *Jaffer Khan.* (There is no rule in Sind Courts civil circular for giving notice of copies being ready for delivery—Party must be diligent.)

('14) 24 Ind Cas 977 (977) : 7 Sind L R 201, *Allahdadshah* v. *Mukhdum Amin.*

('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati* v. *Bhola.*

('90) 4 C P L R 188 (189), *Mt. Kaveri Bai* v. *Mt. Chandra Bhagabai.*

('81) 9 Cal L R 293 (294) (DB), *Gopal Chunder Roy* v. *Brojo Behary Mitter.*

('23) 10 AIR 1923 Lah 696 (696) : 73 Ind Cas 447, *Ram Sarup* v. *Zorawar Mal.*

('30) 17 AIR 1930 Rang 209 (209) : 127 Ind Cas 379, *Hatin* v. *Osi Ulla.*

[*See* ('11) 9 Ind Cas 607 (607) (Lah), *Mohan Ram* v. *Md. Khuda Dad Khan.*]

3. ('34) 21 AIR 1934 Lah 135 (136) : 149 Ind Cas 1127, *Chandu* v. *Mast Ram.* (Limitation to be reckoned from date of communication.)

the rules of a Court the copying establishment is unable to tell the exact date on which copies will be ready and the appellant is not guilty of undue delay in taking delivery, the period between the date of their being ready and the date of taking delivery should be excluded.[4]

Where a Sunday or a holiday succeeds the day on which the copy is ready for delivery, such a day also will be excluded if the delivery is taken the next day.[5] But where special arrangement is made to deliver copies during holidays and this fact is known to the appellant, he cannot take delivery of the copy on the re-opening of the Court and claim a deduction of the whole period it remained undelivered.[6]

16. Supply of folios before they are called for by Court.— The appellant made an application for copies of judgment and decree on 6-10-1923 and with the application deposited a certain number of folios for the copies. On 8-10-1923 folios necessary for the copies were called for. As the appellant had already deposited a certain number of folios, the remaining number of folios were supplied on 14-11-1923. The copy of the decree was ready for delivery on 16-11-1923. The copy of the decree required only three folios, that is, less than the number of folios deposited with the application for copies. It was held that the appellant was entitled to deduct the whole period between 6-10-1923 and 16-11-1923 as time requisite for a copy of the decree, even though *all* the folios necessary for the *judgment* were not deposited in proper time, as he had deposited the requisite folios for the decree without any loss of time.[1]

('20) 7 AIR 1920 Pat 278 (279) : 57 Ind Cas 266, *Fouda Uraon* v. *Ganpat Ram*.
('90) 12 All 105 (109) : 1890 All W N 10, *Bachi* v. *Sheo Gobind*.
('67) 8 Suth W R 141 (141, 142), *Bharutt Chunder Roy* v. *Issur Chunder Sircar*. (Delay due to negligence of Munsif's Amlah.)
[*See* ('12) 13 Ind Cas 850 (851) (Lah), *Sarkhara* v. *Nawab*. (Party not called to appear for delivery of copy.)]
[See however ('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tola Ram* v. *Jaffer Khan*. (There is no rule in Sind Courts civil circular for giving notice of copies being ready for delivery.)]

[4] ('90) 4 C P L R 166 (166), *Upasoo* v. *Gopal*.
('91) 6 C P L R 13 (14), *Punjaji* v. *Jagannath*.

[5] ('13) 21 Ind Cas 192 (192) (Mad), *Ramasamy Chetty* v. *Ramanathan Chetty*. (12 All 461 followed.)

[6] ('19) 6 AIR 1919 Mad 409 (410) : 49 Ind Cas 626, *Appalaswamy* v. *Narayanaswamy*. (Madras High Court, by Notification published in Government Gazette, made arrangements to deliver copies during the summer vacation and not during the Christmas holidays.)
[See however ('11) 12 Ind Cas 183 (184) : 34 All 41 : 8 All L Jour 1095 (DB), *Khub Chand* v. *Harmukh Rai*. (Notice put on Court notice-board during vacation that copy was ready—Party alleging that he received no notice—*Held* notice-board notice was not enough — Party was not bound to take cognizance of such notice.)]

Note 16

[1] ('26) 13 AIR 1926 Cal 1105 (1106) : 98 I. C. 748 (DB), *Adarpriya Choudhrani* v. *Ramprotap Agarwala*.

Section 12
Notes 17–18

17. Application struck off for non-compliance and subsequently revived. — Where under rules a time is fixed within which the copy stamps are to be furnished failing which the copy application is to be struck off, an application so struck off may be revived by a special application to the Court on that behalf and the computation of the limitation period will be made as if the application has been subsisting.[1]

18. Delay caused by despatch of copies by post. — When rules allow copies to be despatched by post, the post office is the agent of the *applicant* and the date on which the copy is handed over to the post office is the date of delivery to the applicant. The period, therefore, between the date on which the copy was ready and the date on which it was despatched by post is to be excluded also,[1] but not the time taken in the transmission of the copy by post.[1a] But if being despatched by the copying department to a wrong address the copy is returned to the department and again re-despatched to the correct address, the period between the date of despatch to the wrong address and date of despatch to the right address will have also to be excluded.[2]

In a case where the applicant had asked copies to be sent by post under rules but the department failed to do so but only posted a notice on the board that the copies were ready and the party took delivery of it in person after waiting for a reasonable time, the period between the date of the copy being ready and the date of delivery was deducted.[3]

Note 17

[1] ('95) 18 Mad 374 (376, 377), *Ramanuja Iyengar* v. *Narayana Iyengar.* (Madras Copy Rules — Default in supplying within three days stamp paper as required —Application liable to be struck off.)

Note 18

[1] ('22) 9 AIR 1922 Lah 219 (220) : 3 Lah 280 : 69 Ind Cas 818, *Ghulla Singh* v. *Sohan Singh.*
('22) 9 AIR 1922 Lah 415 (415) : 72 Ind Cas 797 (DB), *Gurdit Singh* v. *Charan Das.*
('19) 6 AIR 1919 Oudh 11 (11) : 54 Ind Cas 831, *Mt. Iqbal Jehan Begam* v. *Mathra Prasad.*
('26) 13 AIR 1926 Lah 223 (223) : 92 I. C. 966, *Allah Baksh* v. *Rohtak Municipality.*
('33) 20 AIR 1933 Pesh 22 (23) : 142 Ind Cas 230, *Sultan Din* v. *Partab Singh.* (Whether by ordinary post or by V. P. P. immaterial.)
('12) 13 Ind Cas 943 (943) (All) (DB), *Balmakand* v. *Kundan Lal.*
('12) 14 Ind Cas 403 (404) : 8 Nag L R 11, *Krishna* v. *Balia.* (Where rules permit of copies being granted by post, delay caused by the office in despatching them after their being ready should not be reckoned against party.)
('12) 17 Ind Cas 624 (625) : 8 Nag L R 172, *Paga* v. *Sadasheo.* (Copy ready on 3rd but office unable to despatch it that day—Party took delivery on 4th—As office could have despatched it only on 4th, held 4th also to be excluded.)
[*See also* ('25) 12 AIR 1925 Oudh 643 (644) : 90 Ind Cas 115, *Sripat* v. *Hubdar.*]

[1a] ('01) 14 C P L R 40 (41), *Garud Chamar* v. *Hira Ram Koshta.*

[2] ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *The Municipal Committee, Chiniot* v. *Bashi Ram.* (So assumed.)

[3] ('05) 8 Oudh Cas 150 (151), *Mt. Fatim-un-nissa* v. *Amjad Ali Khan.*

Section 12
Notes 19–21

19. Delay caused by getting a vernacular copy of decree or judgment. — Where the decree of the Court has been drafted in English, and the party obtains only a vernacular copy and files it along with the appeal, he is not entitled to a deduction of the time taken for such a copy.[1] The same rule applies in the case of an English judgment of which the appellant had applied for a translation.[2]

20. Copies of same documents obtained on two different occasions — Time requisite to obtain which copy to be excluded. — Where copies of the judgment and decree are obtained but are not available for being filed owing to their loss or to other causes, and subsequently another application for copies is made and an appeal is filed with these copies, it has been held by a Full Bench of the High Court of Madras that the time requisite for obtaining the copies *which accompany the memorandum of appeal* should be excluded, and not the time spent in obtaining the other copies.[1] The High Court of Lahore has dissented from this view, and has held that the appellant will be entitled to deduct only the time requisite for obtaining *a* copy of the decree and the judgment, and if according to the copy already obtained the appeal would be out of time, the appellant cannot claim to get over the bar by claiming to exclude the time taken to obtain the later copy and by filing the same with the appeal.[2]

21. Application for copy on date of judgment. — Sub-section (2) provides that in addition to the time requisite for obtaining copies, the day on which the judgment is pronounced should also be excluded. But where the application for copies is put in on the same day as the judgment, that day cannot be excluded twice over, once as the day on which judgment was pronounced and again as the day requisite for obtaining copies. The day of judgment has to be excluded first and then the time requisite for copies has to be excluded.[1] A contrary view has, however, been taken by the High Court of Nagpur which has held, overruling the undermentioned case[2] that such day

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Note 19

1. ('17) 4 AIR 1917 Lah 287 (288) : 39 Ind Cas 617 (DB), *Mohammad Amin* v. *Chiragh.* (Rules requiring English copy of decree to be produced with appeal memorandum.)
('34) 21 AIR 1934 Lah 304 (304) : 150 Ind Cas 781, *Meher Singh* v. *Ram Chand.* (Copy of translation of decree unsigned by Judge—132 Ind Cas 3 followed.)

2. ('20) 7 AIR 1920 Lah 224 (224) : 59 I. C. 965, *Kanhaya* v. *Nur Muhammad.*
('88) 1888 Pun Re No. 145, *Mt. Dya Kour* v. *Mt. Amrao Kour.*

Note 20

1. ('34) 21 AIR 1934 Mad 306 (307, 309) : 149 Ind Cas 172 : 57 Mad 560 (FB), *Thirumala* v. *Anavemareddi.* (A I R 1922 P C 352 and A I R 1925 Cal 735 disting.)

2. ('35) 22 AIR 1935 Lah 682 (684, 685) : 161 Ind Cas 72 : 17 Lah 621 (DB), *Mathela* v. *Sher Muhammad.*

Note 21

1. ('24) 11 AIR 1924 Lah 599 (600) : 75 I. C. 1055, *Ata Muhammad* v. *Pir Khan.*
('92-96) 2 Upp Bur Rul 456 (457), *Maung Aung Gyi* v. *Mobye Sitke Gye.*

2. ('17) 4 AIR 1917 Nag 196 (197) : 40 Ind Cas 425 : 13 Nag L R 89, *Salamsingh* v. *Hira.*

can be excluded twice over.[3]

22. Application for copy mislaid by office.—The fact that time is lost by reason of the party's copy application being lost in the copying department and that another application is rendered necessary is not to be counted against the appellant.[1]

23. Time between the date of the application for copies and the date of notice of requisition for stamp and folios for copies.—This period will have to be excluded in the computation of the period of limitation, i.e., the period inclusive of the date of the application and the date of the notification.[1] The proper mode of informing the applicant of the requisite or deficit stamps and folios is to put up a notice on the notice board in Court. Calling out the names of the applicant in the copying department is not sufficient notice.[2]

24. Holidays intervening between dates of judgment and copy application.—As a general rule, no period *prior* to the date of application for copies can be regarded as "time requisite" for obtaining the copies.[1] The rule is, however, subject to a broad exception, and that is, that holidays intervening in such a way as to prevent a party from taking the necessary steps for obtaining copies should be regarded as time requisite for obtaining the copies. Whether the exception applies in any case depends largely on the facts and circumstances of that case. Its applicability may be exemplified by a reference to illustrative cases :

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[3] ('39) 26 AIR 1939 Nag 150 (154) : I L R (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna Rajaram* v. *Baijnath Girdharilal.* (There is nothing fundamentally unjust or unreasonable in excluding the same day twice.)

Note 22

[1] ('14) 1 AIR 1914 Lah 545 (546) : 1915 Pun Re Cri No. 3 : 28 Ind Cas 524 : 16 Cri L Jour 300, *Hidayata* v. *Emperor.*

Note 23

[1] ('31) 18 AIR 1931 Cal 731 (732) : 58 Cal 969 : 134 Ind Cas 895 (DB), *Md. Islam Choudhury* v. *Kali Charan Singh.* (*Vide* clauses 1 and 2 of the Rule in General Letter No. 16 of the Calcutta High Court.)
('36) 23 AIR 1936 Lah 650 (651, 652) : 166 I. C. 716 (DB), *Sheo Ram* v. *Luta Ram.*
('02) 7 Cal W N 109 (110) (DB), *Kali Sankar Bajpai* v. *Baikanta Nath Sen.*

[2] ('31) 18 AIR 1931 Oudh 314 (315) : 132 Ind Cas 777 : 6 Luck 578, *Rahim Bux* v. *Maiku.*

Note 24

[1] ('21) 8 AIR 1921 Pat 175 (176) : 6 Pat L Jour 350 : 62 Ind Cas 649 (FB), *Jyotindranath Sarkar* v. *The Lodna Colliery Co. Ltd.* (Overruled on another point in A I R 1936 Pat 45 (FB).)
('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 Ind Cas 67 (DB), *Subramanyan* v. *Narashimham.* (12 All 461 (F B) relied on.)
('22) 9 AIR 1922 Oudh 39 (40) : 25 Oudh Cas 71 : 68 Ind Cas 250, *Abdul Ghaffor* v. *Mt. Rasul-un-nisa.* (Do.)
('12) 15 Ind Cas 59 (61, 62) : 39 Cal 766 (DB), *Haris Chandra Tewari* v. *Chandpur Co. Ltd.* (Do.)
('20) 7 AIR 1920 Cal 304 (304) : 58 Ind Cas 408 (DB), *Nibaran Chandra* v. *Martin & Co.* (Do.)
('11) 10 Ind Cas 866 (868) : 7 Nag L R 67, *Parashram* v. *Likhan.* (Do.)
[*See also* ('19) 6 AIR 1919 Cal 374 (378) : 52 Ind Cas 582 (DB), *Pramatha Nath Roy* v. *W. A. Lee.* (Per Chitty, J.)]

Illustration 1. — A judgment is delivered on the last day before the closing of the Court. A copy application is filed on the re-opening date and copies are obtained with which the appeal or other proceeding is filed.

According to the High Court of Madras, if the judgment was delivered at an hour after which, under the rules of the Court, no copy application could have been filed, the holidays must be regarded as "time requisite" for obtaining the copies,[2] but if a copy application *could* have been filed on the date of the judgment itself, the holidays cannot be regarded as time requisite.[3] According to the High Court of Calcutta[4] and the Chief Court of Oudh,[5] if there is nothing to show at what hour of the day the judgment was delivered, it is reasonable to regard the holidays as time requisite for obtaining the copies. According to the High Court of Patna,[6] it would appear that the question, whether the application could or could not have been filed on the date of the judgment, is not relevant, and the holidays must necessarily be excluded as time requisite, whether the copy application is filed on the re-opening day or later, the reason being that it is the universal practice to exclude the day on which the case was decided, for all purposes connected with the calculation of limitation for an appeal. It is submitted that this last view is correct. The late Judicial Commissioner's Court of Nagpur had also held that the holidays should be excluded, but not on the ground that it is "time requisite."[7] The ground of the decision was that the appeal could have been, by virtue of S. 4, filed on the re-opening date, that the copy application made on the re-opening date is therefore made *before the expiry of the period* of limitation for the appeal and that therefore the appeal filed after obtaining the copy is within time. As will be seen further, this reasoning is not correct, though the decision itself can clearly be supported on the ground that the holidays should be excluded as being "time requisite" for obtaining the copy. The Lahore High Court has also expressed the same view as the Nagpur Judicial Commissioner's Court.[7a]

Illustration 2. — A judgment is delivered during the time the Court is closed for the holidays. A copy application is filed on the re-opening date, and copies are obtained with which the appeal is filed.

If in such a case the party could not, under the rules of the Court, have applied for copies during the holidays, it is quite clear that the holidays must be regarded as time requisite for the copies, in view of the fact that he has applied as soon as the Court re-opened. This follows from what has been said under illustration 1.

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[2] ('04) 27 Mad 21 (22, 23) : 13 Mad L Jour 300, *Saminatha* v. *Venkatasubba.*

[3] ('20) 7 AIR 1920 Mad 1025 (1025) : 63 I. C. 922 (DB), *Masilamony* v. *Arunga Mudali.* (11 Ind Cas 839 and A I R 1920 Mad 359 followed.)

[4] ('11) 11 Ind Cas 387 (388) (DB) (Cal), *Sri Chandan Bhuya* v. *Haroo Sethi.*

[5] ('22) 9 AIR 1922 Oudh 39 (40) : 25 Oudh Cas 71 : 68 Ind Cas 250, *Abdul Ghaffor* v. *Rasul-un-nisa.*

[6] ('16) 3 AIR 1916 Pat 317 (318, 319) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal* v. *Mehdi Hussein.* ("Time requisite" need not be continuous.)
('34) 21 AIR 1934 Pat 4 (5) : 146 Ind Cas 931, *Pikhesarnath* v. *Janakdeonath.* (Whether appeal is to lower Court or to High Court makes no difference.)

[7] ('15) 2 AIR 1915 Nag 117 (118) : 29 Ind Cas 833 : 11 Nag L R 104, *Kashi Bai* v. *Kannoo.*

[7a] ('37) 167 Ind Cas 250 (251) (DB) (Lah), *Atmaram* v. *Ram Chand.* (Implied.)

Illustration 3. — A judgment is delivered during the vacation when the Court is closed for the holidays. A copy application is filed not on the re-opening day but some days *after* the re-opening and copies are obtained with which an appeal is filed.

There is a conflict of opinions as to whether in such a case the holidays should be regarded as time requisite for obtaining the copies. According to the High Court of Madras it is not. In *Tanjore Palace Estate* v. *Andi Ramiah Chetty*,[8] where the judgment was delivered after the Court closed for vacation but the party applied for copies seventeen days after the re-opening of the Court, their Lordships held that the holidays could not be excluded in computing the period of limitation. They observed :

> "We can see no reason for excluding the period during which the Court was closed in this case, except on grounds, which would entitle an appellant to demand the exclusion of every holiday which occurred during the period allowed for the presentation of his appeal; that nothing of this kind is intended by the Act is clear from the wording of Section 5, clause (1)."

In *Subramanyan* v. *Narasimham*,[9] which was also a similar case to that mentioned above, Wallis, C. J., held to the same effect and observed that by "requisite" is meant "reasonably requisite" and that it would defeat the intention of the Legislature that time should run on days when the Court is closed. The High Court of Allahabad has followed the Madras view in the undermentioned case.[9a] The Lahore High Court also has held that the holidays cannot be excluded in such a case.[9b] The High Court of Patna has held a contrary view.[10] In *Debi Charan Lal* v. *Mehdi Hussain*,[11] where judgment was delivered on 27th September 1913, the Court closed on 28th September 1913 and re-opened on 1st November 1913, and the copy application was made on 3rd November 1913, Chamier, C. J., observed as follows :

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8. ('11) 11 Ind Cas 339 (340) (DB) (Mad).

9. ('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 Ind Cas 67.

9a. ('38) 25 AIR 1938 All 106 (107, 108) : ILR (1938) All 209 : 174 I. C. 50 (DB), *Puttu Lal* v. *Bhagwan Das.* (Judgment delivered on last day before vacation — Application for copy not made on opening day — Period of limitation for appeal expiring during vacation—Period of limitation is not extended under S. 12 (2).)

9b. ('37) 167 Ind Cas 250 (251) (DB) (Lah), *Atmaram* v. *Ram Chand.* (Judgment delivered on 31-8-'33—Court closed from 1-9-'33 and reopening on 2-10-'33—Application for copy made on 4-10-'33.)

10. ('16) 3 AIR 1916 Pat 317 (319) : 35 I. C. 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal* v. *Sheikh Mehdi Hussain.* (Judgment was delivered on the last day before Court closed for vacation and not during the vacation.)

('19) 6 AIR 1919 Pat 506 (507) : 49 Ind Cas 664, *Imaman* v. *Sham Sagar Rai.* (Application sent one day after Court re-opened.)

('29) 16 AIR 1929 Pat 615 (616) : 120 I. C. 765 (DB), *Munshi Mahton* v. *Lachman Lal.* (Copy application made 15 days after re-opening — AIR 1916 Pat 317 held not overruled by AIR 1921 Pat 175 (FB).)

11. ('16) 3 AIR 1916 Pat 317 (319) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB).

"It is common ground that from 28th September to 31st October (both days included) the appellants could not have applied for a copy either of the judgment or of the decree. That being so, it appears to me to follow that the whole of the time which elapsed from the delivery of the judgment to the re-opening of the Court on 1st November 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that *this must be so whether the appellant applied for copies on the day on which the Court re-opened or on some later date.* In fact it appears to me that the date on which the application for copies was made, has in this case no bearing on the question whether or not the period of the vacation should be deducted. In this respect I am unable to accept the decision in *Tanjore Palace Estate* v. *Andi Ramiah Chetty.*[12] It was suggested that the time requisite for obtaining a copy must be continuous. But the words of the section do not appear to lay down any such rule."

In view of the reasons stated in the above passage, it is difficult to support, on principle, the decisions of the High Courts of Madras, Allahabad and Lahore.

Illustration 4. — A judgment is delivered, and several days thereafter the Court closes for the vacation. The limitation for the appeal expires during the holidays. A copy application is filed on the re-opening day and on getting the copies the appeal is filed.

There is a conflict of opinions here also as to whether the appeal is in time. In the cases noted below[13] it has been held that the appeal is barred. A contrary view has been held in the undermentioned cases.[14] The ground on which these latter decisions proceed is that

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[12] ('11) 11 Ind Cas 339 (340) (DB) (Mad).

[13] ('05) 28 Mad 452 (453) : 15 Mad L Jour 109 (DB), *Venkata Rao* v. *Venkatachalam Chetty.* (25 Bom 584 and 25 Bom 586 disting.)
('16) 3 AIR 1916 Lah 407 (407) : 35 I. C. 233 : 1916 Pun Re No. 79, *Guran Rakha* v. *Bindraban.* (Do.)
('36) 23 AIR 1936 Rang 201 (202) : 14 Rang 276 : 162 I. C. 853 (DB), *U Chan Mya* v. *Mrs. Whittam.* (Primary period of limitation expiring during holidays — Copy application filed on re-opening day, though during holidays practice of Court provided for application and delivery of copies—*Held* time for copy not to be excluded.)

[14] ('38) 25 AIR 1938 Lah 317 (318) : 177 Ind Cas 672, *Asa Singh* v. *Hira Singh.*
('97) 19 All 342 (346) : 1897 All W N 76 (DB), *Siyadut-un-nissa* v. *Muhammad Mahmud.* (See also critical note on this case in 7 Mad L Jour 340 (341) Jour.)
(1900) 2 Bom L R 221 (223) (DB), *Sitaram* v. *Ramji.*
('01) 25 Bom 586 (588) : 3 Bom L R 244 (DB), *Pandharinath* v. *Shankar.* (So long as right to present appeal subsists exclusion sanctioned by this section applies.)
('30) 17 AIR 1930 Lah 216 (216, 217) : 120 Ind Cas 169 : 11 Lah 111, *Mt. Attri* v. *Ramkishan.* (Provided copies have not been obtained previously.)
('29) 16 AIR 1929 Rang 96 (96): 6 Rang 743 : 115 I. C. 667 (DB), *Ma Dan* v. *Tan Chong San.* (25 Bom 584 followed.)
('28) 15 AIR 1928 Lah 655 (656, 657) : 112 I. C. 670, *Ram Chand* v. *Ram Rattan.*
('26) 13 AIR 1926 Lah 121 (122) : 89 Ind Cas 437, *Naman* v. *Gurditta.*
('26) 13 AIR 1926 All 111 (112) : 89 I. C. 956, *Megh Baran* v. *Ram Das.* (12 All 461 not followed.)
('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu* v. *Sultan.*
('31) 18 AIR 1931 Pat 60 (60) : 130 Ind Cas 265 (DB), *Ramcharan Shukul* v. *Sri Thakurjee Mandil Darkadhis.* (Time for appeal as extended by application for copy of decree expiring during holidays — Copy of judgment applied for on re-opening day and appeal filed on delivery of copy of judgment.)
('37) 24 AIR 1937 Oudh 26 (27) : 165 I. C. 269 : 12 Luck 531 (DB), *Sukhnandan Prasad Shukla* v. *Raja Ahmad Ali Khan.*

Section 12
Notes 24–25

under S. 4 of the Act the appeal could be filed on the re-opening day, that thus the appeal is *not barred* by limitation on the re-opening day and that since the copy application was made on the re-opening day, the appeal cannot be barred, inasmuch as the period from the re-opening date to the date of filing the appeal is excluded by this section. It is submitted that this latter view is not correct. It has been held by the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap*,[15] that S. 4 does not *alter* the length of any prescribed period but only provides that where the prescribed period *expires* on a day when the Court is closed, then *notwithstanding the fact*, the application may be made on the day that the Court re-opens. An appeal, the time for which has expired during the holidays, is really barred on the day of the re-opening of the Court but is allowed to be filed notwithstanding such bar. See also Notes to S. 4. The basis of the view expressed in the cases cited in Foot-Note 14 has been thus overruled by the Privy Council, and consequently the decisions cannot any longer be considered as good law. See also Note 10 to section 4.

25. Interval between the judgment and the signing of the decree, if and when can be deducted. — Where there is an interval of several days between the pronouncement of the judgment and the signing of the decree, can such interval be excluded under the section irrespective of the date of the application for copies of the judgment and decree? Ordinarily, after a Court pronounces judgment, a drafting of the decree in accordance with the judgment and signing it is a matter for the Court with which a party has no direct concern. It may also be noted that under Order 20, Rule 7 of the Code of Civil Procedure the decree "shall bear date the day on which the judgment was pronounced." Further, it has been seen already that the *ordinary* rule is that no period *prior* to the application for copies can be

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[*See also* ('39) 26 AIR 1939 Bom 46 (46) : 179 I. C. 645 (DB), *Raichand* v. *Rahi Nana.* (Limitation for appeal expiring on Sunday — Application for copies on Monday — Appeal filed next day after copies ready — Appeal held in time.)

('38) 25 AIR 1938 Bom 288 (288) : 175 I. C. 508, *Pannalal Murlidhar* v. *Khemchand Sakharchand.* (Limitation for appeal expiring on Sunday and next day holiday—Appeal presented before expiry of period of limitation—Application for copies made on next working day—Appellant is entitled to deduct time required for obtaining copies.)

('38) 25 AIR 1938 Lah 707 (708, 709) : 182 I. C. 108, *Mahomed Zaman* v. *Hans Raj Shah.* (Limitation expiring on holiday — Copy application on next day — Time deducted — Even if it be assumed that application for obtaining copy of decree does not strictly fall within purview of S. 4, Limitation Act, the general principle underlying that section reproduced in S. 10, General Clauses Act, must be given effect to.)

('11) 12 I. C. 58 (60) : 36 Mad 131 (DB), *Mira Mohideen* v. *Nalla Perumal Pillai.*

('01) 25 Bom 584 (585, 586) : 3 Bom L R 143 (DB), *Tukaram Gopal* v. *Pandurung.* (Under rules copy application could have been made during vacation — Copy applied for, on re-opening day — Appeal time is subsisting as last date for appeal was re-opening day by operation of S. 5 of Act of 1877 — Time during vacation was still extended.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (DB), *Bai Hemkore* v. *Masamalli.*

('06) 3 Cal L Jour 94*n* (SN), *Kabiran* v. *Golam Peer.*]

[15] ('35) 22 AIR 1935 P C 85 (87) : 155 I. C. 205 : 62 I. A. 80 : 57 All 242 (PC).

regarded as time requisite for obtaining the copies. It has accordingly been held by all the Courts, except the High Courts of Calcutta and Patna, that the interval referred to above cannot be excluded as time requisite without regard to the date of the application for copies;[1] in other words, that it is only the time required *after* the application is made that can be excluded as "time requisite." In *Seth Jagannath*

Note 25

[1] ('39) 1939 Rang L R 686 (689) (DB), *Maung Baw Byu* v. *Maung Yan Shin.*
('90) 12 All 461 (471, 474) : 1890 All W N 149 (FB), *Bechi* v. *Ahsan Ullah.*
('90) 12 All 79 (81, 82) : 1890 All W N 25 (DB), *Parbati* v. *Bhola.* (Such time can only be excluded if it delayed applicant in obtaining copy.)
('99) 23 Bom 442 (445) (DB), *Yamaji* v. *Antaji.*
('05) 3 Low Bur Rul 62 (64, 65) : 11 Bur L R 220 (FB), *Maung Kin* v. *Maung Sa.* (Time begins only when step is taken to obtain copy.)
('05) 1905 Upp Bur Rul C P C 24 (24), *Maung San Ko* v. *Ma Myo Ma.*
('35) 22 AIR 1935 Oudh 30 (32) : 152 I. C. 419 : 10 Luck 250 (DB), *Gokul Prasad* v. *Kunwar Bahadur.* (13 Cal 104 (FB) not followed.)
('98) 1 Oudh Cas 184 (186), *Kamikhya Singh* v. *Indar Down Singh.*
('30) 17 AIR 1930 Oudh 369 (370) : 127 I. C. 35 : 6 Luck 187, *Faqir Bux* v. *Bileshar.*
('36) 23 AIR 1936 Lah 670 (671) : 161 Ind Cas 215, *Abdul Ghani* v. *Maula Baksh.* (Application was made before decree was prepared.)
('35) 157 Ind Cas 181 (181) (Lah), *Baij Nath* v. *Gapu Ram.* (Do.)
('15) 2 AIR 1915 Mad 308 (308) : 25 Ind Cas 67 (DB), *Narayanaswamy Theran* v. *Krishnaswamy Pillai.* (Decree could not be prepared owing to non-payment of extra court-fee—Time granted for payment.)
('27) 14 AIR 1927 Nag 1 (2) : 98 Ind Cas 1057 (FB), *Umda* v. *Rupchand.* (A I R 1926 Nag 207 cannot be considered to be good law in view of this decision and that in A I R 1933 Nag 125.)
('33) 20 AIR 1933 Nag 125 (126, 127) : 29 Nag L R 220 : 143 Ind Cas 745 (DB), *Mukunda Ramkrishna* v. *Bisansa Sakharamsa.* (Dissenting from A I R 1924 Nag 271 and following 13 C P L R 78.)
('22) 9 AIR 1922 Nag 113 (113) : 66 Ind Cas 7, *Narayan* v. *Ramdulari.* (Decree must be deemed to come into existence on the day the judgment is pronounced — A decree is a decree even before it is signed.)
('26) 94 Ind Cas 121 (121) (DB) (Nag), *Kutubuddin* v. *Ghulam Rabbani.*
('26) 13 AIR 1926 Nag 349 (349, 350): 22 N.L.R. 60: 97 I. C. 307, *Dindayal* v. *Anopi.*
('25) 12 AIR 1925 Oudh 600 (600, 601) : 89 Ind Cas 479, *Mehdi Ali Khan* v. *Lal Bahadur Singh.*
('29) 16 AIR 1929 Rang 116 (116) : 7 Rang 18 : 117 Ind Cas 251, *Maung Po Kyaw* v. *Ma Lay.*
('21) 8 AIR 1921 Sind 42 (44) : 15 Sind L R 16 : 62 Ind Cas 537 (DB), *Harjimal & Sons* v. *Firm of Dhanpatmal Diwan Chand.* (Time between date of application and date of copy being ready to be excluded.)
('07) 1 Sind L R 71 (74), *Lakhiomal* v. *Joomromal.*
[*See* ('41) 28 AIR 1941 Lah 212 (213) : 43 Pun L R 88 (90), *Jiwan Das* v. *Rakhmat Din.* (Application for copy made before decree was signed — Period till signing of decree to be excluded.)]
[But see ('40) 27 AIR 1940 Bom 415 (416) : 192 Ind Cas 275 (DB), *Balappa Tammanna* v. *Dyamappa Bhusappa.*
('40) 27 AIR 1940 Oudh 173 (174) : 15 Luck 376 : 186 Ind Cas 136 (DB), *Yusuf Ali Khan* v. *Mohammad Kasim Ali.* (Follows the Calcutta and Patna view — No reference made to earlier Oudh cases.)
('28) 15 AIR 1928 Nag 199 (201) : 109 Ind Cas 79, *Sirajuddin* v. *Soni Lal.* (This simply follows the view in A I R 1924 Nag 271 which is of doubtful authority in view of the decision in A I R 1927 Nag 1 (FB) and that in A I R 1933 Nag 125.)
('36) 23 AIR 1936 Lah 976 (977, 978) : 168 Ind Cas 897, *Kahanchand* v. *Gurdit Singh.* (Follows the Calcutta and Patna view.)]

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Note 25

v. *Gangaram*,[2] the late Judicial Commissioner's Court of Nagpur observed as follows:

> "I think that the time requisite for obtaining a copy must be taken to commence only when the applicant does something in order to obtain the copy and to end when he obtains the copy. If a decree has not been drawn up and signed at the time when an application for a copy of it is made, and the making of the copy is thereby delayed, such period of delay must be allowed for in computing the time which was requisite for obtaining the copy. But it could never have been intended that a would-be appellant should be allowed to sleep over his right of appeal and then to claim extension of the period of limitation by taking advantage of a delay with which he had no direct concern."

According to the High Court of Calcutta, the interval should be excluded as part of the time requisite for obtaining the copies.[3] The leading case which is the foundation of the practice in that Court is *Bani Madub Mitter* v. *Matungini Dassi*.[4] In that case the judgment was delivered on 17th July 1883, the decree was signed on 23rd July 1883 and the copy application was filed on 3rd August 1883. It was observed by Petheram, C. J.:

> "In our opinion the fact that the decree was not in existence, that is, signed by the particular Judge, and could not therefore be copied until 23rd July, that is, six days after the date that it bears, entitles the appellant to ask us to deduct those six days in addition to the eight days, and thus to hold that under S. 12 the appeal has been presented within the prescribed period."

The High Court of Patna has followed the practice of the High Court of Calcutta.[5]

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[2] (1900) 13 C P L R 78 (79, 80).

[3] ('39) 26 AIR 1939 Cal 711 (713) : 186 I. C. 58, *Sarat Chandra* v. *Rati Kanta*. (Even if application for copy of decree is not within 30 days from judgment.)
('27) 14 AIR 1927 Cal 65 (66) : 97 Ind Cas 539 (DB), *Ashutosh Roy Chowdhury* v. *Mono Mohan Roy*. (13 Cal 104 (FB) and Court practice of forty years followed.)
('04) 32 Cal 175 (177) (DB), *Gopal Chandra Chakravarti* v. *Preonath Dutt*. (Time between judgment and final order in an inquiry as to mesne profits under O. 20, R. 12, Civil Procedure Code.)
('11) 10 Ind Cas 542 (542) (DB) (Cal), *Tarabati Koer* v. *Gajdeo Narain*. (There was however an application for decree copy before decree was drawn up.)
('11) 12 Ind Cas 677 (677, 678) (DB) (Cal), *Sundar Koer* v. *Raghunath Sahai*.
('17) 4 AIR 1917 Cal 320 (321) : 35 Ind Cas 348 (DB), *Gangadhar Karmakar* v. *Sekhar Basini Dasya*. (Review.)
('37) 24 AIR 1937 Cal 732 (734) : 176 Ind Cas 361, *Sudhansu* v. *Majho Bibi*. (Following 13 Cal 104 (FB).)
('24) 11 AIR 1924 Cal 1006 (1007) : 81 Ind Cas 527 (DB), *Irrani* v. *Naimuddin*.
('72) 18 Suth W R 512 (512) (DB), *In re Chowdhury Mohendro Narain Roy*.
[*See also* ('12) 14 I. C. 1006 (1007) (DB) (Cal), *Kamala Dasi* v. *Tarapada Mukerji*.
('36) 165 Ind Cas 53 (54, 55) (Cal), *Kedar Nath Moyra* v. *Gollam Hossain Mollah*.]
[But see ('12) 15 Ind Cas 59 (62) : 39 Cal 766 (DB), *Harish Chandra* v. *Chandpur Co. Ltd.* (But in this case copy application was made after the expiry of the period of limitation.)]

[4] ('86) 13 Cal 104 (107) (FB).

[5] ('39) 26 AIR 1939 Pat 135 (136, 137) : 180 Ind Cas 314, *Kameshar Singh* v. *Kusheshwar Mahto*. (Exclusion can be claimed even if application for copy of decree is not made within the period of limitation.)
('36) 23 AIR 1936 Pat 45 (46) : 160 Ind Cas 447 : 15 Pat 284 (FB), *Gabriel Christian* v. *Chandra Mohan*. (AIR 1921 Pat 175 (FB) overruled on this point.)

In the undermentioned case[6] where the Court after pronouncing judgment refused to pass a decree till the plaintiff complied with certain orders in relation to the suit, it was held that the decision of the Court in that case must be deemed to have been postponed to the date when the decree was passed after the orders were complied with, and that time began to run from the date of passing of the decree which must also be regarded as the date of the final judgment.[6a]

No exclusion can be claimed in any case between the signing of the decree and the application for copies.[7]

Where an application is made for copies of the judgment and the decree, but the office returns the application or the copying folios in so far as the decree is concerned on the ground that the decree has not been signed, it has been held by the High Court of Calcutta that the return is wrong and that the application must be treated as pending all the time, even though the party again applies for a copy after the decree is signed.[8]

In the cases dealt with above the party had nothing to do with the preparation of the decree. But there are cases where a party *has to take certain definite steps* to have the decree drafted. Thus, on the original side of the High Court of Calcutta, the rules require that the party in whose favour a decree or order is passed should, within four days, put in a requisition for getting the decree or order drafted and that if he does not do so, the other party can put in a similar requisition and have the decree drafted. Similarly, there is a rule of the Patna High Court that no decree need be drawn up by the Subordinate Civil Courts if neither party has to recover anything from the other unless the Judge otherwise directs. In such cases it has been held that the mere fact that an application for copies is made will

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('16) 3 AIR 1916 Pat 267 (267) : 35 Ind Cas 868 : 1 Pat L Jour 573 (FB), *Ram Asray Singh* v. *Sheonandan Singh.*
('19) 6 AIR 1919 Pat 506 (507) : 49 Ind Cas 664, *Imaman* v. *Sham Sagar Rai.*
('23) 10 AIR 1923 Pat 140 (141) : 6 Pat L Jour 237 : 63 Ind Cas 278 (DB), *S. C. Dey* v. *Mt. Rajwanti Kuer.*
[*See* ('23) 10 AIR 1923 Pat 529 (530) : 75 Ind Cas 265, *Mohammed Moinuddin Ashraf* v. *Mohammad Ishaq Ashraf.*
('20) 7 AIR 1920 Pat 594 (595) : 55 Ind Cas 17 (DB), *Jaleswar Dayal* v. *Ram Hari Sahu.*]
[But see ('20) 7 AIR 1920 Pat 267 (269) : 57 Ind Cas 312, *Mahadeo Prasad* v. *Gajadhar Prasad.* (Leave to appeal to Privy Council—A I R 1916 Pat 267 (FB) not referred to.)]

[6] ('16) 3 AIR 1916 Sind 2 (3) : 34 Ind Cas 867 : 9 Sind L R 193, *Khudadad* v. *Moriokhan.* (Passing of decree made conditional on plaintiff paying penalty on sale deed under the Stamp Act.)
See also Note 5 to Article 156.

[6a] [*See also* ('14) 1 AIR 1914 Mad 418 (420) : 22 Ind Cas 919 (DB), *Numberumal Chettiar* v. *Krishnajee.* (Court ordering that decree should be recalled—Appellant was held to have sufficient cause for not presenting an appeal in time.)]

[7] ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Chiniot Municipal Committee* v. *Bashi Ram.*

[8] ('11) 10 Ind Cas 542 (543) (DB) (Cal), *Tarabatti Koer* v. *Jagdeo Narain.*

not entitle the party to deduct all the time which elapses before the date of the copy being ready, without regard to the question whether he has taken necessary steps for getting the decree drafted without delay. If he has delayed making a requisition for getting the decree drafted or is guilty of *laches* in attending to the other matters necessary to get the decree drafted, such delay will be counted against him and will not form part of the time requisite for obtaining the copies.[9] For, as observed by the Privy Council in *Pramatha Nath Roy* v. *William Arthur Lee*,[10] "no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain the order."

See also Note 5 to Art. 156.

25a. Delay caused by getting order varied and settled. — Where the appellant applied for a variation and settlement of the order to be appealed from, and it could not be said that he was during such period, failing to take reasonable and proper steps to obtain a copy of the order, it was held by their Lordships of the Privy Council in the undermentioned case[1] that the period could be regarded as requisite for obtaining a copy of the order within the meaning of this section.

26. One common judgment in two suits filed in two appeals against judgment. — Where suits X and Y are decided by a common judgment and two appeals A and B are filed against such judgment in the two suits, but a copy of the judgment which had been applied for only in suit X is filed along with the appeal A, can the time spent in obtaining the copy be excluded for the purpose of computing the limitation for appeal B? According to the High Court of Madras it cannot be.[1] But according to the High Court of Patna it can be.[2] It is submitted that the view of the High Court of Madras is not correct. It has been seen already that it is not necessary that the copy should have been obtained *for the purpose of appeal.* It has also been seen that the time should be excluded even though a copy of the judgment is not necessary to be filed along with the appeal, under the rules of Court. It would, therefore, seem that it really does not matter in what suit the copy was got, provided it is a copy of the judgment appealed against.

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[9] ('32) 19 AIR 1932 Cal 331 (336) : 137 Ind Cas 526 : 59 Cal 1215 (FB), *Secy. of State* v. *Parijat Debi*. (Overruling AIR 1927 Cal 623.)
('34) 21 AIR 1934 Cal 543 (545) : 61 Cal 306 : 151 Ind Cas 809 (DB), *Brijlal Ganeriwalla* v. *Gireendra Shekhar*. (Delay in drafting decree was due to default of appellant in carrying out an amendment of plaint ordered by Court.)
('29) 16 AIR 1929 Cal 734 (735) : 56 Cal 709 : 121 Ind Cas 307 (DB), *Sambhu Nath* v. *Gopilal*. (Time taken by opposite party not to be counted against party.)
('34) 21 AIR 1934 Pat 266 (268) : 149 Ind Cas 142 : 13 Pat 371 (DB), *Lachiminarayan Tekriwala* v. *Jogesh Chandra Lahare*. (A I R 1922 P C 352 followed.)
('25) 12 AIR 1925 Cal 735 (735, 736) : 52 Cal 342 : 89 Ind Cas 277 (DB), *Kamruddin Hyder* v. *M. N. Mitter*. (Laches in getting order drawn up.)
('84) 10 Cal 652 (661, 662) (DB), *Ramey* v. *Broughton*.
[*See* ('37) 24 AIR 1937 Cal 732 (734) : 176 Ind Cas 361, *Sudhansu Bhusan* v. *Majho Bibi*. (Where under the Rules, parties have to apply to get the decree drawn up, the question of promptitude on the part of the party becomes material in considering the question whether time is requisite.)
('37) 170 Ind Cas 653 (655) (Cal), *Rayfield* v. *Raj Narain*. (Party not entitled to apply unless other party failed to apply for drawing up decree — Other party applying — Time taken must be excluded.)]

[10] ('22) 9 AIR 1922 P C 352 (353) : 49 Ind App 307 : 68 Ind Cas 900 : 49 Cal 999 (PC). (On appeal from AIR 1919 Cal 374.)

Note 25a

[1] ('37) 24 AIR 1937 P C 107 (108) : 167 Ind Cas 345 : 31 Sind L R 239 (PC), *Hubert Rowan Hodge* v. *Mahomed Kamgar Shah*.
See also Note 3 to Article 151.

27. Appeal from a judgment on review—Copy of original judgment. — Order 47 Rule 7, Civil Procedure Code, gives a right of appeal from an order granting review of a judgment. In computing the period of limitation for such an appeal, the time requisite for obtaining a copy of the order or judgment appealed against, i. e., the judgment pronounced on review, can be deducted under S. 12. But is the appellant entitled to the deduction of the time requisite for a copy of the original judgment which was the subject-matter of the review application? The answer is in the affirmative if the original judgment can be construed as one from which also the appeal is made, in other words, if the original judgment together with the judgment passed on review can be taken as really one judgment. Where the second judgment did not give all the facts of the case but made an express reference to the first judgment for a discussion of the full facts and it modified only a portion of the first judgment, it was held to be merely supplementary to the first and jointly with it to be one judgment and the time requisite for copies of both the judgments was excluded.[1]

28. Application for leave to appeal to the Privy Council. — Sub-section (2) of the section which provides for the exclusion of the time taken for copy of a *decree* covers *applications* for leave to appeal. In respect of these *applications* the time requisite for obtaining a copy of the *decree* should be excluded.[1] But sub-s. (3) dealing with

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Note 26

[1] ('15) 2 AIR 1915 Mad 493 (494) : 25 I. C. 28 (DB), *Avudai Ammal* v. *Ganapathi.*

[2] ('20) 7 AIR 1920 Pat 535 (535, 536) : 58 Ind Cas 991, *Mt. Umatal Rasul* v. *Ram Charan.* (The practice of Patna High Court is that in several appeals from a common judgment, it is sufficient if the judgment copy is produced in one of the appeals only.)

Note 27

[1] ('28) 15 AIR 1928 Lah 755 (756) : 112 Ind Cas 46, *Jagiri Ram* v. *Daulatkhan.*

Note 28

[1] ('28) 15 AIR 1928 Nag 63 (64) : 105 Ind Cas 852 : 24 Nag L R 297 (DB), *Gulab Chandji* v. *Gulab Singh.* (Article 179 which governs such applications cannot be read divorced from S. 12 (2).)

('35) 22 AIR 1935 All 258 (259) : 157 Ind Cas 170 : 57 All 751 (DB), *Gaekwar Baroda State Railway* v. *Mohammad Habibullah.* (Sub-section 2 is general and applies to all applications for leave to appeal.)

('15) 2 AIR 1915 All 335 (336) : 38 All 82 : 31 Ind Cas 906 (DB), *Ram Sarup* v. *Jaswant Rai.*

copies of *judgments* does not expressly include *applications* for leave to appeal. It has accordingly been held by the High Courts of Allahabad[2] and Lahore[2a] and the Judicial Commissioner's Court of Sind[3] that in the case of such *applications*, the time requisite for obtaining a copy of the judgment cannot be excluded.

The contrary view is held in the undermentioned cases.[4] In *In re Secretary of State by Collector of Chingleput*,[5] it has been held by the High Court of Madras that sub-s. (3) applies *reasonably* and by *implication* to applications for leave to appeal. Their Lordships observe that though that sub-section does not in terms apply to them, the language used in it really covers the case. Under sub-s. (2), where an application for leave to appeal is put in, the time "requisite for a copy of the *decree appealed from*" may be deducted. Here the expression "decree appealed from" in relation to those applications really means "when a decree is *sought* to be appealed from" as the decree cannot strictly be said to be *appealed* from until leave has been given. There

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('14) 1 AIR 1914 Cal 679 (681): 42 Cal 35: 24 Ind Cas 273 (DB), *Abdullah Husain* v. *Ananda Chandra.*

('12) 15 Ind Cas 497 (497) : 39 Cal 510, *Eastern Mortgage Co. Ltd.* v. *Purna Chandra Sarbagna.*

See also Note 4 to Art. 179.

[2] ('35) 22 AIR 1935 All 99 (100) : 152 I. C. 384 : 57 All 455 (DB), *Gulab Chand* v. *Peary Lal.* (The Court was of opinion that copies of judgment can always be got in a shorter time than decrees, that a judgment is ready for copy application on the date of judgment and not so a decree, that period of limitation for application for leave to appeal is ordinarily sufficient for obtaining copy of judgment.)

('26) 13 AIR 1926 All 286 (286) : 92 Ind Cas 897 (DB), *Wilayati Begam* v. *Jhandu Mal Mithu Lal.* (Rules of Allahabad High Court—Judgment copy not necessary.)

('34) 21 AIR 1934 All 974 (976): 57 All 306: 151 Ind Cas 604 (DB), *Gurmukh Rai* v. *Secretary of State.* (Case under Income-tax Act.)

[2a] ('39) 26 AIR 1939 Lah 43 (44) : ILR (1939) Lah 156 : 179 Ind Cas 912 (DB). *Punjab Co-operative Bank Ltd., Amritsar* v. *Punjab National Bank Ltd, Amritsar.*

[3] ('25) 12 AIR 1925 Sind 60 (60, 61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Mahomed* v. *Hassomal.* (Word 'also' in cl. 3 shows that time requisite for copy of judgment can be excluded in addition to time for copy of decree only in cases where decree is appealed from or sought to be reviewed.)

('29) 16 AIR 1929 Sind 206 (206, 207) : 118 Ind Cas 212 : 24 Sind L R 108 (DB), *Jhamandas* v. *Mt. Bibi Aishan.* (A I R 1928 P C 103 distinguished.)

[4] ('41) 28 AIR 1941 Oudh 247 (249) : 193 Ind Cas 295 (DB), *H. Hunter* v. *Ehsan Husain.*

('22) 9 AIR 1922 Pat 255 (256) : 66 Ind Cas 88 : 1 Pat 429 (DB), *Mahabir Prasad Tewari* v. *Jamuna Singh.* (On the ground that when appeal is from a decree it is generally necessary to obtain judgment on which it is based.)

('36) 23 AIR 1936 Rang 82 (82) : 13 Rang 762 : 161 Ind Cas 464 (DB), *R. K. Banerjee* v. *Alagammai Achi.*

('32) 19 AIR 1932 Cal 587 (587): 59 Cal 251 : 139 Ind Cas 236 (DB), *Commissioner of Income-tax* v. *Shaw Wallace & Co.* (Application to High Court by Commissioner of Income-tax for issue of certificate for Privy Council appeal—Judgment copy, time for—*Held* can be excluded.)

[*See* ('24) 11 AIR 1924 Bom 399 (404) : 48 Bom 442 : 80 Ind Cas 862 (DB), *Nagindas Motilal* v. *Nilaji Moroba.* (Per Marten, J.—Entitled to deduct time for both copies.)]

[5] ('25) 12 AIR 1925 Mad 1241 (1242) : 90 Ind Cas 601 : 48 Mad 939 (DB).

is no reason, say their Lordships, why the same phrase in sub-s. (3) should not have the same meaning also. In other words, sub-s. (3) may according to that decision be read also as follows : "When a decree is *sought* to be appealed from, etc." and when that is done it becomes applicable to the case of the applications in question.

In *Hari Ram* v. *Prem Nath*,[6] the Lahore High Court has held that a copy of the decree not being a necessary annexure to an application for leave to appeal, the time taken for the copy cannot be deducted. It is submitted that the decision is wrong and opposed to the express terms of sub-s. (2); and the reasoning is contrary to the principle of the ruling of the Privy Council referred to in Note 7.

Order 45 R. 2 of the Code of Civil Procedure speaks of a "petition" for leave to appeal and section 12 of the Limitation Act uses the word "application." But nothing turns on this difference in language. Otherwise, Art. 179 of the Act will not apply to "applications" for leave to appeal to the Privy Council and they will not be subject to any limitation.[7]

This section in so far as it purports to affect applications for leave to appeal to the Privy Council is not *ultra vires* of the powers of the Indian Legislature or in derogation of the prerogative of the Crown.[8] In fact the section is now made applicable by the rules of the Privy Council to applications for leave to appeal to the Privy Council.[9]

See also Note 4 to Article 179.

29. Application for review. — Time for copies of decree[1] and the judgment[2] sought to be reviewed is to be excluded.

30. Application to set aside award. — In computing the period of limitation for an application to set aside an award, the time requisite for a copy of the award is to be excluded.[1] When an award has been filed in Court, a period of thirty days is allowed for an application to set aside an award. (See Art. 158.) If no such application is made, the Court is within its jurisdiction to pass a decree on the award. It is not the business of the Court to ascertain and find out if any of the parties has applied for copies and wait for the full period available for the party to file an application. It is the duty of the party to bring it to the notice of the Court before it proceeds to pass a decree.[2] Even in a case where an application to set aside an award has been filed which is on the face of it out of time, it is the duty of the party to bring it to the notice of the Court that copies have been obtained and time was consumed thereby.[3]

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[6] ('35) 22 AIR 1935 Lah 341 (341) : 158 Ind Cas 120 (DB). (13 Cal 104 (F B), distinguished.)

[7] ('28) 15 AIR 1928 Nag 63 (64) : 105 Ind Cas 852 : 24 Nag L R 97 (DB), *Gulabchandji* v. *Gulab Singh.*

[8] ('14) 1 AIR 1914 Cal 679 (680, 681) : 42 Cal 35 : 24 I. C. 273 (DB), *Abdullah Husain* v. *Ananda Chandra.*

[9] ('25) 12 AIR 1925 Mad 1241 (1242) : 90 Ind Cas 601 : 48 Mad 939 (DB), *In re Secretary of State by Collector of Chingleput.*

Note 29

[1] ('25) 12 AIR 1925 Lah 377 (377, 378) : 88 Ind Cas 1019 (DB), *Fazal Dad* v. *Umar Bakhsh.*

[2] ('93) 1893 Bom P J 167 (DB), *Lakshmibai* v. *Yeshwantrav.*
[*See* ('93) 7 C P L R 111 (111), *Hiralal Ramdhan* v. *Mt. Gangabai.*]
[But see ('99) 2 Oudh Cas 302 (302), *Jagatpal Singh* v. *Jageswar Bakhsh Singh.*]

Note 30

[1] ('19) 6 AIR 1919 Cal 224 (225) : 46 Cal 721 : 53 Ind Cas 46 (DB), *Sova Chand Bhutoria* v. *Hury Bux Deora.*

('32) 19 AIR 1932 Mad 588 (588) : 140 Ind Cas 11, *Chendrayya* v. *Appalamma.*

('27) 14 AIR 1927 Mad 660 (660) : 101 I. C. 514, *Mangamma* v. *Peda Ammanna.*

('95) 1895 Bom P J 326 (DB), *Nathu* v. *Vithu.*

31. Filing of an appeal with a copy of judgment or decree alone. — An appeal was filed with a copy of the judgment alone in time but a copy of the decree was not applied for as the same was not drafted by the office at the time of the presentation of the appeal. Within the limitation period as computed by adding the time requisite for the copy of the judgment, an application for copy of decree was made and the copy was produced in Court immediately it was obtained. It was held that the appeal was in time and in order.[1] But if the copy of the decree is produced in the appellate Court when the time for appeal *had expired*, the appeal is barred by limitation[2] as the presentation of appeal without the decree copy is no valid presentation of the appeal. (See section 3 Note 6.)

32. Appeal in criminal cases. — In the case of a criminal appeal,[1] or an application for leave to appeal under S. 449, Criminal Procedure Code, the time taken for the necessary copies should be excluded.[2]

('07) 29 All 584 (586) : 1907 All W N 184 : 4 All L Jour 450 (DB), *Najm-ud-din Ahmed* v. *Albert Puech.*

[*See also* ('33) 20 AIR 1933 Rang 38 (38) : 142 I. C. 835, *D. B. Das* v. *Dayalal & Sons.*

('02) 29 Cal 167 (182, 183) : 29 Ind App 51 : 4 Bom L R 161 : 12 Mad L Jour 77 : 6 Cal W N 226 : 8 Sar 154 : 1902 Pun Re No. 25 (PC), *Ghulam Khan* v. *Muhammad Hassan.*

('01) 5 Cal W N 813 (814), *Sm. Nobin Kally Dabee* v. *Ambica Churn Banerjee.*]

[2] ('32) 19 AIR 1932 Mad 588 (588, 589) : 140 Ind Cas 11, *Chendrayya* v. *Appalamma.*

[3] ('16) 3 AIR 1916 Mad 634 (634) : 29 Ind Cas 860, *Subramania Aiyar* v. *Poopparam Lala.*

[*See* ('33) 20 AIR 1933 Rang 38 (38) : 142 Ind Cas 835, *D. B. Das* v. *Dayalal & Sons.*]

Note 31

[1] ('24) 11 AIR 1924 All 162 (162, 163) : 74 Ind Cas 486, *Kidar Nath* v. *Nanak.*

[2] ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Municipal Committee, Chiniot* v. *Bashi Ram.*

Note 32

[1] ('84) 10 Cal 642 (643) (DB), *In the matter of Jhabbu Singh.*

[*See* ('77) 1 Mad 304 (304) : 2 Weir 469 (DB), *In the matter of Subba Aitala.*]

[2] ('27) 14 AIR 1927 Cal 307 (309) : 54 Cal 52 : 101 Ind Cas 657 : 28 Cri L Jour 481 (DB), *Gallagher* v. *Emperor.*

Section 12
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No exclusion can be made of the time taken to obtain copies of diary orders in a criminal case which were filed with the appeal.[3]

In the case of persons in jail, the officer in charge of jail must be regarded as representing the Court establishment. The said officer is responsible for forwarding applications for copies by prisoners and for receiving and delivering copies to them when received. The time, therefore, taken up in forwarding applications for copies on behalf of intending appellants in jail and in transmission of such copies to the jail must be excluded.[4]

33. Finding as to "time requisite" cannot be attacked in second appeal.— A finding as to the time requisite for obtaining copies is one of fact and is not open to question in second appeal.[1]

34. Evidentiary value of dates endorsed on certified copies. — Where an endorsement on the copy by the copying agency which is a Government department shows that a certain number of days was requisite for the supply of copies, it is to be presumed that that number of days was necessary, unless the endorsement shows that a demand for deposit of fee or stamp was made and was not complied with or that the applicant was otherwise negligent.[1] The endorsement by the office may, of course, be shown to be erroneous or fraudulent.[2] But unless there is very clear proof to the contrary, the information given in the endorsement of the copying department must be accepted as correct.[3] When the correctness of an entry made on the copy is challenged, a report of the copyist made in a

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3. ('25) 12 AIR 1925 Rang 239 (240) : 3 Rang 220 : 89 Ind Cas 459 : 26 Cr. L. J. 1371 (DB), *U Zagriya* v. *Emperor.*

4. ('86) 9 Mad 258 (258, 259) : 1 Weir 789 (DB), *Queen-Empress* v. *Lingaya.*
('88) 1888 Pun Re Cri No. 5, p. 9 (9), *Ghamman* v. *Empress.*

Note 33

1. ('22) 9 AIR 1922 Lah 423 (423) : 67 I. C. 478, *Bawa Singh* v. *Thakur Singh.* (A I R 1918 Lah 29 followed.)
('23) 10 AIR 1923 Lah 696 (696) : 73 I. C. 447, *Ram Sarup* v. *Zorawar Mal.* (Much less in revision.)
('94) 1894 Pun Re No. 6, *Thanamal* v. *Mt. Nihali.* (The question was whether two separate periods were requisite in the case for obtaining copies of judgment and decree.)

Note 34

1. ('36) 23 AIR 1936 Lah 693 (694) : 165 Ind Cas 516, *Mani Singh* v. *Anand Parkash.*
('36) 23 AIR 1936 Lah 120 (122) : 158 Ind Cas 736, *Labhu Ram* v. *Bansi Dhar.* (Delay due to negligence of copying department.)
[See however ('98) 1 Oudh Cas 47 (48), *Ghafur Bakhsh* v. *Tilochan.* (Delay in furnishing folios counted in favour of applicant by a subordinate official of copying department wrongly—*Held* party cannot take advantage of it.)]

2. ('14) 1 AIR 1914 Oudh 244 (244, 245) : 23 Ind Cas 209, *Rudra Pratab Singh* v. *Raghuraj Gir.*
[*See* ('20) 7 AIR 1920 Pat 278 (279) : 57 Ind Cas 266, *Fouda Uraon* v. *Ganpat Ram.* (Carelessness of office in giving information to applicant as to date when he should take delivery of copy.)]

3. ('19) 6 AIR 1919 Pat 38 (41) : 49 Ind Cas 1000 (DB), *Mt. Fakhrunissa Bibi* v. *Rambhanjan Singh.*

Section 12
Notes 34–36

departmental enquiry started by the Court in the matter is not legal evidence without the sworn testimony of the copyist.[4] But a *record* of the dates and events in the register of the copying department may be corroborative evidence of the correctness of the entries on the copies.[5] An appeal filed out of time owing to the party being misled by the practice of the Court in allowing an appeal only by seeing the entries on the copy made by the department may be admitted under section 5.[6]

35. Copies in appeals from orders. — In the case of appeals from *orders*, time spent in obtaining not only the fair order (judgment), but also the *final order* (in the form of the decree) where such final order is drawn up, must be excluded.[1]

36. Section 5 and "time requisite." — In determining the time requisite for obtaining copies, the Court has no discretion and is confined to ascertaining the time occupied by the office in preparing the estimate of costs, and, after payment of costs, the time occupied by it to prepare copies to be delivered to the party. If any delay takes place on the part of the appellant in the matter of making the application or supplying the folios or taking delivery, the question of excusing such delay under S. 5 does not arise as part of the said determination but only after it is made. Such delay cannot be considered in *making the computation*. Any *indulgence* by way of extension of the period of limitation can only be granted not under this section but under section 5.[1]

Section 13

Exclusion of time of defendant's absence from British India and certain other territories.

13.* In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India

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* **Act of 1877 : S. 13.**

Exclusion of time of defendant's absence from British India.

In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

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[4] ('28) 15 AIR 1928 Lah 643 (645) : 108 Ind Cas 619, *Nizam Din* v. *Md. Iqbal.* (Entry as to date of copy being ready for delivery.)

[5] *See* ('19) 6 AIR 1919 Pat 38 (40) : 49 Ind Cas 1000 (DB), *Mt. Fakhrunissa Bibi* v. *Rambhanjan Singh.*
[*See also* ('20) 7 AIR 1920 Pat 278 (280) : 57 I. C. 266, *Fouda Uraon* v. *Ganpat Ram.*]

[6] ('07) 10 Oudh Cas 201 (203, 204) (DB), *Shambhu Ratan* v. *Seo Balak.* (Appellant obtained three copies on three different dates—Appeal filed with third copy attached.)

Note 35

[1] ('20) 7 AIR 1920 Pat 844(844): 54 I.C. 630 (DB), *Mahesh Kant* v. *Ram Prasad.* (14 Ind Cas 1006 followed.)

Note 36

[1] ('90) 12 All 461 (490, 491, 493) : 1890 All W N 149 (F B), *Bechi* v. *Ahsan-Ullah Khan.* (7 Suth W R 337 dissented from.)
('81) 9 Cal L R 293 (294) (DB), *Gopal Chunder Roy* v. *Brojo Behary Mitter.* (Period between the date of copy being ready and the date of taking delivery.)

under the administration of [a][the Central Government or the Crown Representative] shall be excluded.

a. Substituted by A. O. for "the Government."

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Any suit."
4. Absence from British India.
4a. Absence from British India on several occasions.
5. Absence of some of several defendants from British India.
6. Ignorance of plaintiff as to defendant's residence.
7. "Territories beyond British India under the administration of the Central Government."
8. Procedure.

Other Topics (miscellaneous)

Absence after or at the time of accrual of cause of action. See Note 4.

Burden of proof is on plaintiff. See Note 8.

Defendant represented by agent. See Note 4.

Defendant under imprisonment in British India—Section not applicable. See Note 4.

Plaintiff's absence from British India—Section not applicable. See Note 4.

Section not applicable to execution application. See Note 3.

Section not qualified or affected by Section 9. See Note 2.

Suit against Native Chiefs or Secretary of State. See Note 4.

1. Legislative changes.

(1) The words "unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, S. 60" occurring in Act IX of 1871 were omitted in the later Acts.

(2) The words "and from the territories beyond British India under the administration of the Government" were added in Act IX of 1908. (See Note 7.)

(3) The words "the Central Government or the Crown Representative" were substituted for the words "the Government" by the Government of Indian (Adaptation of Indian Laws) Order, 1937.

2. Scope of the section. — In *Bhaee Chund* v. *Purtab Chund*[1] it was held by the Privy Council that the period of the defendant's

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Act of 1871 : S. 14.

Exclusion of time of defendant's absence from British India.

In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded unless service of a summons to appear and answer in the suit can during such absence be made under the Code of Civil Procedure, section 60.

Act of 1859 : S. 13.

Computation of period of limitation in case of absence of defendant.

In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

Section 13 — Note 2

[1] ('66) 5 Suth W R P C 81 (88) : 1 Moo Ind App 154 (P C).

absence beyond the jurisdiction of the East India Company's Courts could not be excluded. In *Ruckmaboyee* v. *Lulloobhoy Mottichund*,[2] however, the Privy Council applied the statute, 21 Jac. 1 c. 16, and held that such period could be excluded. The said statute excluded the period of the defendant's absence "beyond the seas," but their Lordships held that the expression "beyond the seas" must be interpreted as synonymous with the expressions "out of territories" or "out of the realm."

This section provides for the *exclusion* of the period of the defendant's absence from British India in computing the period of limitation. It must be distinguished from S. 9 which provides that where once time has begun to run, no subsequent disability or inability to sue stops it. The absence of the defendant from British India does not give rise to an "inability or disability to sue" on the part of the plaintiff. Further, there is no question under this section of *stopping* the running of time. It provides for the *computation* of the period in a particular manner, namely by *excluding* a certain period.[3] This section is therefore in no way affected or qualified by section 9. See Notes 3 and 4 to section 9.

3. "Any suit." — The section applies only to *suits*. It does not apply to execution proceedings.[1]

4. Absence from British India. — In computing the period of limitation, the plaintiff is entitled to exclude, under this section, the time during which the defendant was absent from British India.[1] This may sometimes lead to very inconvenient results. A person may reside out of British India for years, and according to the law of limitation

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[2] (1852) 5 Moo Ind App 234 (260) : 8 Moo P C 4 : 1 Sar 423 (P C).

[3] ('95) 9 C P L R 72 (74), *Bhimraj* v. *Seth Sukh Lal.*

Note 3

[1] ('81) 3 All 185 (186) (DB), *Ahsan Khan* v. *Ganga Ram.* (Section 13 not applicable to application for setting aside execution sale.)

('22) 9 AIR 1922 Oudh 131 (133) : 25 Oudh Cas 74 : 68 Ind Cas 205, *Badal* v. *Chattar Singh.*

Note 4

[1] ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehoodeen Khan* v. *Clara Jane Museehooddeen.*

('71) 1871 Pun Re No. 41, *Home* v. *Jamsetjee.*

('21) 8 AIR 1921 Bom 460 (461) : 45 Bom 1228 : 63 Ind Cas 959 (DB), *Ismailji Haji Halimbhai* v. *Ismail Abdul Kadar.*

('91) 1891 Pun Re No. 72, *Maharaja Sir Partab Singh* v. *Provincial Bank of India Ltd.*

('89) 1889 Pun Re No. 34, *Gulab Khan* v. *Pira.* (Land which was transferred to foreign territory by sudden change of course of river; it was re-transferred to its original position by the same cause. The period during which the land was foreign territory was excluded under S. 13, as defendants as well as subject-matter were outside British India.)

('33) 20 AIR 1933 Lah 741 (741) : 144 Ind Cas 641 (DB), *Dial Singh* v. *Davindar Singh.* (Possession not given to mortgagee as stipulated in mortgage deed — Suit for possession by mortgagee — One mortgagor residing outside British India for considerable time between date of suit and date of mortgage—Such period can be deducted for purposes of limitation as against such mortgagor.)

Section 13
Note 4

of the country in which he resides, the remedy against him in respect of a cause of action may be lost, yet, on his coming to India, it will revive. But the words of the section are express and must be given effect to.[2] It must be remembered that the law of limitation is a law which bars the remedy, and *does not destroy the right*, and, therefore, if by any of its sections, an indulgence is shown to suitors, the Court is bound to give full effect to the language in which that indulgence is conceded.[3]

The words "absent from British India" do not necessarily imply that the defendant was present in British India at the time the cause of action accrued or the period of limitation commenced to run.[4] The section will apply equally to cases where the defendant was absent altogether from British India at the time of the accrual of the cause of action, as to cases where he leaves British India after the period of limitation has commenced to run.[5] It is however necessary for the application of this section that the cause of action or the transaction which gave rise to the cause of action must have taken place in British India.[6]

The fact that the defendant has a duly authorized agent or manager against whom the plaintiff could have filed a suit and obtained a valid decree, does not disentitle the plaintiff from claiming to exclude the period of the *defendant's* absence from British India under this section.[7] But can this principle be applied to suits against the Secretary of State or against a Ruling Prince who always resides outside British India? It has been held in *Sayaji Rao* v. *Madhavrao*,[8] that in such cases, the section should be read consistently with the provisions contained in Part IV of the Code of Civil Procedure, for "suits in particular cases" against defendants who ordinarily would be always out of British India. In that case, Fawcett, Ag. C. J., observed as follows:

> "Section 13 must, in my opinion, be read so as to avoid the obvious absurdity that arises, if such corporate bodies are deemed to reside out of British India, so that suits against them can never be barred at all. And this can be done

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[2] ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehoodeen Khan* v. *Clara Jane Museehooddeen.*
('87) 14 Cal 457 (464) (DB), *Atul Kristo Bose* v. *Lyon & Co.*

[3] ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehoodeen Khan* v. *Clara Jane Museehooddeen.*

[4] ('86) 14 Cal 457 (461, 462) (DB), *Atul Kristo Bose* v. *Lyon & Co.*
[*See also* ('28) 15 AIR 1928 Mad 1088 (1089 to 1091) : 112 Ind Cas 139 (DB), *Rathina Thevan* v. *Packirisamy Thevan.* (*Quære.*)]

[5] ('87) 14 Cal 457 (463, 464) (DB), *Atul Kristo Bose* v. *Lyon & Co.*
(1853) 22 L J C P 217 (218) : 13 C B 813 : 1 C L R 339 : 17 Jur 624: 1 W R 371, *Lafond* v. *Raddock.*

[6] ('28) 15 AIR 1928 Mad 1088 (1091) : 112 Ind Cas 139 (DB), *Rathina Thevan* .v. *Packirisamy Thevan.*

[7] ('98) 25 Cal 496 (503, 504) : 2 Cal W N 269 (FB), *Poorno Chunder Ghose* v. *Sassoon.* (Overruling 10 Cal 440.)
('87) 14 Cal 457 (463) (DB), *Atul Kristo Bose* v. *Lyon & Co.*
('95) 9 C P L R 72 (74), *Bhimraj* v. *Seth Sukh Lal.*

[8] ('29) 16 AIR 1929 Bom 14 (20) : 115 Ind Cas 369 : 53 Bom 12 (DB).

by treating them as defendants, who, by reason of their *special* character, are not absent from British India within the meaning of the section, because they have not the same liberty as private individuals to reside personally in British India and attend to their affairs, and they must do so through agents or representatives. They can be held to reside in British India, in so far as they actually carry on their business through representatives in British India." (See Ss. 79 to 87 of the Civil Procedure Code.)

The plaintiff cannot under this section claim to exclude the period during which the defendant is under *imprisonment* in British India,[9] nor the period of his *own* absence from British India, whether such absence is voluntary or involuntary (as, for instance, absence in consequence of transportation).[10]

4a. Absence from British India on several occasions.— Where the defendant is absent from British India on *several* occasions, all such periods of absence should be excluded.[1] The fact that during his absence the defendant paid occasional visits to British India will not render the section inapplicable in so far as the periods of absence are concerned.[2]

5. Absence of some of several defendants from British India. — A institutes a suit against B, C and D. D was absent from British India for a certain period after the cause of action arose in favour of A. In computing the period of limitation for the suit, can the period of D's absence be excluded under this section,

(1) as against the defendant D,
(2) as against *all* the defendants?

The answer to the question would seem to depend upon the nature of the liability of B, C and D. If their liability is a *several* or *a joint and several* one, the period of D's absence can be excluded only as against D, but not against B and C also. If without excluding such period it appears the suit is barred against B and C, it must be dismissed as against them, but can proceed against D.[1]

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[9] ('69) 1869 Pun Re No. 39, *Janee* v. *Waris*.
See also Section 3 Note 3.

[10] ('68) 10 Suth W R 253 (253): 1 Beng L R (S N) 25 (DB), *A. Domun* v. *Shubul Koolall*. (By adverse holding for more than twelve years, a tenant gains a right of occupancy as against his predecessor, even if the latter's absence has been involuntary in consequence of transportation.)
(1864-65) 2 Mad H C R 113 (113) (DB), *Venkatasubha Pattar* v. *Giri Ammal*. (Plaintiff's voluntary absence abroad after attaining majority does not bar the operation of Act XIV of 1859.)
[Compare ('18) 5 AIR 1918 P C 241 (247) (P C), *John* v. *Dodwell & Co. Ltd.* (Under Ceylon Prescription Ordinance 1871, Ss. 14 and 15, time does not run if *plaintiff* is beyond seas.)
('20) 7 AIR 1920 P C 208 (209) (P C), *Somasundaram Chetti* v. *Arunachalam Chetti*. (Do.)]

Note 4a

[1] ('21) 8 AIR 1921 Bom 460 (461) : 45 Bom 1228 : 63 Ind Cas 959 (DB), *Haji Halimbhai* v. *Ismail Abdul*.

[2] ('97) 1897 Pun Re No. 26, at p. 133, *Mt. Janki* v. *Manohar Lal*.

Note 5

[1] ('18) 5 AIR 1918 Mad 238 (240) : 44 Ind Cas 466 : 41 Mad 446 (DB), *Palaniappa Chettiar* v. *Veerappa Chettiar*.

Suppose now that the liability of B, C and D is a *joint* one and not a joint and several one. Under the English law, if B, C and D are *co-contractors*, their liability is a *joint* one and if D is absent beyond the seas at the time of the accrual of the cause of action, time *does not run* against any of them until the return of D. If D dies beyond the seas, the survivors, i. e., B and C, may be sued within six years of his death.[2] Before the enactment of statute 19 & 20 Vict., Chapter 97, Section 11, the same principles applied in the case of co-debtors. Under the said enactment, however, it was provided that time ran against the co-debtors within the seas and they could be sued during the absence of the co-debtor. The absent co-debtor could also be sued within the statutory period computed from the date of his return.

The above provisions of the English law are plainly inapplicable to cases arising in this country. Under this section the question is not whether *time runs* against the absent person but whether the period of his absence should be *excluded* in computing the period of limitation. But it is conceived that, in the above illustration, the period of D's absence must be excluded not only against D but against *all*. The reason is that, their liability being assumed to be *joint*, the cause of action against them is *single* and indivisible and some of them alone cannot be sued in the absence of the others. If the period of D's absence from British India is not excluded against them all, the result will be that the plaintiff cannot sue B and C alone during the absence of D and cannot sue them after D's return because the suit would be barred against them; nor can he sue D alone after his return because the suit would not be a validly constituted one in the absence of B and C though there is no question of limitation against him. The plaintiff, in such cases, will be without any remedy and the indulgence given by this section will practically become useless.

In the case of defendants who are co-promisors, S. 43 of the Indian Contract Act provides that the promisee may, in the absence of any contract to the contrary, compel *anyone* or more of such joint promisors to perform the whole of the promise. This liability has generally been construed to be a *joint and several one*,[3] and it has been held that

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[2] (1845) 68 R R 573 (579, 580) : 14 L J Q B 282 : L R 7 Q B 811 : 9 Jur 969, *Fannin* v. *Anderson*.
(1855) 100 R R 648 (657, 661) : 16 C B 123 : 3 C L R 381 : 24 L J C P 89 : 1 Jur (N S) 355, *Towns* v. *Mead*.
Halsbury's "Laws of England" (Hailsham Edition), Vol. 20, page 643.

[3] ('10) 5 I. C. 735 (737) : 33 Mad 317 (DB), *Ramanjulu* v. *Aramudu Iyengar*.
('93) 17 Bom 6 (11): Chitty's S C C R 336 (DB), *Motilal Bechardas* v. *Ghellabhai Hari Ram*.
('24) 11 AIR 1924 Cal 209 (211) : 50 Cal 718 : 74 Ind Cas 1021 (DB), *Chand Mall* v. *Ban Behari Bose*.
('33) 20 AIR 1933 Bom 407 (408, 409): 145 Ind Cas 619, *In re Vallibhai Adamji*.
('33) 20 AIR 1933 Mad 382 (383) : 144 Ind Cas 726, *Sadasiva Suryanarayana Rao* v. *Rajalingam*.
('33) 20 AIR 1933 Nag 324 (326) : 144 Ind Cas 117, *Nathusa Pasusa* v. *Mahadeo*.
('35) 163 Ind Cas 331 (334) : 62 Cal 612 (DB), *Moselle Solomon* v. *Martin & Co*, (Per Jack, J.)

the provision is a departure from the principle of the decision in *King* v. *Hoare*[4] that the liability of joint promisors is a *joint* one. Thus, where in a suit against a partnership firm it appeared that some of the partners were absent from British India for a certain period, it was held that the liability of the partners was joint and several under the Contract Act, S. 43 and S. 249 (which is now S. 25 of the Partnership Act of 1932), and that the plaintiff was entitled to exclude the period of the absence of the said partners *only as against them* but not against the partners who were not so absent. It was also held that if a judgment had been obtained against those within British India, but had not been fully satisfied, a suit for the unsatisfied portion of the claim would lie against the others.[5]

According to some decisions of the High Court of Calcutta, however, S. 43 of the Contract Act merely prevents a person sued on a joint promise by him and others, from objecting that the others are not made parties to the suit but does not make their liability a joint and several one.[6] Where the plaintiff obtained a judgment against A alone on a joint promise by A and B, B having been absent from British India at the time of the suit against A, and, the judgment not being fully satisfied, the plaintiff instituted a suit against B after his return for the unsatisfied portion of the claim, it was held by Garth, C. J., applying the decision in *King* v. *Hoare*,[4] that the liability of A and B was a *joint* one, that consequently the cause of action was a *single* one, which was exhausted on obtaining judgment against A, and that the suit against B did not lie.[7] His Lordship further observed as follows:

> "It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the statute of limitation. But this is an injustice which the Legislature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 & 20 Vict., c. 97."

It is not clear as to what his Lordship meant by the words "and the plaintiff, if he waits for his return, would be barred by the statute of limitation." If S. 13 is applied, there would be no bar against the absent person. If his period of absence is excluded as against the other persons also, there is no hardship of any kind.

6. Ignorance of plaintiff as to defendant's residence. — The plaintiff's ignorance of the defendant's residence is by itself not a ground of exclusion under the Limitation Act, but where the defendant has resided out of British India, the period of such residence can be excluded independently of any question of knowledge of that fact by the plaintiff.[1]

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[4] (1844) 67 R R 694 (702, 703, 704) : 13 M & W 494 : 14 L J Ex 29 : 2 Dowl & L 382 : 8 Jur 1127.

[5] ('18) 5 AIR 1918 Mad 238 (240) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa Chettiar* v. *Veerappa Chettiar*.

[6] ('78) 3 Cal 353 (359 to 363) : 1 Cal L R 488 : 2 Ind Jur 758 (DB), *Hemendro Coomar Mullick* v. *Rajendrololl Moonshee*.

('35) 163 Ind Cas 331 (334, 335) : 62 Cal 612 (DB), *Moselle Solomon* v. *Martin & Co.* (Per Lort-Williams, J.; Jack, J., contra.)

[7] ('78) 3 Cal 353 (360) : 1 Cal L R 488 : 2 Ind Jur 758 (DB), *Hemendro Coomar Mullick* v. *Rajendrololl Moonshee*.

7. **"Territories beyond British India under the administration of the Central Government."** — Where during the war, Basra was under the *military occupation* of the Indian Expeditionary Force sent by the Government of India, such occupation did not make it a territory under the *administration* of the Government of India within the meaning of this section; and, therefore, if the defendant was at Basra, the plaintiff was entitled to deduct the period of such absence under this section.[1] Secunderabad is under the administration of the Government of India.[2]

8. **Procedure.** — In case the plaintiff claims exclusion of the period of the defendant's absence from British India, he should specifically plead (See Order 7 Rule 6 of the Civil Procedure Code) and prove strictly that the defendant was absent from British India during the period for which the exclusion is claimed.[1] The burden is on him also to prove that the defendant was absent from territories under the administration of the Government of India.[2]

Exclusion of time of proceeding bona fide in Court without jurisdiction.

14.* *(1)* In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or

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* **Act of 1877 : S. 14.**

Exclusion of time of proceeding bona fide in Court without jurisdiction.

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Note 6

1. **('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museeh-ood-deen Khan* v. *Clara Jane Museeh-ood-deen.***

See also Section 3 Note 3.

Note 7

1. **('23) 10 AIR 1923 All 64 (65) : 45 All 18 : 68 Ind Cas 978 (DB), *Fakrullah Khan* v. *Ram Sarup.***

2. **('38) 25 AIR 1938 Lah 225 (225) : 176 Ind Cas 255 (DB), *Ali Shah Khan* v. *Ahmad Nawaz Khan.* (21 Cal 177 and A I R 1933 P C 134 referred.)**

('37) 24 AIR 1937 Bom 242 (243) : 169 Ind Cas 651, *Ezra Sion & Co.* v. *Kailas Viraiah.* (AIR 1933 P C 134 relied on.)

Note 8

1. **('10) 9 Ind Cas 568 (568) (Mad), *Periyanna Pillai* v. *Arasu Thevan.***

2. **('37) 24 AIR 1937 Bom 242 (243) : 169 Ind Cas 651, *Ezra Sion and Co.* v. *Kailas Viraiah.***

in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Like exclusion in case of order under Civil Procedure Code, section 20.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

Like exclusion in case of application.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief, shall be excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

Explanation 1. — In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2. — A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

Act of 1871 : S. 15.

Exclusion of time of suing bona fide in Court without jurisdiction.

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1. — In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2. — A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

Act of 1859 : S. 14.

Computation of period of limitation in case of suit prosecuted bona fide, but in wrong Court.

In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bona fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I. — In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III. — For the purposes of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. Effect of section is not to render second suit a continuation of the first.
4. Limitation, if suspended during the period spent in prior proceeding in wrong Court.
5. Proceedings to which this section is applicable.
6. Sections 5 and 14 of the Act.
7. Sections 4 & 14, joint operation.

7a. Section 14 and Article 182 (5).

8. Section 14 and withdrawal of proceedings.
9. "In computing the period of limitation prescribed."
10. Plaintiff prosecuting — Explanation II.
11. "Due diligence."
12. "Another" proceeding.
13. "Civil proceeding" in a "Court."
14. "Court of appeal," if includes Court of revision.
15. "Court of appeal" — Second or further appeal.
16. Parties must be the same.
17. Suit must be based on the same cause of action — Application must be for the same relief.
18. "Same cause of action" — Sub-section (1).
19. "For the same relief" — Sub-section (2).
20. "In good faith."
21. "Good faith," whether a question of fact.
22. "Which, from defect of jurisdiction, ... is unable to entertain it."
23. "Jurisdiction."
24. "Other cause of a like nature."
25. "Unable to entertain."
26. Misjoinder — Explanation III.
27. Explanation I.
28. Time for obtaining copy of the order in prior proceedings — Explanation I.
29. Exclusion of a portion of the time.
30. Failure to plead the exemption under this section.

Other Topics (miscellaneous)

Applicability of section to appeals. See Notes 5 and 6.

Arbitration proceedings. See Note 5.

Different causes of action — Instances. See Note 18.

Different reliefs—Instances. See Note 19.

Execution proceedings. See Notes 5 and 12.

Honest doubt as to Court where suit lies. See Note 20.

Insolvency proceedings. See Note 12.

Mistake of law. See Note 20.

Prior proceedings in foreign Courts. See Notes 5 and 10.

Resisting appeal — If "prosecuting." See Note 10.

Resisting suit — Whether "prosecuting." See Note 10.

Revenue Courts are "Courts." See Note 13.

Same person suing or sued in different capacities. See Note 16.

Section to be liberally construed. See Note 2.

Wrong choosing of forum. See Note 20.

Wrong valuation of suit. See Note 20.

1. Legislative changes.

(1) Section 14 of the Act of 1859 and S. 15 of the Act of 1871, corresponding to this section, applied to the computation of the period of limitation prescribed for *suits* and not for *applications*.[1]

(2) The Act of 1877 extended this principle to the computation of the period prescribed for *applications* also, but restricted its applicability by providing that only the time during which *another application* was prosecuted in good faith in a wrong Court could be excluded.[2]

(3) Under the present section the time during which the plaintiff or the applicant has been prosecuting *another civil proceeding* can be excluded.

Explanation III is new.

2. Scope and applicability of the section.—The principle of the section is the protection against the bar of limitation of a person honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial; and this principle is applicable not only to cases where the person brings his suit in the wrong Court, but also where he brings his suit in the right

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Section 14 — Note 1

[1] (1865) 4 Suth W R Misc 18 (18) (DB), *Khetturnath Dey* v. *Gossain Doss Dey*. (Case under Act of 1859.)

('67) 7 Suth W R 327 (329) (DB), *Sheo Narain* v. *Jhoogul Kishen Ram*. (Do.)

('75) 24 Suth W R 405 (405, 406) (DB), *Banu Kant Ghose* v. *Haran Kisto Ghose*. (Case under Act of 1871 — McDonnell, J., *contra*.)

('77) 1877 Pun Re No. 79, *Abdul Rehman* v. *Ghulam Kadir*. (Case under Act of 1871.)

('75-77) 1 All 97 (99, 100) : 11 Mad Jur 258 (FB), *Jiwan Singh* v. *Sarnam Singh*. (Case under Act of 1871 — Stuart, C. J. dissenting.)

('75-76) 8 Mad H C R 99 (100) (DB), *Krishna Chetty* v. *Rami Chetty*.

[2] ('82) 1882 All W N 184 (184) (DB), *Jadunath Sahai* v. *Partab Ram*.

('86) 1886) Pun Re No. 63, *Sheoji Ram* v. *Sheo Chund Rai*.

See also Article 163 Note 11.

Court but is nevertheless prevented from getting a trial on the merits by something which, though not a defect of jurisdiction, is analogous to that defect.[1] In *Ramdutt Ramkissen* v. *E. D. Sassoon & Co.*,[2] Lord Salvesen in delivering the judgment of the Privy Council observed as follows :

> "It may be assumed that it had been ascertained before these provisions (i.e., S. 14) were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence, the necessity for some provision to protect a *bona fide* plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim."

It has been held that the section ought to be liberally construed.[3]

In cases coming under S. 71 (2) of the U. P. Village Panchayat Act of 1920, S. 14 must be treated as abrogated, the former being a *special* provision.[4]

3. Effect of section is not to render second suit a continuation of the first. — In *Ramdutt Ramkissen* v. *E. D.*

Note 2

[1] (1900) 22 All 248 (253, 258) : 1900 All W N 64 (FB), *Mathura Singh* v. *Bhavani Singh.* (Misjoinder of plaintiffs and causes of action in former suit.)

('75) 23 Suth W R 274 (274, 275) (DB), *Chandee Roy* v. *Isree Pershad Narain Singh Bahadur.* (Time occupied by judgment-creditor in prosecuting his claim in Civil Court according to the directions of the Collector allowed to be deducted.)

('71) 15 Suth W R 125 (126) (DB), *Khuthur Paul Singh* v. *Luckhee Narain.*

('37) 24 AIR 1937 Mad 357 (359) : ILR (1937) Mad 161 : 170 Ind Cas 524 (DB), *Dugarajulum Garu* v. *Aryan Bank of Vizagapatam.* (Principle of S. 14 applies equally to steps taken after decree as to steps taken prior to decree.)

[*See also* ('78-80) 2 All 792 (797) : 7 Ind App 167 : 6 Cal L R 561 : 4 Sar 157 : 3 Shome L R 211 : 4 Ind Jur 426 : 3 Suther 761 (PC), *Hira Lall* v. *Badri Dass.*

(1865) 4 Suth W R P C 63 (65) : 8 Moo Ind App 308 : 1 Suther 427 : 1 Sar 774 (PC), *Doorgapersad Roy Choudhury* v. *Taraprasad Roy Chowdhury.* (Decided under S. 14 of Regulation III of 1793.)

('84) 10 Cal 669 (674) : 8 Ind Jur 619 (DB), *Juggut Chunder* v. *Rada Nath.*

('66) 5 Suth W R 51 (52) (DB), *Huromonee Gooptia* v. *Gobind Coomar Chowdhry.* (Decided under S. 14, Regulation III of 1793.)

(1865) 2 Suth W R 256 (257) (DB), *Purbhoo Narain* v. *Raja Keelanund.*]

[**See however** (1865) 2 Suth W R 45 (45) (DB), *Okhetonoonissa* v. *Koochil Sirdar.*

(1864) 1 Suth W R 328 (328) (DB), *Sham Kant* v. *Baboo Gopal Lal.*]

[2] ('29) 16 AIR 1929 P C 103 (107) : 115 I. C. 713 : 56 I. A. 128 : 56 Cal 1048 (PC).

[3] ('26) 13 AIR 1926 Mad 1081 (1082) : 98 I. C. 14, *Venkamma* v. *Parthasarathi.*

('23) 10 AIR 1923 Mad 347 (348) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali* v. *Kunhammad.*

('33) 20 AIR 1933 Bom 276 (284) : 145 I. C. 190 (DB), *Shri Sharada Peeth Math Dwarka* v. *Shri Rajrajeshvarashram.*

('19) 6 AIR 1919 Mad 1071 (1074) : 41 Mad 701 : 46 I. C. 265 (DB), *Kannusami Pillai* v. *Jagathambal.* (Words "other cause" to be construed liberally.)

[4] ('41) 28 AIR 1941 Oudh 276 (276) : 192 I. C. 840, *Ram Sagar* v. *Ram Nath.*

Sassoon & Co.,[1] their Lordships of the Privy Council observed : "It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a *continuation* of the first, even though the subject-matter and the parties to the suits were identical." (See Note 12 and S. 3 Note 5.)

4. Limitation, if suspended during the period spent in prior proceeding in wrong Court.—As has been seen in the Notes under S. 9, where limitation has once begun to run, it will continue to do so and the only exception recognized is that provided in the proviso to that section. It is clear, therefore, that during the period of the prosecution of the prior civil proceeding in the wrong Court, limitation is not *suspended*, for otherwise, it would amount to a recognition of another exception to the general rule stated above. It has been held that this cannot be done.[1] In *Ramcharan Sahu* v. *Goga*,[2] their Lordships of the Allahabad High Court observed :

> "The Indian Limitation Act is undoubtedly an exhaustive Code governing the law of limitation in India. The cases in which the running of limitation can be suspended are contained in sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended."

Some cases,[3] however, appear to lay down that limitation would be suspended during such period. But an examination of the cases

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Note 3

1. ('29) 16 AIR 1929 P C 103 (107) : 115 I. C. 713 : 56 I. A. 128 : 56 Cal 1048 (PC).

Note 4

1. ('20) 7 AIR 1920 Mad 1 (7, 13) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty* v. *Mahamad Madar Ammal.*
('35) 22 AIR 1935 All 323 (326, 327) : 153 I. C. 1058 (DB), *Muhammad Yunis* v. *Tilokchand.* (12 Moo Ind App 244 and A I R 1916 P C 96 distinguished and explained.)
('34) 21 AIR 1934 Rang 329 (331) : 154 Ind Cas 153 : 13 Rang 43, *M. S. Chettiar Firm* v. *S. E. Bholat.*
('27) 14 AIR 1927 Mad 597 (597) : 100 Ind Cas 776 : 50 Mad 417 (DB), *Satya Narayana Brahman* v. *Seethayya.*
[*See* ('24) 11 AIR 1924 Lah 40 (41) : 71 Ind Cas 495 : 4 Lah 90 (DB), *Hukam Chand* v. *Shahab Din.*
('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prosad* v. *Bhupal Ram.*
(1862-63) 1 Mad H C R 320 (321, 322) (DB), *Ramakrishnasastrulu* v. *Lakshimidevamma.*]

2. ('27) 14 AIR 1927 All 446 (449) : 49 All 565 : 102 Ind Cas 96 (DB).

3. ('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 I. C. 452 (PC), *Nrityamony Dassi* v. *Lakhan Chandra Sen.*
('03) 30 Cal 1033 (1043) : 30 Ind App 177 : 8 Cal W N 1 : 8 Sar 529 (PC), *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri.*
(1857-59) 7 Moo Ind App 238 (258, 259) : 1 Sar 633 (PC), *Rajah Enayat Hossain* v. *Sayud Ahmad Reza.*
('69) 11 Suth W R P C 5 (6) : 12 Moo Ind App 244 : 2 Suther 173 : 2 Sar 424 : 2 Beng L R P C 10 (PC), *Rani Swarnomayee* v. *Shooshe Mukhi Barmani.* (Fresh cause of action.)

Section 14
Notes 4-5

shows that most of them have reference to different circumstances from those arising in cases covered by the specific terms of this section; these cases deal with suspension of a cause of action or the right to sue rather than with suspension of limitation.

See also Notes 5, 11 and 12 to section 9.

5. Proceedings to which this section is applicable.—The section applies, in terms, to suits and applications.[1] In the undermentioned cases,[2] it has, however, been held that the section does not

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('20) 7 AIR 1920 Mad 663 (664) : 43 Mad 845 : 59 Ind Cas 472, *Muthuveerarpa Chetty* v. *Adikappa Chetty.*

('20) 7 AIR 1920 Mad 948 (951, 961) : 59 Ind Cas 98 (SB), *Secretary of State* v. *Vegayammapeta Estate.*

('20) 7 AIR 1920 Pat 786 (786) : 59 I. C. 314, *Midnapore Zamindary Co., Ltd.* v. *Jaga Nath Sarangi.* (Right to recover rent from tenants held to be in suspense pending result of a suit for apportionment as among the co-sharer zamindars.)

('11) 10 Ind Cas 21 (22, 23) (Oudh), *Amir Chand* v. *Narsingh Narain.* (In this case it was held that there were no legal or equitable *grounds* for such suspension.)

('08) 35 Cal 209 (217, 218) : 7 Cal L Jour 59 : 12 Cal W N 326 (DB), *Lakhan Chandra Sen* v. *Madhu Sudan Sen.*

('71) 16 Suth W R 79 (80) : 8 Beng L R 537*n* (DB), *Eshan Chunder Roy* v. *Khajah Assanoollah.* (Suit for arrears of rent—Prior suit for ejectment of same defendants as trespassers—Time excluded—11 Suth W R P C 5 followed.)

[*See* ('02) 29 Cal 626 (632) : 6 Cal W N 776, *Chowdhry Kesri Sahay* v. *Glani Roy.*

('25) 12 AIR 1925 Pat 369 (371) : 86 Ind Cas 358 : 4 Pat 378, *Gobind Prasad* v. *Jugdip Sahay.* (Analogy of Section 14 applied.)

('83) 9 Cal 255 (259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (PC), *Hurro Pershad Roy* v. *Gopal Dass Dutt.* (12 Moo Ind App 244 construed.)

('77) 3 Cal 6 (12, 13) : 2 Ind Jur 209, *Watson & Co.* v. *Dhonedra Chunder Mookerjee.*

('77) 3 Cal 817 (822) : 2 Cal L R 450, *Hurro Pershad Roy* v. *Gopal Dass Dutt.*

('18) 5 AIR 1918 Mad 548 (550) : 41 Ind Cas 581, *Doraisamy Padayachi* v. *Vaithilinga Padayachi.* (A I R 1916 P C 96 held to favour equitable suspension of limitation apart from statute.)

('24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520, *Dwijendra Narayan Roy* v. *Jogees Chendra.*]

[*See also* ('73) 19 Suth W R 18 (19), *Huronath Roy Chowdhury* v. *Golucknath Chowdhry.* (Prior suit for ejectment as trespasser — Subsequent suit for rent —Prior suit must have been in *bona fide* belief that defendants were trespassers.)]

Note 5

[1] ('40) 27 AIR 1940 Pat 677 (681) : 19 Pat 354 : 191 I. C. 695 (DB), *Bhishundeo Narain* v. *Raghunath Prasad.* (Execution application.)

('32) 19 AIR 1932 Lah 531 (532) : 138 Ind Cas 646 : 14 Lah 106, *Kala Singh* v. *Gehna Singh.* (Section 14 covers execution applications.)

('94) 18 Bom 784 (786) (DB), *Navalchand Nemchand* v. *Ami Chand Talakchand.* (Do.)

('93) 20 Cal 29 (32) (DB), *Raj Bullubh Sahai* v. *Joy Kishen Pershad.* (Prior execution application in a wrong Court saves time for later application.)

('75) 24 Suth W R 303 (303) (DB), *Rajah Promotho Nath Roy Bahadoor* v. *Robert Watson & Co.* (Execution application.)

('32) 19 AIR 1932 All 340 (342) : 54 All 423 : 140 Ind Cas 178, *Raghunandan* v. *Bhuwal Tewari.* (Application for rehearing appeal.)

[2] ('26) 13 AIR 1926 All 345 (345) : 93 Ind Cas 292, *Ramraj* v. *Mt. Umraji.* (Section 14 held not to apply to execution applications.)

Section 14
Note 5

apply to *applications*. It is submitted that they are not correct, being obviously opposed to the section.

A 'suit,' as defined in S. 2, does not include an appeal. It has been held by their Lordships of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram*,[3] that the section does not, in terms apply to *appeals*, but that the circumstances contemplated in the section may be ordinarily taken to constitute a 'sufficient cause' within the meaning of S. 5 of the Act. (See Note 9 under S. 5.) A contrary view, namely that this section will apply to appeals has been taken in the undermentioned cases.[4] It is submitted that these cannot be accepted as correct.

In *Ramdutt Ramkissen* v. *E. D. Sassoon & Co.*,[5] their Lordships of the Privy Council held that though the Limitation Act had no application, in terms, to proceedings before an arbitrator, the analogy of the Limitation Act required that an arbitrator should exclude the time spent in prosecuting, in good faith, the same claim before an arbitrator who was without jurisdiction. Now, after the enactment of the Arbitration Act, X of 1940, the above result will follow from S. 37 of that Act under which the provisions of the Limitation Act apply to arbitrations as they apply to proceedings in Courts.

Foreign Courts.—The section does not apply to prior proceedings in foreign Courts[6] or in Courts, which are not in British India.[7]

Special or local Acts. — As to the application of this section to special or local Acts, see Notes under section 29.

('23) 10 AIR 1923 All 319 (320) : 45 All 332 : 84 Ind Cas 538, *S. T. Gadre* v. *Brijnandan Saran.* (Application to set aside an ex parte decree.)

[3] ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

[4] ('28) 15 AIR 1928 Lah 136 (137) : 106 I. C. 812, *Maula Bakhsh* v. *Udham Singh.*

('13) 18 Ind Cas 92 (93) (DB) (Oudh), *Rahat-Ullakhan* v. *Ibadullakhan.* (Appeal filed in wrong Court —*Bona fide* mistake—Due diligence—Section 14 assumed to apply.)

('23) 10 AIR 1923 Cal 291 (291) : 68 Ind Cas 200 (DB), *Purna Chandra Chattopadhya* v. *Mabub Bakhsh.* (Appeal after an infructuous review application.)

('08) 1908 Pun W R No. 66, p. 240, *Jagatram* v. *Jacob.* (Do.)

('21) 62 Ind Cas 957 (959) (DB) (Cal), *Thakamani Dasi* v. *Pitambar Bhuya.* (Do.)

('30) 17 AIR 1930 Pat 307 (308) : 129 Ind Cas 660 (DB), *Jiwan Ram-Ram Chander* v. *Hazari Lal.* (Appeal after an infructuous suit in a claim matter falling under Section 47, Civil Procedure Code.)

[5] ('29) 16 AIR 1929 P C 103 (107, 108) : 56 Ind App 128 : 56 Cal 1048 : 115 Ind Cas 713 (PC). (An arbitrator is a Court constituted by parties.)

[6] ('37) 169 Ind Cas 788 (793) : I L R (1937) 1 Cal 541, *Mayadas Bhagat* v. *Commercial Union Assurance Company Ltd.* (Court in Kashmir State.)

('27) 14 AIR 1927 Lah 200 (208) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh* v. *Muhammad Said.* (Court in Poonch State.)

('10) 8 Ind Cas 645 (646, 647) : 35 Bom 139 (DB), *Chanmalappa* v. *Abdul Vahab Muhammad Hussain.* (Court in Mysore State.)

[*See* ('78-80) 2 Mad 407 (412) : 5 Ind Jur 188 (DB), *Parry and Co.* v. *Appasamy Pillai.* (No opinion expressed on the question.)]

[7] ('23) 10 AIR 1923 Nag 321 (321) : 76 Ind Cas 305 (DB), *Rajanna* v. *Narayan.* (A Berar Court.)

This section is restricted to *civil* proceedings; hence a complaint under S. 9 of the Child Marriage Restraint Act (XIX of 1929) made to a wrong Court, will not save time, under this section, for a subsequent complaint to the proper Court.[8]

6. Sections 5 and 14 of the Act. — There is a clear distinction between the two sections. Section 14 provides for the *exclusion* of time during which another civil proceeding was pending, whereas S. 5 affords an *extension* of time for good cause shown. The power to excuse delay and grant an extension of time under S. 5 is discretionary, whereas under S. 14, exclusion of time is mandatory, if the requisite conditions are satisfied.[1] As has been already seen in Note 5, though S. 14 may not, in terms, apply to a particular case, as for example *an appeal*, the *circumstances* contemplated in S. 14 might and ordinarily would constitute a "sufficient cause" in the sense of S. 5. (See Note 9 under section 5.)

7. Sections 4 and 14, joint operation. — It has been seen in Note 7 to S. 4, that where the period of limitation, after excluding the period allowed under S. 14, expires on a day on which the Court is closed, the suit or other proceeding may be filed on the re-opening day. But the days on which the Court was closed *prior* to the commencement of the period of exclusion under this section cannot be excluded either under this section or under section 4.[1] Thus, where the period of limitation for a suit expired on 1st June 1913, which was a Sunday, and the suit was filed on 2nd June 1913, but in a wrong Court, and was, consequently, returned to be presented to the proper Court, it was held that the period of one day between the 1st and 2nd June could not be excluded under this section.[2] See also S. 4 Note 13.

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[8] ('39) 26 AIR 1939 Mad 512 (513) : 183 Ind Cas 595, *Venkata Narasimham* v. *Satyanarayana Rao.*

Note 6

[1] ('15) 2 AIR 1915 Low Bur 145 (146) : 27 I. C. 829 : 8 Low Bur Rul 146 (DB), *Maung Tun U* v. *Palaniappa Chetty.*

('02) 25 Mad 166 (178) : 11 Mad L Jour 406 (DB), *Kichilappa Naickar* v. *Ramanujam Pillai.*

('13) 20 Ind Cas 3 (6) (DB) (Lah), *Mt. Husaina* v. *Mt. Sahib Nur.*

[But see ('38) 25 AIR 1938 Oudh 100 (101) : 14 Luck 4 : 173 Ind Cas 648 (DB), *Jagdeo Prasad* v. *Pearey Lal.* (The words "discretion exercised under S. 14" in the judgment are probably used to denote a finding on the question whether the earlier proceedings were in good faith or not.)]

Note 7

[1] ('28) 10 AIR 1928 Mad 114 (116, 119) : 69 Ind Cas 724 (DB), *Govindasamy* v. *R. Sami.*

('21) 8 AIR 1921 Mad 654 (655, 657) : 44 Mad 817 : 63 Ind Cas 924 (DB), *Ummathu* v. *Puthamma.*

('19) 6 AIR 1919 Mad 845 (845, 846) : 47 I. C. 624 (DB), *Ramalingam* v. *Subbaier.*

('29) 16 AIR 1929 Lah 425 (426) : 116 Ind Cas 314 : 11 Lah 12 (DB), *Dharman Ram* v. *Ganga Ram.*

[But see ('21) 8 AIR 1921 Bom 379 (380) : 45 Bom 443 : 59 Ind Cas 743 (DB), *Basavanappa* v. *Krishnadas.* (Dissenting from 36 Mad 131.)]

[2] ('20) 7 AIR 1920 Lah 346 (347) : 55 Ind Cas 55, *Banomal* v. *Banomal.* (A I R 1916 All 222 relied on.)

('16) 3 AIR 1916 All 222 (223) : 35 Ind Cas 292 (DB), *Mukund Ram* v. *Ramraj.*

Section 14
Notes 7a–8

7a. Section 14 and Article 182 (5). — Section 14 and Art. 182 (5) deal with quite different matters. Section 14 relates to the method of *calculation* of the period of limitation after it has started, while Art. 182 (5) fixes the point from which limitation begins to run. A prior application for execution which is not in accordance with the law and is not made to the proper Court will not be sufficient to give a fresh starting point of limitation under Article 182 (5) but may fall under this section and entitle the applicant to the deduction of the period occupied by such application in calculating the period of limitation for a subsequent application for execution.[1]

8. Section 14 and withdrawal of proceedings. — This section does not apply where the plaintiff himself withdraws the suit under O. 23 R. 1 of the Civil Procedure Code.[1] Order 23 R. 2 lays down that in case of withdrawal of a suit under that provision, the suit so withdrawn must be deemed to be non-existent for purposes of limitation for a fresh suit. This is a special provision in the nature

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[*See also* ('37) 24 AIR 1937 Lah 464 (464, 465) : 173 I. C. 740, *Bujamal Gainda Mal* v. *Mukta Parshad.*

('37) 24 AIR 1937 Nag 215 (215, 216) : I L R (1937) Nag 217 : 170 Ind Cas 798, *Wamanrao Anandrao* v. *Umrao Tulsiramji.*]

Note 7a

[1] ('40) 27 AIR 1940 Pat 677 (681) : 19 Pat 354 : 191 Ind Cas 695 (DB), *Bhishundeo Narain* v. *Raghunath Prasad.*

Note 8

[1] ('39) 26 AIR 1939 Cal 625 (625, 626) : I L R (1939) 2 Cal 316 : 184 Ind Cas 631 (DB), *Mohanlal Baheti* v. *Tabizuddin Ahmed.* (Plaintiff feeling difficulty regarding question of jurisdiction asking leave to withdraw suit with liberty to bring fresh suit — Court granting permission without deciding point of jurisdiction — S. 14, Limitation Act does not apply.)

('38) 25 AIR 1938 Bom 281 (282) : I L R (1938) Bom 327 : 175 Ind Cas 528 (DB), *Achut Dadaji* v. *Parashram Vasudev.* (Suit on promissory note filed in High Court having jurisdiction to entertain it under Cl. 12 of Letters Patent — Defendants raising plea that they were agriculturists—Plaintiff withdrawing suit under O. 23 R. 1, C. P. C., and bringing fresh suit — Case comes under O. 23 R. 2 and not under S. 14, Limitation Act.)

('34) 21 AIR 1934 All 688 (692) : 57 All 145 : 150 Ind Cas 135 (FB), *Sadayatan Pande* v. *Ram Chandra Gopal.*

('28) 15 AIR 1928 All 402 (402, 403) : 114 Ind Cas 910, *Rahim Ali* v. *Yehia Khan.*

('16) 3 AIR 1916 Mad 944 (945) : 31 Ind Cas 234 : 39 Mad 936 (DB), *Arunachallam Chettiar* v. *Lakshmana Aiyar.*

('13) 20 Ind Cas 205 (206) (DB) (Cal), *Upendra Nath Nag Choudhury* v. *Surya Kanta Roy Chowdhury.*

('05) 29 Bom 219 (225, 226) : 7 Bom L R 90 (DB), *Varajlal* v. *Shomeshwar.*

('88) 12 Bom 625 (633) : 1887 Bom P J 337 (DB), *Krishnaji Lakshman* v. *Vithal Ravji Renge.*

('82) 6 Bom 681 (683) (DB), *Pirjade* v. *Pirjade.* (Same rule applies to applications.)

('35) 22 AIR 1935 Bom 259 (260) : 157 Ind Cas 592, *Kondaji Bagaji* v. *Dagadu Gajaba.*

[*See also* ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Rampati* v. *Phool Singh.*

('25) 12 AIR 1925 Cal 845 (851) : 88 Ind Cas 637 : 52 Cal 894 (FB), *Becharam Choudhuri* v. *Purna Chandra Chatterjee.* (Per Suhrawardy J.)]

of an exception to s. 14 and must be held to prevail, on the principle *generalia specialibus non derogant.* But there is no real conflict between s. 14 of the Act and o. 23 r. 2, Civil Procedure Code, as the words "is unable to entertain it" in s. 14 do not merely mean that the Court has expressed its mind as to the defect in the suit but also that it has passed an *order terminating* the proceeding on the ground that it cannot proceed.[2] The above principles will also apply to the withdrawal of proceedings other than suits.[3]

Where a plaintiff is honestly in doubt as to in which of two Courts his suit lies and institutes it in one of such Courts with due care and caution, but at a subsequent stage it is found that a wrong forum has been chosen, and on an admission to that effect the Court returns the plaint for presentation to the proper Court, it is not a case of *withdrawal* of the suit by reason only of such an *admission.* To such a case, section 14 will apply.[4]

9. "In computing the period of limitation prescribed." — The section applies only where a period of *limitation has been prescribed.* The period of two years, referred to in s. 53 of the Provincial Insolvency Act, 1920, is not a "period of limitation prescribed" within the meaning of this section.[1] But the section applies to the computation of the period of limitation prescribed by the Bengal Tenancy Act.[2]

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2. ('40) 27 AIR 1940 Sind 125 (127) : I L R (1940) Kar 225 : 190 Ind Cas 328 (DB), *Kaliandas* v. *Muhammad Akbar.* (A I R 1934 All 688 (FB) relied on.)
('39) 26 AIR 1939 Cal 625 (625, 626) : I L R (1939) 2 Cal 316 : 184 Ind Cas 631 (DB), *Mohanlal Baheti* v. *Tabizuddin Ahmed.*

('37) 24 AIR 1937 All 124 (126) : 167 Ind Cas 371 (DB), *Ram Manohar* v. *Baboo Singh.* (The observation that in cases of withdrawal the suit does not fail for defect of jurisdiction or other cause of like nature is not however correct, as withdrawal may be permitted where the Court is satisfied that the suit must fail by reason of "some formal defect" which expression will include defect of jurisdiction or other defect of like nature — See Authors' Commentary on the Code of Civil Procedure, 3rd Edn., Order 23 Rule 1, Note 25.)

('81-82) 6 Bom 681 (683) (DB), *Pirjade* v. *Pirjade.* (The criticism contained in the foot-note remark under A I R 1937 All 124 above cited is also applicable to this case.)

('34) 21 AIR 1934 All 688 (691, 692) : 57 All 145 : 150 Ind Cas 135 (FB), *Sadayatan Pande* v. *Ram Chandra Gopal.*

3. ('38) 25 AIR 1938 Cal 517 (518) : I L R (1938) 1 Cal 262 : 177 Ind Cas 948 (DB), *Hrishikesh Mitra* v. *Barada Prosad Roy.* (Withdrawal of certificate proceedings under the Bengal Tenancy Act.)

4. ('32) 19 AIR 1932 All 377 (378) : 138 I. C. 108 (DB), *Mt. Rampati* v. *Phool Singh.*

Note 9

1. ('17) 4 AIR 1917 Mad 144 (144) : 36 Ind Cas 828 (DB), *Mahomed Maraikkar* v. *Official Receiver, Tinnevelly.* (Case under Section 36 of Act 3 of 1907, which is same as Section 53 of Act V of 1920.)

2. ('29) 16 AIR 1929 Cal 825 (326) : 56 Cal 805 : 121 Ind Cas 673 (DB), *Sati Prosad Garga* v. *Govind Chandra.*

Section 14
Notes 9–10

As to the applicability of the section to the computation of the twelve years' period under S. 48 of the Civil Procedure Code, see section 29 Note 6a.

10. Plaintiff prosecuting — Explanation II. — Where the plaintiff in the second suit was a *plaintiff* in the prior proceeding and the other circumstances specified in the section exist, the section clearly applies. But where the present plaintiff was only a *defendant* in the prior proceeding, does the section apply? It has been held that it will apply, provided he had *claimed* therein the *rights* sought for in the present suit.[1] In other words, he must have had in the prior suit interests in the *nature of those of a plaintiff*.[1a] If he was merely

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('38) 25 AIR 1938 Cal 517 (520) : I L R (1938) 1 Cal 262 : 177 Ind Cas 948 (DB), *Hrishikesh Mitra* v. *Barada Prosad Roy.*

Note 10

[1] ('38) 25 AIR 1938 Sind 50 (52, 53) : 32 Sind L R 151 : 174 Ind Cas 172 (DB), *Aildas Madhowdas* v. *Sobhomal Pursoomal.* (Application to file award under Arbitration Act, 1899 — Prior proceeding for the same purpose failing on account of want of jurisdiction in Court—The fact that in prior proceeding the party in whose favour the award had been passed moved the arbitrator to present the award in Court instead of himself doing so and that under the rules of the Court he was known as a "respondent" does not disentitle the party to the benefit of this section.)

('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 Ind Cas 452 (PC), *Sm. Nrityamoni Dassi* v. *Lakhan Chandra Sen.*

('23) 10 AIR 1923 Mad 347 (347, 348) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali* v. *Kunhammad.*

('01) 4 Oudh Cas 281 (282, 283), *Prabhu Dayal* v. *Abadi Begam.* (Plaintiff in present suit claiming set-off as defendant in prior proceedings in respect of the amount claimed in present suit.)

(1864) 1 Suth W R 309 (310) (DB), *Maharajah Jugutendur Bunwaree* v. *Din Dyal Chatterjee.* (Claim of set-off in prior suit.)

[*See* ('08) 13 Cal L R 214 (215, 216) (DB), *Hafizunnessa Khatun* v. *Bhyrab Chunder Das.* (Rent claimed by plaintiff in present suit claimed to be set off in a prior suit instituted by the defendant.)]

[*See also* ('36) 23 AIR 1936 Cal 400 (402) : 165 Ind Cas 756 (DB), *Abdul Sattar* v. *Abdul Rusan.*]

[1a] ('19) 6 AIR 1919 Lah 23 (23) : 1919 Pun Re No. 89 : 52 Ind Cas 561, *Nazim Khan* v. *Alam Khan.* (Present plaintiff merely defending previous suit as defendant—S. 14 held inapplicable.)

('33) 20 AIR 1933 Sind 379 (381) : 147 Ind Cas 94 : 27 Sind L R 422 (DB), *Pribhadinomal Methumal* v. *Mt. Chutti.*

('11) 10 Ind Cas 21 (22) (Oudh), *Amir Chand* v. *Narsing Narain.*

('72-73) 6 Mad H C R 234 (237, 238) (DB), *Sami Ayyan* v. *Ammai Ammal.* (Prior suit by mortgagor to set aside a mortgage will not save limitation for a subsequent suit on the mortgage.)

('35) 22 AIR 1935 Cal 333 (334, 335) : 62 Cal 66 : 158 I. C. 191 (DB), *Jateendrachandra* v. *Rabatee Mohan Das.*

('25) 12 AIR 1925 Mad 675 (680, 681) : 91 I. C. 833, *Achuthan* v. *Kunnambrath Abdu.* (Same right must be under litigation in both suits.)

('36) 164 Ind Cas 651 (653, 654) (Cal), *Adbul Sattar Chowdhury* v. *Adbul Rusan.* (He must have been a plaintiff or applicant in the prior suit—Explanation II is said to point to this construction.)

[*See also* ('25) 12 AIR 1925 Mad 922 (926, 928, 929) : 91 I. C. 202 (DB), *Muddana Adenna* v. *Muddana Subbanna.* (Suit for partition—Prior suit for partition in *resisting* the suit of the other party against him, it cannot be said that he was "prosecuting" any proceeding against the other party.[1b]

Illustrations.

1. Plaintiff claimed a share in certain properties. Some of the defendants in the suit also claimed a share therein, and an adjudication was actually made in favour of those defendants in the trial Court. But on appeal the said adjudication was set aside on the technical ground that as they were defendants and not plaintiffs the adjudication should not have been made, and the defendants were referred to a separate suit. In the separate suit subsequently filed by them as plaintiffs, the question of limitation was decided in their favour by the Privy Council, the period during which the prior suit was prosecuted being excluded from computation.[2]

2. Some of the trustees of a mosque brought a suit against its manager for his removal and for the appointment of a receiver to the property of the mosque. The manager contested the suit and made a claim for a sum of money as due to him by the mosque. An issue was raised on the question of the amount, if any, due to the manager by the mosque and it was decided that a certain sum of money was so due and a receiver was appointed to collect the rents and profits and pay the manager. The receiver made the collections and also paid a portion of the dues to the manager. The trustees, however, appealed from the decree and in the appeal the suit was dismissed for non-joinder of other trustees. The manager subsequently filed a suit for the recovery of the balance of the amount due to him. In that suit the period of the prior litigation started by the trustees was excluded in computing the period of limitation therefor.[3]

3. Where *A* has obtained a decree for possession as against *B* but *B* subsequently files a suit to have the decree set aside on the ground of fraud and *A* resists the same, *A* cannot claim to exclude the period of the said suit in computing the period of limitation for an application by him for execution of his decree for possession.[4]

4. Where the executant of a promissory note sued for a declaration that the promissory note was discharged and was unenforceable, it was held that the period of the pendency of the suit could not be deducted in computing the period of limitation for a suit on the pronote by the payee.[5]

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which present plaintiffs were defendants — They claimed no relief and got none — They had only prayed for dismissal of suit — Reversed on another point in A I R 1930 P C 18.)

('27) 14 AIR 1927 Lah 785 (786) : 104 Ind Cas 726 (DB), *Mt. Sat Bhirai Khurd* v. *Ahmad.*]

[1b] ('39) 26 AIR 1939 Bom 1 (9, 21) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunath Gouda.* (The fact that the Court in the previous suit would not have been competent to entertain a counterclaim by the defendant if one had been raised by him is no ground for applying the section to him.)

('24) 11 AIR 1924 Bom 39 (40) : 76 I. C. 557 (DB), *Somshikharswami* v. *Shivappa.*

('16) 3 AIR 1916 Mad 57 (59) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Kaliba Mavulvija* v. *Saran Bivi Saila Ammal.*

[2] ('16) 3 AIR 1916 P C 96 (100, 102) : 43 Cal 660 : 33 Ind Cas 452 (PC), *Sm. Nrityamoni Dassi* v. *Lakhan Chundra Sen.*

[3] ('23) 10 AIR 1923 Mad 347 (347, 348, 349) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali* v. *Kunhammad.*

[4] ('24) 11 AIR 1924 Bom 39 (39, 40) : 76 Ind Cas 557 (DB), *Somshikharswami* v. *Shivappa.*

[5] ('33) 20 AIR 1933 Nag 13 (14, 15) : 28 Nag L R 348 : 141 Ind Cas 34, *Hiralal* v. *Kripal Singh.*

5. Where the plaintiff obtains an *ex parte* decree in a foreign Court, the period, during which the defendant was taking proceedings to have the *ex parte* decree set aside, cannot be excluded in computing the period of limitation for a suit by the plaintiff in a British Indian Court on the foreign judgment.[6]

No doubt, explanation II construes the resisting of a proceeding, viz., an appeal, as prosecuting a proceeding. But the appeal contemplated is from the decision *in his favour* in the proceeding which the plaintiff himself started.[7]

The fact that a *third* party was prosecuting an application to get a deed, on which the decree is based, set aside, will not save limitation running against a decree-holder for the execution of his decree.[8]

It has been held that in computing the period of limitation for an application for execution, the decree-holder is not entitled to the exclusion of the period during which an application by the judgment-debtor to enter satisfaction of the decree has been pending.[9]

11. "Due diligence."

1. Return of the plaint for presentation to the proper Court. — The time during which a Court holds up a case, while it is discovering that it ought to have been presented in another Court, must be excluded as the delay of the Court cannot affect the due diligence of the party.[1]

After the plaint has been ordered to be returned, the party may be entitled to the deduction of the time taken in appeal or revision from that order;[2] (see also Note 27) but if the appeal or revision should go against him, he should lose no time in presenting it to the proper Court; and if he has not taken return of the plaint immediately after the return was ordered, but waited till the appeal or revision was concluded, any subsequent delay in taking the return and making the presentation will amount to want of due diligence.[3] If, however, on the date of the presentation to the proper Court, the suit was in time after deducting only the period during which it was pending in the wrong Court, the fact that after taking the return of the plaint the plaintiff made some delay in re-presentation does not matter.[4]

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[6] **('27) 14 AIR 1927 Lah 200 (207, 208, 209) : 102 Ind Cas 523 : 8 Lah 54 (DB),** ***Hari Singh* v. *Mahomed Said.***

See also Article 117 Note 4.

[7] **('25) 12 AIR 1925 Cal 67 (67, 68, 72) : 83 Ind Cas 110 (DB),** ***Niranka Chandra* v. *Atul Krishna.***

[8] **('91) 1891 All W N 128 (129),** ***Gokul Singh* v. *Tika Ram.***

[9] **('17) 4 AIR 1917 Cal 460 (460) : 32 I. C. 931 (DB),** ***Kartic Chandra* v. *Nilmani.***

Note 11

[1] **('22) 9 AIR 1922 All 404 (404) : 70 I. C. 613,** ***Mt. Maryam Bibi* v. *Ram Das.*** **(Court taking two years to return plaint.)**

('30) 17 AIR 1930 Bom 187 (188, 189) : 124 Ind Cas 791 (DB), ***Duni Chand Bishandas* v. *Comptior National D'Escompte D'Paris.***

('25) 12 AIR 1925 Mad 1270 (1271) : 91 Ind C. 497 (DB), ***Viraswamy* v. *Nayudama.***

('25) 12 AIR 1925 Nag 54 (57) : 80 Ind Cas 286, ***Venkat Bhat* v. *Mt. Yamuna.***

('35) 22 AIR 1935 All 759 (760) : 155 Ind Cas 1092, ***Abdul Shakur Khan* v. *Rajendra Kishore Saran.***

('30) 17 AIR 1930 Lah 503 (503, 504) : 128 Ind Cas 63 : 11 Lah 308 (DB), ***Mt. Nihal Kaur* v. *Surat Singh.***

('11) 9 I. C. 157 (157, 158) (DB) (Mad), ***Yereni Anjayya* v. *Vappulapati Bapaya.***

('08) 35 Cal 924 (927, 928) : 12 Cal W N 921, ***Ramdeo* v. *Goaneshnarain.***

[*See* ('21) 8 AIR 1921 Bom 209 (209) : 45 Bom 1132 : 62 Ind Cas 221 (DB), ***Shant Murti Devappa* v. *Narayan Ramchandra.*]**

[2] **('39) 26 AIR 1939 Lah 47 (48) : 182 Ind Cas 732,** ***Gurdit Singh* v. *Mota Singh.*** **(Appeal.)**

Where the plaintiff had to amend his plaint, and after the amendment, the jurisdiction became altered to the knowledge of the plaintiff and he re-presented it, as amended, to the same Court, it was held that he was not prosecuting the suit with due diligence.[5]

2. When some alone of the parties, who could have prosecuted the prior proceedings, were engaged in those proceedings, the others, who did not do so, cannot claim the benefit of the section.[6]

3. Proceedings struck off for default of prosecution cannot be said to be carried on with due diligence.[7]

4. When the plaintiff was non-suited for neglect to state the

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('18) 5 AIR 1918 All 180 (180) : 45 Ind Cas 991 (DB), *Hamida Bibi* v. *Fatima Bibi.* (A case of revision in a small cause suit—Right to deduct time occupied by revision assumed without being decided.)

('66) 5 Suth W R S C C Ref 8 (9) (DB), *Shumboonath Biswas* v. *Kisto Dhun Sircar.* (Appeal.)

('37) 24 AIR 1937 Nag 1 (4) : 167 Ind Cas 48 : ILR (1937) Nag 291 (DB), *Kastur Chand* v. *Mt. Wazir Begam.* (Do.)

[*See also* ('29) 16 AIR 1929 Nag 219 (220, 221) : 25 Nag L R 99 : 116 Ind Cas 509, *Chintaman* v. *Kisan.* (But if the plaintiff in acceptance of the order of the first Court presents the plaint in the proper Court and also appeals from the order of return, the appeal is not prosecution in *good faith.*)

('67) 6 Suth W R 308 (309) (DB), *Raj Kristo Roy* v. *Beer Chunder Joobraj.* (Dismissal for want of jurisdiction—Appeal against dismissal — Period between decision of first Court and disposal of appeal excluded.)]

See also Article 11 Note 21.

[3] ('18) 5 AIR 1918 All 180 (180, 181) : 45 Ind Cas 991 (DB), *Hamida Bibi* v. *Fatima Bibi.*

('19) 6 AIR 1919 Oudh 378 (378, 379): 22 Oudh Cas 39 : 51 Ind Cas 590, *Ram Sahu* v. *Imdad Hussain.* (Delay in taking back plaint after High Court orders.)

('88) 1888 All W N 168 (169) (DB), *Banni Jan* v. *Munawar Khan.* (Delay after return of plaint by the Appellate Court.)

('93) 3 Mad L Jour 190 (191), *Krishna Variar* v. *Kunji Taravanar.*

[4] ('35) 22 AIR 1935 Oudh 444 (444, 445) : 157 Ind Cas 629, *Ganga Prasad* v. *Karim Khan.*

[5] ('15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347, *Radha Kishan* v. *Ladha Mal Ram Chand.*

('81) 1881 Pun Re No. 115, *Narain Singh* v. *Muhammad Amir Khan.*

See also Note 29.

[6] ('01) 23 All 434 (435) : 1901 All W N 123 (DB), *Dasarath Bai* v. *Bhirgu Bai.*

[7] (1864) 1864 Suth W R (Gap) 378 (378) (DB), *Gholam Durbesh Chowdhury* v. *Sham Kishore Roy.*

boundaries of his land[8] or to implead a necessary party,[9] it cannot be said that there was due diligence.

5. In an insolvency matter, a creditor took no part either by opposing the adjudication or by filing a proof of his claim. In a subsequent suit by him on his debt, it was held that he could not claim a deduction of the period of the pendency of the insolvency proceedings, as he was not *prosecuting* them.[10]

6. The fact that the prior suit[11] or execution application[12] was filed on the last day of limitation cannot negative due diligence so long as it was in time.

12. "Another" proceeding.

1. *Return of plaint.*—When a plaint presented in time to a Court is subsequently ordered to be returned for presentation to the proper Court and the same is presented to the proper Court, the case is not one of a continuation of prior proceedings; to such a case this section applies.[1] (See also Note 3 and section 3 Note 5.)

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8. ('66) 6 Suth W R 184 (185, 186) : Beng L R Sup Vol 553 (FB), *Chunder Madhub Chukerbutty* v. *Ram Coomar Chowdhry.*

9. ('16) 3 AIR 1916 Lah 234 (235, 236) : 1916 Pun Re No. 41 : 32 Ind Cas 497 (DB), *Kalu* v. *Mehru Mal.*

10. ('20) 7 AIR 1920 Low Bur 148 (149) : 64 Ind Cas 50, *Greenburgh* v. *Xavier.*

11. ('93) 6 C P L R 85 (86), *Jagannath* v. *Mt. Chandbi.*

12. ('38) 25 AIR 1938 Cal 791 (791) : 179 Ind Cas 160, *Debi Prosanna Ghosh* v. *Indra Narain Pal.*

Note 12

1. ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati* v. *Phool Singh.*

('34) 21 AIR 1934 Lah 412 (412) : 150 Ind Cas 739 (DB), *Topan Dass* v. *Tharia Ram.* (Plaint amended on appeal and remanded for trial.)

('28) 15 AIR 1928 Bom 421 (422, 425) : 52 Bom 548 : 113 Ind Cas 511 (DB), *Hirachand* v. *G. I. P. Ry. Co., Ltd.*

('14) 1 AIR 1914 Cal 858 (860) : 24 Ind Cas 232 (DB), *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose.*

('12) 13 Ind Cas 377 (380, 381) (DB) (Cal), *Hedlot Khasia* v. *Ka Ran Khasiani.*

('29) 16 AIR 1929 Lah 877 (878) : 117 I. C. 900, *Surat Singh* v. *Nihal Kaur.* (Any change in the law of the period of limitation would affect the suit as re-presented.)

('12) 14 Ind Cas 157 (158) : 36 Mad 482 (DB), *Seshagiri Rao* v. *Velayudham Pillai.*

('11) 12 Ind Cas 58 (59, 60) : 36 Mad 131 (DB), *Mira Mohideen* v. *Nallaperumal Pillai.*

('93) 16 Mad 274 (276, 277) (DB), *Saminadha* v. *Samban.*

('33) 20 AIR 1933 Sind 117 (117, 118) : 144 I. C. 56 (DB), *Gouri Dutt Jankidas* v. *P. T. S. Shanker.*

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai* v. *Ganesh Parshad.*

[*See* ('23) 10 AIR 1923 Lah 591 (592) : 82 Ind Cas 866 (DB), *Sukhbir Singh* v. *Piarelal.*

('16) 3 AIR 1916 Lah 432 (433) : 33 I. C. 438 (DB), *Jetha Ram* v. *Mehnga Ram.*]

[*See also* ('29) 16 AIR 1929 P C 103 (107) : 56 Cal 1048 : 56 Ind App 128 : 115 Ind Cas 713 (PC), *Ramdutt* v. *E. D. Sassoon & Co.* (Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found

A instituted a suit for rent in Court X and the suit was decreed, but was dismissed on appeal on the ground that Court X had no jurisdiction. By that time, Court X was invested with jurisdiction over such matters and A instituted a fresh suit in Court X on the same cause of action. It was held that A was entitled to claim the benefit of this section when he came up on the second occasion with the original plaint or with a new one,[2] provided the new plaint was on the same cause of action,[3] and the prior proceedings were prosecuted with diligence and in good faith.[4]

The expression "another" civil proceeding does not mean that the prior proceeding must have been in a *different Court.*[5] But in a case, where the plaint is returned for presentation to the proper Court for want of jurisdiction, the plaintiff abandons a part of the claim and again presents it to the same Court after the period of limitation, no exclusion can be claimed under this section.[6]

2. Where a plaintiff institutes a suit against a person, who is dead before its institution, and then impleads the legal representatives as defendants, there are no two proceedings and section 14 has no application.[7]

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necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties were identical—Prior arbitration proceedings failing for want of jurisdiction of the arbitrator appointed—Fresh arbitration proceedings before newly appointed arbitrator not a continuation of the prior proceedings.)]

[See however ('41) 1 Mad L Jour 629 (633) (DB), *Ramaswami Iyer* v. *Veerarayan Raja.* (Suit instituted in Court having *jurisdiction* to entertain it but not being Court of lowest grade competent to try it under S. 15, C. P. C.—Plaint returned for presentation to latter Court — Date of institution of suit is the date on which the plaint was originally filed and not the date on which it was re-presented.)]

[But see ('15) 2 AIR 1915 All 344 (344) : 30 Ind Cas 544 (DB), *Ganga Prasad Rai* v. *Ramanand Gir.*]

See also Note 25.

2. ('35) 22 AIR 1935 Pat 82 (82, 83) : 153 Ind Cas 155 (DB), *Brijlal* v. *Janendra Narain.*

3. ('98) 1 Oudh Cas 272 (277), *Mt. Tulsha* v. *Mahadeo Pershad.*

4. ('41) 28 AIR 1941 Oudh 161 (164) : 191 Ind Cas 708 (DB), *Abdulla Khan* v. *Tirbhuan Dutt Singh.*

5. ('21) 8 AIR 1921 Sind 13 (14) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim* v. *Ghulam Hussain.*

6. ('40) 27 AIR 1940 Mad 689 (691) (DB), *Chandrayya* v. *Seethanna.* (AIR 1939 Mad 897 reversed — Plaintiff cannot claim the benefit of S. 14 as he deliberately under-valued his relief in the first instance.)

('95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen* v. *Madureswara Bhattar.*

7. ('33) 20 AIR 1933 Mad 454 (455) : 143 Ind Cas 596, *Municipal Council, Calicut* v. *Kunhipathumma.* (The suit as originally instituted against a dead person being void.)

('68-69) 4 Mad H C R 1 (2), *Karuppan Chetti* v. *Veeriyal.* (Suit against a defendant who is supposed to be dead — Frame of suit to save time against the legal representatives under Section 14 explained.)

3. The period of the prosecution *bona fide* in an administration suit of a claim by a creditor, under a promissory note executed by the deceased debtor, will be excluded in computing the period of limitation for a subsequent suit on the promissory note.[8]

4. The time taken by a creditor in filing a proof of claim in the insolvency Court can be excluded in computing the period of limitation for a suit by him on the claim after the annulment of adjudication.[9]

5. *Execution proceedings.*—The words 'another civil proceeding' will include execution proceedings in another suit. In *Dugarajulum Garu v. Aryan Bank, Vizagapatam,*[10] Varadachariar, J., observed as follows:

> "The reason of the rule (S. 14) seems to us equally to apply to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of S. 14 of the Limitation Act. A party is seeking the relief that he was entitled to as much in the execution stage as during the pre-decree stage; and in a mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in 'another civil proceeding' within the meaning of S. 14. That is the reason why in the earlier part of clause 1, S. 14, the Legislature has advisedly used the expression 'civil proceeding' and does not use the word 'suit.' The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because under the law proceedings in execution have to be taken in the Court of first instance."

6. *Application to sue as a pauper.* — Where a *bona fide* application for leave to sue as a pauper is refused and the plaintiff thereafter institutes a suit on payment of full court-fee, it has been held that he will be entitled to deduction of the time taken up by the pauper application.[11]

13. "Civil proceeding" in a "Court." — It is necessary in each case to examine the precise nature of the proceedings and the constitution of the authority, before whom such proceedings are taken,

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[8] ('06) 10 Cal W N 959 (961, 962) (DB), *Baij Nath Ramgoenka* v. *Hem Chunder Bose.* (The Judge in administration suit himself ordering a separate suit to be filed.)

[9] ('19) 6 AIR 1919 Low Bur 132 (133) : 52 Ind Cas 934, *N. K. M. M. Chetty* v. *Lutchman Chetty.*

[10] ('37) 24 AIR 1937 Mad 357 (359) : ILR (1937) Mad 161 : 170 I. C. 524 (DB).

[11] ('38) 25 AIR 1938 Cal 730 (734) : ILR (1939) 1 Cal 112 : 179 Ind Cas 271 (DB), *Kali Dasi Dasi* v. *Santosh Kumar Pal.* (The Court must be held to be unable to entertain it on account of a cause of a "like nature" with want of jurisdiction.) [See however ('39) 26 AIR 1939 Cal 394 (398, 399) : ILR (1939) 2 Cal 68 : 184 Ind Cas 345, *Biswanath* v. *Khejerali Molla.* (Defect not one of "like nature.")]

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in order to decide whether they are *civil proceedings* in a *Court*.[1]

A Land Registration Deputy Collector, acting in a matter for decision under Ss. 28, 29 or 42 of the Land Registration Act of Bihar, is not a Court[2] and the proceedings are not civil proceedings.[3]

A Settlement Officer or Commissioner of a Board of Revenue, in preparing or revising a record of rights, is not a Court dealing with a civil proceeding.[4] Proceedings before officers acting in an administrative[5] or an executive[6] capacity are not covered by the section. But revenue *Courts* are Courts under this section.[7]

Note 13

[1] ('24) 11 AIR 1924 Nag 309 (310) : 78 Ind Cas 580, *Bandappa* v. *Sankar Rao.* (Collector in Central Provinces held not to be empowered to investigate claims under Order 21 Rule 100, C. P. C., in execution of decrees.)

[2] ('26) 13 AIR 1926 Pat 194 (195, 196) : 90 Ind Cas 244 (DB), *Ramjee Prasad* v. *Bishun Dutt.*

[3] ('26) 13 AIR 1926 Pat 194 (195, 196) : 90 Ind Cas 244 (DB), *Ramjee Prasad* v. *Bishun Dutt.* (Question of title not within his jurisdiction.)

[4] ('04) 26 All 382 (384, 385) : 1904 All W N 54 (DB), *Muhammad Subban-ullah* v. *Secretary of State.*

[5] ('18) 5 AIR 1918 Bom 82 (82, 83) : 43 Bom 201 : 48 Ind Cas 467 (DB), *Laxaman* v. *Keshav.* (Collector acting under S. 11A, Bombay Hereditary Offices Act, 1874—Definition of 'Court' discussed.)

('27) 14 AIR 1927 Lah 186 (186) : 101 Ind Cas 254 (DB), *Abbas Ali Khan* v. *YusufAli Khan.* (Notices of ejectment issued under S. 45, Punjab Tenancy Act, by a Revenue Officer—A I R 1925 Lah 264 reversed.)

('78) 1878 Pun Re No. 52, *Khana* v. *Hossein Khan.* (Revenue Officer—Proceedings before him in regard to a matter expressly excluded from cognizance of civil Courts.)

[*See* ('29) 16 AIR 1929 Pat 694(697) : 9 Pat 385 : 122 Ind Cas 817(FB), *Mahabir Prosad* v. *Bhupal Ram.* (Manager under Chota Nagpur Encumbered Estates Act, VI of 1876, whether a Court.)]

[6] ('39) 26 AIR 1939 Nag 141 (144) : 185 Ind Cas 241, *Meghji Hirjee & Co.* v. *B. N. Rly. Co. Ltd.* (The Governor-General in Council is no doubt the supreme executive authority in India but there is no statute constituting him a Court.)

('04) 26 All 382 (384, 385) : 1904 All W N 54, *Muhammad Subban-ul-lah* v. *Secretary of State.*

('82) 6 Bom 31 (32, 33) (DB), *Manohar* v. *Gebiapa.* (A conciliator under the Dekkhan Agriculturists' Relief Act before whom a conciliation petition is pending in regard to an execution was held not a Court.)

('08) 31 Mad 495 (498) : 18 Mad L Jour 581 : 4 Mad L Tim 321 (DB), *Regulation Collector of Uthumali Estate* v. *Subbier.* (Regulation Collector under the Madras Court of Wards Act, I of 1902.)

[7] ('30) 17 AIR 1930 All 193 (200, 205) : 52 All 501 : 124 Ind Cas 540 (F B), *Ananti* v. *Chhannu.*

('20) 7 AIR 1920 Pat 504 (506) : 58 Ind Cas 434 : 5 Pat L Jour 697 (DB), *Jagdeswar Dayal* v. *Bhagdi Mahton.* (Suits under S. 87 before Settlement Officer under the Chota Nagpur Tenancy Act, VI of 1908.)

('75) 23 Suth W R 152 (154) : 15 Beng L R 56 (DB), *Gobind Coomar Choudhry* v. *W. B. Manson.* (Suit in revenue Court for arrears of rent.)

('70) 13 Suth W R 390 (391) : 11 Beng L R App 31n (DB), *Prosunno Coomar Paul Choudhry* v. *Muddun Mohun Paul Choudhry.* (Do.)

('71) 16 Suth W R 61 (62) : 8 Beng L R 190n (DB), *Haris Chandra Dutt* v. *Sm. Jagadamba Dasi.*

As regards proceedings before arbitrators, the Privy Council has held that they are tribunals, whom the parties have substituted for a Court of law to be the judges of the disputes between them and that proceedings before them are civil proceedings in a Court.[8] The observations to the contrary, in the undermentioned case,[9] cannot be considered as good law.

The word "Court" in section 14 does not include a *foreign* Court. See Note 5.

14. "Court of appeal," if includes Court of revision. — Does the expression "proceeding *in a Court of appeal*" include revision proceedings in the High Court? In *Appa Row* v. *Sriramulu*,[1] their Lordships of the Madras High Court observed as follows:

> "The language of the Legislature is not that the time occupied in prosecuting an *appeal* may be deducted, but the time occupied in prosecuting *any civil proceeding in a Court of appeal*. We see no reason why a revision petition in the High Court should not be regarded as a *civil proceeding in a Court of appeal*. We think that the expression *Court of appeal* should be taken as being used in the broad sense of any Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court."

The other High Courts agree in considering that revision proceedings do not, as such, fall outside the intendment of the section, though they hold that, in each case, it should depend on its own merits whether the prosecution by way of civil revision in the High Court can be considered to be in good faith or not. The Allahabad High Court in the undermentioned case[1a] held that the time during which revision proceedings were going on must be excluded. This ruling was followed in a recent case of that Court[1b] in which it was

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('93) 20 Cal 264 (268, 269) (DB), *Girjanath Roy Chowdhury* v. *Ram Narain Das.* [*See also* ('87) 14 Cal 9 (12) (DB), *Ram Logan Ojha* v. *Bhavani Ojha.*]

[See however ('11) 11 Ind Cas 34 (35) (Lah), *Katara* v. *Arjan Singh.* (Period prescribed by S. 21 (a), Land Alienation Act, is not subject to provisions of Ss. 4 to 25 of Limitation Act.)]

[But see ('14) 1 AIR 1914 Lah 337 (338) : 26 Ind Cas 441 : 1914 Pun Re No. 83 (DB), *Gobinda Mal* v. *Santa.* (Decided on counsel's admission on the law—No discussion.)]

[8] ('29) 16 AIR 1929 P C 103 (107, 108) : 115 Ind Cas 713 : 56 Ind App 128 : 56 Cal 1048 (P C), *Ramdutt Ramkissen* v. *E. D. Sassoon & Co.*

[*See also* ('30) 17 AIR 1930 Cal 5 (8) : 56 Cal 639 : 120 Ind Cas 710, *Abdul Rahim Oosman & Co.* v. *Ojamshee Purshottam Das & Co.*

(1864) 1864 Suth W R Gap 283 (284), *Ramdhone Sircar* v. *Seetanath Sircar.*]

[9] ('33) 20 AIR 1933 Nag 130 (132) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai* v. *Kedar Nath.*

Note 14

[1] ('12) 17 Ind Cas 593 (593,594) (DB) (Mad). (Reversing the decision of Ayling, J., in 14 Ind Cas 259.)

[1a] ('82) 1882 All W N 59 (59) (DB), *Mul Chand* v. *Samir Mal.*

[1b] ('38) 25 AIR 1938 All 78 (79) : I L R (1938) All 192 : 173 I. C. 461, *Chhuttan Lall* v. *Dwarka Prasad.*

held that only the time from the date of application for revision to the date of the order thereon should be excluded. The Court therefore refused to exclude the period between the appellate decision returning the plaint and the date of application for revision therefrom and also the period from the date of order in revision to the filing of the plaint in the competent Court. The same High Court assumed in the undermentioned case[2] that the duration of the civil revision proceedings, as such, is deductible but refused to exclude the period of delay that elapsed after the disposal of the civil revision petition. The Bombay High Court[3] also assumed the former position but declined to exclude the time taken by the revision proceedings on the ground that those proceedings being contrary to the clearly expressed provisions of law, there was no good faith on the part of the plaintiff. The Madras[4] and Rangoon[5] High Courts hold that where another remedy is open, the time spent in revision cannot be considered to be spent in good faith. Mukherjea, J., of the Calcutta High Court remarked in the undermentioned case[5a] that he was not prepared to go to the length as the Rangoon High Court had done and that he did not think that the application for revision where another remedy was open was a *mala fide* one; but his Lordship expressed his doubt whether "Court of appeal" could include a Court of revision. According to the late Nagpur Judicial Commissioner's Court,[6] each case depends on its own circumstances and, under proper circumstances, the time spent in revision may be excluded.

See also Note 20.

15. "Court of appeal" — Second or further appeal. — The plaintiff is entitled to deduct the period occupied by the litigation till its termination in a *final* Court of appeal.[1] The fact that one appellate Court held against the plaintiff on the ground of want of jurisdiction, will not disentitle him to claim the deduction of the time occupied by a further appeal therefrom which was infructuous.[2]

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[2] ('18) 5 AIR 1918 All 180 (180, 181) : 45 Ind Cas 991 (DB), *Hamida Bibi* v. *Fatima Bibi.*

[3] ('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayan Ambaji* v. *Hari Ganesh.* (Filing *revision* instead of a *suit* after an adverse order under Order 21 Rule 103, C. P. C.)

[4] ('15) 2 AIR 1915 Mad 405 (407) : 26 Ind Cas 219 : 39 Mad 62 (DB), *Baiznath Lala* v. *Ramadoss.* (Adverse order under S. 73, C. P. C., in the matter of rateable distribution—Revision without filing a suit.)

[5] ('29) 16 AIR 1929 Rang 297 (297, 298) : 7 Rang 466 : 120 Ind Cas 236 (DB), *S. R. M. M. A. Firm* v. *Maung Po Saung.* (Revision from order under O. 21 R. 63, C. P. C. — The law in Rangoon being that, that High Court does not interfere in revision in such matters.)

('15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Maung Tun U* v. *Palaniappa Chetty.* (Remedy under O. 21 R. 63, C. P. C., open — Time spent in revision or appeal should not be excluded.)

[5a] ('38) 25 AIR 1938 Cal 577 (578) : 179 Ind Cas 40, *Meghmala Debi* v. *Saday Parhya.* (Even assuming that a "Court of appeal" would include a Court of revision, it was held that in this case the time taken by the application for revision could not be excluded as it could not be said that the High Court had been unable to entertain it for want of jurisdiction or other cause of like nature.)

[6] ('31) 18 AIR 1931 Nag 17 (19) : 130 Ind Cas 145 : 27 Nag L R 251, *Laxmandas* v. *Chunnilal.* (*Bona fide* belief that revision would succeed.)

16. Parties must be the same. — Both the proceedings must be between the same parties,[1] or (in view of the definitions of plaintiff, defendant and applicant in S. 2) their representatives.[2] A firm is not the same party as the individual members thereof.[2a] But a prior suit against a firm and a subsequent suit against the surviving partners of that firm, and the persons in possession of the assets of a deceased partner, are both against the same parties.[3] A prior suit, wrongly filed against the Traffic Manager of a Railway Company, instead of the Secretary of State according to law, is not against the same party as the Secretary of State, against whom a subsequent suit is instituted.[4] So also, where A sues B and C, whom he supposes to be the legal representatives of the deceased debtor, and after discovery of his mistake, he seeks to bring in D, the proper legal representative, as defendant, the latter proceeding is not against the same party as the former.[5] In a suit against the defendant who had become surety under a bond for payment by the judgment-debtor of the plaintiff, the time, during which the plaintiff was taking out execution against the said

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Note 15

[1] ('73) 20 Suth W R 380 (382) : 13 Beng L R 146 : 24 Suth W R 407*n* : 3 Sar 273 (P C), *Luckhinarain Mitter* v. *Khettro Pal Singh Roy.*

[2] ('73) 20 Suth W R 380 (382) : 13 Beng L R 146 : 24 Suth W R 407*n* : 3 Sar 273 (P C), *Luckhinarain Mitter* v. *Khettro Pal Singh Roy.*

Note 16

[1] ('21) 8 AIR 1921 Cal 596 (596) : 64 Ind Cas 315, *Janki Nath Sinha Roy* v. *Bejoy Chand Mahatab Bahadur.*

('25) 12 AIR 1925 Oudh 369 (369) : 87 Ind Cas 17, *Ram Pher* v. *Ajudhia Singh.* (Defendant must be same in both proceedings.)

('90) 1890 Pun Re No. 154, *Mihr Jang Khan* v. *Faizulla Khan.*

(1864) 1 Suth W R 121 (122, 123) (DB), *Mt. Munna Jhunna Koonwar* v. *Laljee Roy.* (Prior litigation against a different party.)

(1864) 1 Suth W R 29 (30, 31) (DB), *Rajah Barodakant Roy* v. *Sookmoy Mookerjee.* (Previous suit neither by plaintiff nor by any one under whom he claims.)

('72-'73) 6 Mad H C R 122 (123, 125) (DB), *Lee Morris* v. *Sambamurthi Rayar.*

('76) 1876 Bom P J 52 (DB), *Pandharinath* v. *Prahlad.* (A different defendant.)

(1864-65) 2 Mad H C R 1 (2, 5) (DB), *Venkataswamy Nayakkan* v. *Subba Rau.* (In a *communal* matter the Court held that some only of the parties in the later suit being parties in the prior suit did not matter.)

[2] ('22) 9 AIR 1922 Pat 450 (457, 458) : 66 Ind Cas 945 : 1 Pat 506 (DB), *Hari Prasad Singha* v. *Sourendra Mohan Sinha.* (Son of Mitakshara defendant.)

[2a] ('27) 14 AIR 1927 All 181 (181, 182) : 98 Ind Cas 1050, *Firm Ram Lochan Ram Lachmi Prasad* v. *Jagat Narain Dube.*

[3] ('28) 112 Ind Cas 715 (717) (DB) (All), *Firm of Baldeo Prasad Babu Ram* v. *Firm of Haji Ali Muhamad Usman.*

[4] ('26) 13 AIR 1926 Lah 572 (572) : 96 Ind Cas 144 (DB), *Chanda Singh* v. *Secretary of State.*

[5] ('73) 10 Bom H C R 224 (226, 227) (DB), *Kavasji Sorabji* v. *Barjorji Sorabji.*

judgment-debtor under the decree, was held not deductible.[6]

The same person suing in *different capacities* is not the same plaintiff, as for example, the same person suing as the administratrix of the estate of one person in one suit, and of the estate of a different person, in another suit.[7] So also, two suits against the same defendant but in different capacities are not covered by the section.[8]

A prior suit was instituted by two plaintiffs alone. A third party, on his application, was impleaded as a co-plaintiff. The plaint was returned for presentation to the proper Court, and in presenting it to the proper Court, the two original plaintiffs alone sued and sought to exclude the time taken up by the prior suit. It was held that the parties to the second suit were the same notwithstanding the omission of the third person co-plaintiff.[9]

An application by a decree-holder to enter satisfaction of a decree was struck off on account of the absence of the decree-holder and his pleader. The judgment-debtor then applied for the recording of satisfaction. It was held that the time during which the application by the decree-holder was pending could not be excluded under this section but that the application by the judgment-debtor must be treated as being in continuation of the application by the decree-holder.[10]

17. Suit must be based on the same cause of action — Application must be for the same relief. — In order to save time under this section for a suit, the prior suit must have been based on the same cause of action.[1] The section employs the expression "*cause of action*" in relation to suits in sub-section (1) and the word "*relief*" in the case of applications in sub-s. (2). The former expression is of larger import and several reliefs may be asked for in respect of the same cause of action. In the matter of "applications," the prior proceedings must relate to the same 'relief.' Where the prior proceeding was a *suit* for mesne profits on dispossession for a period of two years and the subsequent proceeding was an application under S. 144, Civil Procedure Code, for mesne profits on the same dispossession for a period of four years, inclusive of the former period of two years, the exclusion of time under this section would apply only in respect of the relief for mesne profits for two years in common between the two proceedings though the cause of action of dispossession was the same.[2]

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[6] ('74) 1874 Pun Re No. 58, *Bhai Sawaya Singh* v. *Hira Nand.*

[7] ('24) 11 AIR 1924 Rang 123 (123) : 1 Rang 402 : 76 Ind Cas 639, *H. G. Hoosein* v. *Asha Bibi.*

[8] ('27) 14 AIR 1927 All 628 (629) : 102 Ind Cas 870 (DB), *Devi Chand* v. *Pirbhu Lal. (Obiter.)*

[9] ('04) 14 Mad L Jour 287 (288, 289) (DB), *Venkatasubbiah* v. *Pichamma.*

[10] ('39) 26 AIR 1939 Mad 163 (164) : 180 Ind Cas 437, *Kailasa Padayachi* v. *Duraiappa Kachirayar.*

Note 17

[1] ('28) 15 AIR 1928 Nag 178 (179) : 108 Ind Cas 785, *Ganesh Parsad* v. *Bhawani Pershad.*

Though, in the case of suits, the expression used is "founded upon the same cause of action" and nothing is said about the relief being the same, it has been held by the Madras High Court that it would be an extraordinary proposition to hold that where the same cause of action entitles a party to several reliefs and he chooses to sue only for one of them, he can subsequently bring a suit for another relief, and so far as limitation is concerned, claim the benefit of S. 14. The relief also must be the same even under sub-s. (1).[3] A recent decision of the Allahabad High Court has, however, taken the contrary view and held that the relief need not be identical in both suits.[4]

18. "Same cause of action" — Sub-section (1). — In *Dugarajulum Garu* v. *Aryan Bank, Vizagapatam,*[1] it was observed as follows :

> " The concluding words of cl. (1), S. 14 no doubt provide that the previous proceeding should be founded upon the same cause of action as the later. And it is also true that so far as proceedings in execution following upon a decree are concerned, there is no question of their being founded upon a particular "cause of action"; it is the suit in which the decree was passed that must be looked to for determining the identity of the causes of action between the two suits. It seems to us that if the two suits are founded on the same cause of action, the fact that no "cause of action" can be predicated in respect of proceedings in execution is no reason for holding that the time *bona fide* but infructuously taken in executing the prior decree should not be deducted under section 14."

A obtained a decree for money against one brother as a member of a firm. On attachment of certain property in execution of the decree, the other brothers raised objections to the attachment under O. 21 R. 58 of the Civil Procedure Code, and the objections were upheld. The plaintiff then applied under O. 21 R. 50 of the said Code for a declaration that the brothers were liable as partners and his application was successful in the first Court but was dismissed on appeal and also on further appeal under the Letters Patent on the ground that the application was barred by the order made against the decree-

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[2] ('34) 21 AIR 1934 All 824 (824, 825) : 152 I. C. 800, *Balkaran Pandey* v. *Ram Badan Pandey*. (The conclusion in the ruling is correct though the reasoning is involved and contradictory—The Court ought to have considered the case with reference to the language of sub-section (2) and not of sub-section (1).)

[3] ('33) 20 AIR 1933 Mad 778 (779) : 146 Ind Cas 361, *Ramakrishna Chettiar* v. *Jayaramier*.
[*See also* ('33) 20 AIR 1933 Mad 197 (198) : 140 Ind Cas 270, *Narasimmacharyulu* v. *Appa Rao*. (Material factors constituting cause of action in present suit also alleged in prior proceedings—*Held* prior proceedings must be deemed to have been founded upon same cause of action.)]

[4] ('40) 27 AIR 1940 All 145 (146) : 187 Ind Cas 336, *Dal Singar Koeri* v. *Chandi Singh*. (Suits on simple mortgage—One for recovery of the loan and the other for additional relief of enforcing the charge—*Held*, that the common cause of action was failure to discharge loan and hence S. 14 applied though the relief was not identical.)

Note 18

[1] ('37) 24 AIR 1937 Mad 357 (358) : I L R (1937) Mad 161 : 170 I. C. 524 (DB).

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holder under O. 21 R. 58. Thereupon, the decree-holder filed a suit for declaration of his rights against the objecting brothers. It was held that the time occupied by the decree-holder's application under O. 21, R. 50 and the appellate proceedings thereafter should be excluded in computing the period of limitation for the suit, the cause of action being the same for the suit as well as the infructuous application.[1a]

An application by a creditor to have the debtor adjudged an insolvent is on the same cause of action as a subsequent suit by him for a decree on the debt, the cause of action in both being the failure of the debtor to pay.[2]

But, time spent in carrying on a wholly independent litigation founded on a different cause of action cannot be excluded.[3] The following are some instances of different causes of action :

(1) Mutation proceedings before revenue authorities and an application to a civil Court under Sch. II of the Civil Procedure Code,

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1a. ('28) 15 AIR 1928 All 10 (10, 11) : 108 Ind Cas 134 (DB), *Kanhaiya Lal* v. *Suraj Karan.*

2. ('35) 22 AIR 1935 Lah 736 (737) : 156 Ind Cas 378 (DB), *Firm Lorind Chand* v. *Bahadur Khan.*

3. ('29) 16 AIR 1929 All 101 (101) : 112 Ind Cas 246, *Gaya Prasad* v. *Ram Sarup.*

('33) 20 AIR 1933 Bom 450 (452, 454) : 145 Ind Cas 630 : 58 Bom 200 (DB), *Karsondas* v. *Surajbhan.*

('26) 13 AIR 1926 Cal 693 (694, 695) : 92 Ind Cas 37 (DB), *Port Canning and Land Improvement Co. Ltd.* v. *Achhiruddi Mollah.* (Suit for the recovery of rent against a non-occupancy raiyat—Period cannot be extended owing to pendency of proceedings under S. 46, Bengal Tenancy Act.)

('25) 12 AIR 1925 Mad 675 (680, 681) : 91 Ind Cas 833, *Alayil Kalathil Kambil Achuthan* v. *Kunambrath Abdu.*

('24) 11 AIR 1924 Rang 123 (123) : 1 Rang 402 : 76 Ind Cas 639 (DB), *Hossein* v. *Asha Bibi.*

('13) 20 I. C. 513 (514) (DB) (Cal), *Dand Bahadur Singh* v. *Deo Nandan Prosad.*

('81) 1881 All W N 3 (3) (DB), *Girdhar Prasad* v. *Gaya Prasad.* (Different reliefs.)

('32) 138 Ind Cas 621 (622) (Lah), *Tola Ram Singh* v. *Shehinchi Khan.*

('16) 3 AIR 1916 Mad 57 (59) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Mahomed Usain Kadir* v. *Saran Bivi Saila Ammal.*

('16) 3 AIR 1916 Mad 1010 (1010, 1011) : 31 Ind Cas 917 (DB), *Sambasiva Iyer* v. *Mohamed Hussain.* (Two separate proceedings in execution with different objects in view.)

('28) 15 AIR 1928 Bom 252 (256, 257) : 52 Bom 477 : 110 I. C. 33 (DB), *Maneklal Mansukbhai* v. *Suryapur Mills Co. Ltd.*

('21) 8 AIR 1921 Cal 525 (525) : 48 Cal 65 : 57 Ind Cas 992 (DB), *Nagendra Nath Sen* v. *Sadhu Ram Mandal.*

(1864) 1864 Suth W R Gap 130 (130) (DB), *Wooma Churn Mitter* v. *Ranee Mohamaya.* (A summary proceeding for title and a subsequent suit for possession.)

('68) 9 Suth W R 570 (570) (DB), *Prodhan Gopal Singh* v. *Bhoop Roy.* (Suit for rent on account of lands as *mal* from defendants — Time spent in suits for rent and for small portions of land against defendants cannot be deducted.)

[*See* ('66) 5 Suth W R 32 (33), *Kishen Mohun Koond* v. *Muddun Mohun Tewaree.*]

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(now repealed by Arbitration Act x of 1940) to have an award as to the family rights in the property filed and decreed upon.[4]

(2) Suit for rent and a suit for possession[5] or for mesne profits arising out of unlawful use or occupation.[5a]

(3) Suit in revenue Courts for ejectment of defendants as tenants and a suit in a civil Court for ejecting them as trespassers.[6]

(4) A suit in Malabar founded on *kanom* right and a suit based on *jenmi* right.[7]

(5) Suit for rent against all defendants on a *muchilika* jointly executed by them and suits for rents against each defendant under a separate contract by each.[8]

(6) Separate suits for the recovery of specific portions of property in the hands of co-sharers and a suit for general partition as against all the co-sharers.[9]

(7) A proceeding before arbitrators based on an agreement to refer to arbitration, and a regular suit based on the rights of parties after setting aside the award.[10]

(8) A suit to set aside an award and a suit on a promissory note executed in pursuance of the award.[11]

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[4] ('15) 2 AIR 1915 All 369 (371) : 38 All 85 : 31 Ind Cas 899 (DB), *Ram Ugrah* v. *Achraj Nath.*

[5] ('18) 5 AIR 1918 Cal 819 (819, 820) : 39 Ind Cas 865 (DB), *Aswani Kumar Nag* v. *Madhu Sudan Pal Kundu.*

('14) 1 AIR 1914 Mad 656 (656) : 23 Ind Cas 942 (DB), *Bahavaraju Venkata Subba Rao* v. *Yenumul Mallu Dora.*

('86) 12 Cal 258 (260, 261) (DB); *W. Sheriff* v. *Dino Nath Mookerjee.*

('83) 9 Cal 255 (258, 259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (P C), *Hurro Proshad Roy* v. *Gopal Dass Dutt.*

('78) 3 Cal 817 (820, 823) : 2 Cal L R 450 (DB), *Hurro Pershad Roy* v. *Gopal Das Dutt.*

(1865) 3 Suth. W R 13 (13) (DB), *Baboo Issureenund Dutt Jha* v. *Parbutty Churn Jha.* (Subsequent suit for mesne profits.)

[*See* (1864) 1 Suth W R 35 (36) (DB), *Hossien Khan* v. *Dinnobundhoo Pundah.* (Subsequent suit for proprietary title and prior suit for rent.)]

[5a] ('39) 26 AIR 1939 Mad 724 (726) : 189 Ind Cas 204, *Satyanarayanamurthy* v. *Surya Rao.* (Claim for rent based on the ground of subsisting relationship between landlord and tenant cannot be held to be founded on the same cause of action as a claim for mesne profits which is based essentially on trespass.)

[6] ('16) 3 AIR 1916 Oudh 155 (156) : 36 Ind Cas 770, *Dondoo Singh* v. *Sheo Narain Singh.*

[7] (1864-'65) 2 Mad H C R 266 (267) (DB), *Parakut Assen Cutty* v. *Edapally Chennen.*

[8] ('72-73) 7 Mad H C R 242 (244, 245) (DB), *G. Lee Morris* v. *Chinnasamy Ayyan.*

[9] ('71) 8 Bom H C R A C 228 (232, 233) (DB), *Joitaram Bechar* v. *Bai Ganga.*

('88) 1888 Bom P J 285, *Tukaram* v. *Naro.*

[10] ('33) 20 AIR 1933 Nag 130 (132) : 144 I. C. 948 : 29 Nag L R 272, *Maharaj Sai* v. *Kedar Nath.*

[11] ('12) 17 Ind Cas 513 (514, 515) (Mad), *Krishnaswamy* v. *Sitaram Chetty.*

(9) A suit was instituted for the second instalment on a bond under the impression that the first instalment was beyond limitation. The plaint was returned for presentation to the proper Court. The plaintiff in presenting the suit to the proper Court included the first instalment also. It was held that the second suit was not saved by the first suit so far as the first instalment was concerned.[12]

(10) Where a decree-holder attaches a book-debt due to a judgment-debtor and purchases it himself in court-auction, a subsequent suit by him to recover the book-debt is not on the same cause of action as the attachment.[13]

(10a) Suit by mortgagee to recover mortgage money on the ground of deprivation of security by the wrongful act or default of the mortgagor and a suit by him, after the principal has become payable, for foreclosure or sale.[13a]

(11) An application under O. 9 R. 2 of the Civil Procedure Code for restoration of a suit dismissed for the default of the plaintiff and a fresh suit under Order 9 Rule 4.[14]

(12) A suit for accounts against the defendant as a broker in respect of cotton transactions alone and a subsequent suit against him as a commission agent in respect of cotton and also of other commodities and for certain dividends received by him on behalf of the plaintiff.[15]

(13) Suit for money under an agreement and a subsequent suit for the same sum as on a settlement of accounts.[16]

(14) A suit in a British Indian Court on a foreign judgment concerning a promissory note and a suit on the promissory note itself.[17]

In a suit for partition of joint family property the dispute was referred to arbitration. The question of the actual division of the properties was not referred to arbitration. But the arbitrator attempted to bring about a compromise between the parties as to this, and succeeded in doing so with reference to a large portion of the joint family property. One of the parties attempted to enforce this arrangement in the proceedings that followed the award but it was held that as the matter was outside the scope of the reference, he was not entitled to do so. Thereupon, he brought a suit for the purpose and it was held that in the previous proceeding he was founding himself on the same cause of action as that upon which the present suit was founded and that he was entitled to the benefit of this section in computing the period of limitation.[18]

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[12] ('88) 1888 Bom P J 349 (DB), *Govind v. Balakrishna.*

[13] ('19) 6 AIR 1919 Mad 317 (318, 319) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasamy Chetty v. Thangavelu Chetty.*

[13a] ('01) 4 Oudh Cas 293 (294, 295) (DB), *Sarju Prasad Singh v. Sripat Prasad Singh.*

[14] ('29) 16 AIR 1929 Nag 219 (220, 221) : 25 Nag L R 99 : 116 Ind Cas 509, *Chintaman v. Kisan.*

[15] ('33) 20 AIR 1933 Bom 450 (452, 454) : 145 Ind Cas 630 : 58 Bom 200 (DB), *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal.*

[16] ('86) 8 All 475 (478) : 1886 All W N 233 (DB), *Mangu Lal v. Kandhai Lal.* (Per Straight, Offg. C. J.)

[17] ('28) 15 AIR 1928 Mad 1088 (1088) : 112 Ind Cas 139 (DB), *Rathina Thevan v. Pakrisamy Thevan.*

19. **"For the same relief" — Sub-section (2).** — The following are instances of cases in which the relief claimed in the application was held not to be the same as was claimed in the prior civil proceeding :

(1) The relief claimed in an application for execution of a decree is the realisation of the decretal amount and is different from the relief in an application for the preparation of a final decree, viz., to pass a decree which is capable of execution.[1]

(2) A suit for injunction restraining the defendant from entering a piece of property on the ground that it belongs to the plaintiff under a court-auction purchase and a subsequent application for the execution of the balance of the decretal amount against the same property as belonging to the same defendant are for two different reliefs.[2]

(3) The right to enforce a sale is not suspended on account of a suit to set aside the sale, the reliefs being different.[3]

(4) The relief for possession under a sale deed is different from a relief for damages or for a return of the purchase money in default of possession.[4]

(5) The relief of possession is different from a relief of declaration.[5]

(6) An application to obtain execution under a preliminary decree is not for the same relief as a subsequent application for a final decree in the suit.[6]

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[18] ('39) 26 AIR 1939 P C 128 (132) : ILR (1939) Kar (PC) 211 : 181 Ind Cas 471 (PC), *Nitya Nand* v. *Karam Chand.*

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[1] ('38) 25 AIR 1938 Lah 117 (119) : ILR (1937) Lah 671 : 175 Ind Cas 846 (DB), *Jodh Singh* v. *Firm Bhagwan Das Nanak Chand.*

('29) 16 AIR 1929 All 677 (678, 679) : 118 Ind Cas 670 (DB), *Maqbul Ahmad* v. *Pateshri Partap Narain Singh.*

('26) 92 Ind 299 (299, 300) (Lah), *Mohan Singh* v. *Nathu Mal.*

[2] ('28) 15 AIR 1928 All 368 (368, 369, 371) : 50 All 670 : 115 Ind Cas 869 (DB), *Mohsin Raza Khan* v. *Haider Baksh.* (The suit was dismissed on the ground that the property did not form part of auction purchase.)

[3] ('66) 6 Suth W R 57 (57) (DB), *Munnoo Beebee* v. *Nund Kishore Lall.* (Decided under S. 14, Regulation III of 1793.)

[4] ('27) 14 AIR 1927 Mad 273 (277) : 100 Ind Cas 40, *Pattarachariar* v. *Alamelumangaiammal.*

[5] *See* ('11) 11 Ind Cas 76 (77) : 1912 Pun Re No. 15, *Saif-ud-din* v. *Hansraj.*

[6] ('35) 22 AIR 1935 P C 85 (86, 87) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC), *Maqbul Ahmad* v. *Onkar Pratap Narain Singh.*

(7) A suit under O. 9 R. 4, Civil Procedure Code, and an application to restore a suit dismissed for default are not for the same relief.[7]

(8) An application by the judgment-debtor to have an *ex parte* decree set aside is not for the same relief as an application for execution of the same decree.[8]

(9) An application under O. 21 R. 89 of the Civil Procedure Code is for a different relief from one claimable under O. 21 R. 90.[9]

(10) A revision from a judgment of a Small Cause Court is for a different relief from a revision from an infructuous prior appeal from a previous decree of the Small Cause Court in the same matter.[10]

(11) A suit by decree-holder for a declaration under O. 21 R. 63, Civil Procedure Code, with respect to one set of properties and an application for execution in respect of other set of properties of the judgment-debtor are for different reliefs.[11]

20. "In good faith." — Section 2, sub-s. (7), provides that "nothing shall be deemed to be done in good faith which is not done with due care and attention." The General Clauses Act (X of 1897) in S. 3 defines 'good faith' as follows: "A thing shall be deemed to be done in 'good faith' where in fact it is done honestly, whether it is done negligently or not." Looking at these two definitions, the one given by the Limitation Act is stricter than the other. And, inasmuch as the definition found in the General Clauses Act is not applicable where there is anything repugnant in the subject or context, the definition given in the Limitation Act alone is applicable in construing S. 14 of the Act.[1] This section cannot, therefore, help a party who is guilty of *negligence, laches* or *inaction.*[2]

('35) 22 AIR 1935 All 323 (324, 325, 327) : 153 I. C. 1058 (DB), *Muhammad Yunis* v. *Tilok Chand.* (Compromise decree on a mortgage — Execution application dismissed for want of a final decree—Subsequent application for final decree.)

[7] ('29) 16 AIR 1929 Nag 219 (221): 25 N.L.R. 99: 116 I. C. 509, *Chintaman* v. *Kisan.*
('86) 1886 Pun Re No. 63, *Sheoji Ram* v. *Sheo Chand Rai.*

[8] ('32) 19 AIR 1932 All 601 (602) : 132 Ind Cas 692 (DB), *Sukhnandan Singh* v. *Mt. Ramdevi Kunwar.*

[9] ('34) 21 AIR 1934 Mad 593 (593, 594, 596) : 152 Ind Cas 519 (DB), *Chidambaram Chettiar* v. *Annamalai Chettiar.*

[10] ('10) 8 Ind Cas 318 (318) : 1910 Pun Re No. 92, *Behari Lal* v. *Kalu.*

[11] ('38) 25 AIR 1938 Nag 534 (537) : ILR (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji* v. *Paiku.*

Note 20

[1] ('12) 13 Ind Cas 260 (260) : 5 Sind L R 181, *Manghanmal Lalchand* v. *Fernandes.*
[*See* ('38) 25 AIR 1938 Nag 300 (303) : I L R (1939) Nag 422 : 179 Ind Cas 837, *Dinkarrao Dharrao* v. *Ratansi Asaram.* ('Good faith' as used in S. 14 means 'exercise of due care and attention.)]

[2] ('38) 25 AIR 1938 Cal 377 (380) : 62 Cal 510 : 164 Ind Cas 111 (DB), *Ghisulal Goneshilal* v. *Gumbhirmull.* (Plaintiff and his attorney knowing that leave of

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There can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case.[3] It will, in almost every case, be more or less a question of degree, and the same course of action, which on the part of a person within reach of skilled advice would indicate bad faith or want of diligence might be consistent with good faith in a mofussil community unfamiliar with the refinements of law.[4] It would be a fair working rule, however, to lay down that indulgence should be granted only where the error is one which might be committed by a reasonable and prudent man exercising due diligence and caution.[5] An error of judgment is quite a different thing from bad faith.[6] There must be no pretended mistake intentionally made with a view to delay proceedings or harass the opposite party.[7]

Burden of proof of good faith.—The person claiming the benefit of this section must prove that he acted in good faith in instituting the earlier proceedings.[7a]

Court under Cl. 12, Letters Patent, would be necessary but not making application for it—Nor, if application had been made, ascertaining whether leave has been granted or not—Besides this, in spite of defendant's plea in written statement that Court had no jurisdiction, plaintiff and attorney not taking trouble to ascertain meaning of that plea — Plaintiff and attorney held could not be said to be prosecuting case in good faith.)

('32) 19 AIR 1932 Oudh 220 (221) : 138 Ind Cas 149 (DB), *Jagmohan Tewari* v. *Mahdeo Prasad.*(Filing an execution application in a wrong Court.)

('23) 10 AIR 1923 Nag 241 (242, 243) : 74 Ind Cas 317, *Sheonarayan* v. *Ramprasad.* (Deliberate refusal to amend plaint, thus protracting prior proceedings.)

('30) 17 AIR 1930 Pat 54 (58) : 8 Pat 851 : 122 Ind Cas 241 (DB), *Narpat Singh* v. *Mahidhar Jha.*

('11) 11 Ind Cas 338 (339) (DB) (Mad), *Kakamani Rayappa* v. *Kotta Venkanna.* (Omission to take steps in pending execution petitions.)

('75) 7 N W P H C R 284 (285, 287) (DB), *Bahal Singh* v. *Gauri.* (Gross negligence in framing suit, without ascertaining whether defendant was a major or minor and then impleading a person as guardian without ascertaining if the latter was legally constituted guardian.)

('90) 3 C P L R 134 (134), *Krishna Lodhi* v. *Sheoram Patel.*

[3] ('16) 3 AIR 1916 Sind 82 (83) : 9 Sind L R 167 : 32 Ind Cas 616 (DB), *Gehimal* v. *Manager, Encumbered Estates, Sind.*

[4] ('78) 3 Bom 182 (184) (DB), *Sheth Kahandas Narandas* v. *Dahiabhai.*

[5] ('38) 25 AIR 1938 Lah 704 (706) : 181 Ind Cas 290 (SB), *Maya Singh* v. *Udham Singh.* (Plaintiff filing a suit in Court *A* alleging that the defendant resided within its jurisdiction—Defendant not residing but only having land within the jurisdiction—*Held* that the suit was filed in good faith.)

('16) 3 AIR 1916 Oudh 139 (140) : 19 Oudh Cas 367 : 36 Ind Cas 702, *Ramjag* v. *Bhagwan Dat.* (Filing prior plaint on last day of limitation in a patently wrong Court.)

[6] ('28) 112 Ind Cas 715 (717) (DB) (All), *Firm Baldeo Prasad Babu Ram* v. *Firm Haji Ali Mahomed Usman.*

[7] ('93) 6 C P L R 85 (86), *Jagannath Kewalram* v. *Mt. Chandbi.*

[7a] ('41) 28 AIR 1941 Mad 319 (320) : I L R (1941) Mad 347 (FB), *Gnanacharya Swamigal* v. *Saravana Perumal Pillai.* (1937 M W N 465 overruled — 21 Suth W R 97 (PC) distinguished.)

Honest doubt. — An honest doubt as to whether a suit lies in one Court or another is covered by the expression 'good faith,' the test being one of honesty with due care and caution.[8] The mere fact that the question of jurisdiction is an arguable one does not negative good faith provided the party *believed bona fide* that the Court in which he instituted the proceedings had jurisdiction in the matter.[9] If in addition to this, the Court in which the prior proceedings were pending also thought that they were in the proper Court, there can be no question of bad faith.[10]

Wrong valuation of suit. — If the plaintiff gave *bona fide*, a particular value to the suit property but the Court, on trial, found the value to be different and returned the plaint for want of jurisdiction, it is a case of good faith.[11] But knowingly to undervalue the subject-matter of the suit to suit a wrong forum,[12] or to present a plaint to

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8. ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati* v. *Phool Singh.* (Subsequent admission of want of jurisdiction and return of plaint by Court does not affect good faith.)

('33) 20 AIR 1933 Sind 317 (319, 320) : 27 Sind L R 101 : 150 Ind Cas 279 (DB), *Mt. Shamul* v. *Dost Mahomed Khan.*

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai* v. *Ganesh Prasad.*

[*See* ('18) 5 AIR 1918 Cal 986 (986, 987) : 46 Ind Cas 116 (DB), *Rupa Thakurani* v. *Kumudnath.* (*Bona fide* construction of a notification as to Courts in which to present an appeal.)

('96) 23 Cal 526 (531) (DB), *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra.*]

9. ('33) 20 AIR 1933 Lah 264 (264, 265) : 144 Ind Cas 184, *Bhagwan Das* v. *Tikaya Ram.*

10. ('78) 3 Bom 182 (183, 184, 185) (DB), *Sheth Kahandas Narain Das* v. *Dahiabhai.*

('17) 4 AIR 1917 All 122 (123) : 40 Ind Cas 447, *Ford & Macdonald Ltd.* v. *A.D. Meyer.*

('96) 19 Mad 67 (69) (DB), *Barrow* v. *Javerchund Sett.* (Prior execution petition.)

('96) 19 Mad 90 (93, 94, 95) (DB), *Subbarau Nayadu* v. *Yagana Pantulu.* (Enabling rule subsequently declared *ultra vires.*)

11. ('32) 19 AIR 1932 Cal 504 (506) : 138 Ind Cas 349 (DB), *Mahendra Nath Baychi* v. *Tarak Chandra.*

('33) 20 AIR 1933 Lah 652 (653) : 146 Ind Cas 125, *Mulchand* v. *Allah Yar Khan.* (Opposite party and Court taking no objection at first; in course of trial, Judge taking point of valuation *suo motu* and returning plaint.)

('14) 1 AIR 1914 Oudh 282 (282, 283) : 17 Oudh Cas 210 : 25 Ind Cas 403, *Ram Dayal* v. *Sarju Prasad.* (Under-valuation not deliberate, reckless or *mala fide*, though plaintiff later admits value to be higher.)

('81) 7 Cal 284 (286, 287) (DB), *Obhoy Churn Nundi* v. *Kritarthamoyi Dossee.* (Court holding that there was over-valuation.)

('98) 1 Oudh Cas 272 (276), *Mt. Tulsha* v. *Mahadeo Pershad.*

('68) 1 Beng L R (S N) 12 (C) (DB), *Chandi Dasi* v. *Jankiram.*

12. ('40) 27 AIR 1940 Mad 689 (691) (DB), *Chandrayya* v. *Seethanna.* (AIR 1939 Mad 397 reversed.)

('19) 6 AIR 1919 Pat 345 (348, 349): 53 Ind Cas 892 (DB), *Sairah Bibi* v. *Gulab.*

('12) 14 Ind Cas 86 (87, 90) (DB) (Oudh), *Rukaiya Bibi* v. *Mubarak Ali.* (Pre-emption suit—Price in sale deed alleged to be fraudulent and market value given in plaint deliberately understated.)

a wrong Court when the plaint valuation patently took the suit out of its cognizance,[13] is not consistent with good faith. Where the circumstances are such as would justify either of the two views as regards the value of the suit property, the plaintiff will not be regarded as having acted dishonestly and without due care and attention because he follows the view which is more advantageous to him.[13a]

Wrong choosing of forum. — If a plaintiff, having a right to institute a suit in different Courts, elects to sue in the Court in which the defendant was an officer in the hope of getting his money paid easily, there is nothing *mala fide* in his conduct.[14] Nor is the plaintiff bound to look to the convenience of the other party in choosing the Court.[14a] But where the plaintiff, with a view to have an advantage over the defendant of another province, makes a false allegation of fact in the plaint in order to enable himself to sue in a place most convenient to himself, there is no good faith.[15] The prosecution of a proceeding in a wrong forum owing to the *bona fide* mistake of the counsel is protected by the section.[16] But a legal adviser's mistake, by itself, is no test of *bona fides*. The mistake must be *bona fide*, i. e., the legal adviser should have acted with due care and attention.[17]

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[13] ('19) 6 AIR 1919 Oudh 378 (379) : 51 I. C. 590 : 22 Oudh Cas 39, *Ram Sahu* v. *Imdad Husain.*
('16) 3 AIR 1916 Oudh 139 (140) : 19 Oudh Cas 367 : 36 Ind Cas 702, *Ram Jag* v. *Bhagwan Dat.*

[13a] ('38) 25 AIR 1938 Nag 300 (303) : I L R (1939) Nag 422 : 179 Ind Cas 837, *Dinkarrao Dharrao* v. *Ratansi Asaram.*

[14] ('19) 6 AIR 1919 Mad 845 (845) : 47 Ind Cas 624 (DB), *Ramalingam Ayyar* v. *S. Subbier.*

[14a] ('39) 26 AIR 1939 Pat 86 (89) : 182 Ind Cas 632 (DB), *Kaluram* v. *Janistha Lal.* (Plaintiff's choosing Court inconvenient to defendant does not constitute lack of good faith.)

[15] ('12) 14 Ind Cas 19 (23) (DB) (Lah), *Sham Lal* v. *Baink Mal.*
[See however ('12) 14 Ind Cas 86 (88) (DB) (Oudh), *Rukaiya* v. *Mubarak Ali.* (Motive immaterial in considering good faith.)]

[16] ('27) 14 AIR 1927 All 719 (719) : 101 Ind Cas 750 : 49 All 555 (DB), *Kishan Lal* v. *Tika.*
('33) 20 AIR 1933 Lah 541 (541, 542) : 14 Lah 206 : 149 I. C. 968 (DB), *Ghulam Muhammad* v. *Usman.* (A leading pleader's advice on the authority of certain rulings.)
('33) 20 AIR 1933 Oudh 231 (233) : 8 Luck 646 : 150 Ind Cas 533 (DB), *Mahabir, Singh* v. *Mt. Radha.*
[*See also* ('21) 8 AIR 1921 Bom 302 (302, 303) : 45 Bom 607 : 60 I. C. 744 (DB) *Dattatraya Sitaram* v. *Secretary of State.*
('18) 5 AIR 1918 Bom 228 (229) : 46 I. C. 14 : 42 Bom 295 (DB), *Bai Nemathu* v. *Bai Nematullabu.* (First review application to wrong Court—Second application to right Court—Applicant Muhammadan female.)]

[17] ('38) 25 AIR 1938 Oudh 112 (114) : 173 I.C. 956 (DB), *Ram Dutta* v. *Mahpal Singh.* (Where a decree in the nature of a foreclosure decree was passed by an Additional Subordinate Judge, but the application for making it final was made to another of co-ordinate jurisdiction, on the advice of counsel, it was held that it was a case of gross negligence and hence the applicant was not entitled to the benefit of Section 14.)

Bona fide ignorance of facts determining correct jurisdiction is covered by the section.[17a] Where the plaintiff institutes a suit in the proper Court but, due to the mistake of the Court, he is driven from Court to Court and ultimately required to file the suit again in the same Court, the time occupied by these proceedings must be excluded under this section.[17b]

Error of law. — Whether an *error or mistake of law* entitles a person to the benefit of this section has been the subject of some difference of opinion. Some rulings incline to the view that as ignorance of law is no excuse it cannot be a ground of claim under the section.[18] On the other hand, it has been observed that though every one is supposed to know the law and the law is always certain, if that principle is to be strictly applied, then section 14 of the Act would be useless.[19] A *bona fide* mistake of law has, therefore, been held to be a sufficient ground for treating the proceedings to be in good faith.[20]

('33) 20 AIR 1933 Lah 568 (569) : 144 Ind Cas 627 (DB), *Uttam Chand* v. *Vishan Das Bhagwan Das.* (The question of jurisdiction beyond all doubt — *Held* no *bona fide* mistake.)

('15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Maung Tun U* v. *Palaniappa Chetty.*

('33) 20 AIR 1933 Lah 541 (541, 542): 14 Lah 206 : 149 Ind Cas 968 (DB), *Ghulam Muhammad* v. *Usman.* (A leading practitioner acting on the strength of certain decided cases of the High Court.)

('38) 25 AIR 1938 Cal 377 (379) : 164 I. C. 111 (114) : 62 Cal 510 (DB), *Ghisulal Goneshilal* v. *Gumbhirmull Pandya.* (Negligence of pleader and attorney in not obtaining leave required in law.)

('19) 6 AIR 1919 Oudh 378 (379) : 22 Oudh Cas 39 : 51 Ind Cas 590, *Ram Sahu* v. *Imdad Husain.*

[*See* ('26) 93 Ind Cas 876 (876, 877) (Lah), *Labhu Ram* v. *Muhammad Din.*]

[17a] ('10) 6 Ind Cas 154 (155, 157) (DB) (Cal), *Basiruddin Mondal* v. *Sonaullah Mondal.* (Petition to set aside *ex parte* decree—Later discovery that decree was made on Small Cause side — Security required by law furnished subsequently — Time excluded.)

[17b] ('35) 22 AIR 1935 Oudh 501 (503) :158 I.C.267 (DB), *Gappoo Singh* v. *Haracharan.* (Suit filed in Court of Subordinate Judge—Court directing plaintiff to file it in the Court of Additional Sub-Judge who subsequently found that he had no jurisdiction and hence the suit was again filed in the original Court—S. 14 applied.)

('25) 12 AIR 1925 Oudh 493 (494) : 89 I. C. 443, *Raghubar Dayal* v. *Kanhaiya Bux.*

[18] ('24) 11 AIR 1924 Pat 716(717) : 78 I.C. 482, *Sheo Dhari Ram* v. *Guptheswar.* (Ignorance of law is *per se* want of good faith, i.e., due care and attention.)

('88) 10 All 587 (597, 598) : 1888 All W N 258 (DB), *Ramjiwan Mal* v. *Chand Mal.* (Mahmood, J. — Section 14 refers only to *bona fide* mistakes of fact and not of law — But this was *obiter*, the case dealing only with S. 5 — This was disapproved in 19 All 848 (F B).)

('88) 11 All 408 (414) : 1888 All W N 111 (DB), *Chajmal Das* v. *Jagadamba Prasad. (Obiter.)*

('90) 12 All 461 (482) : 1890 All W N 149 (F B), *Bechi* v. *Ahsanullah Khan.* (Per Mahmood, J.—*Obiter.*)

[19] ('89) 12 Mad 467 (471) (DB), *Kullayappa* v. *Lakshmipathi.*

[20] ('41) 28 AIR 1941 Pesh 3 (5) : 192 I. C. 758 (DB), *Peoples Bank of Northern India Ltd.* v. *Firm Lekhu Ram & Sons.* (Award between Bank and private

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But, as a general rule, proceedings contrary to a *clearly expressed* provision of law cannot be said to be prosecuted in good faith.[20a] Thus,

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individual — Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court — Subsequent ruling declaring that awards such as one in question were cognizable by District Judge—Bank held entitled to benefit of S. 14.)

('40) 27 AIR 1940 Oudh 412 (413) : 190 Ind Cas 93, *Ram Shankar* v. *Bechan Chaudhari.* (AIR 1937 All 333 followed—Suit instituted in wrong Court due to ignorance of S. 7 of U. P. Agriculturists' Relief Act held *bona fide.*)

('37) 24 AIR 1937 All 333 (334) : 168 Ind Cas 936, *Ahmed* v. *Ram Chander.* (19 All 348 (FB) followed — Suit instituted in wrong Court due to ignorance of S. 7A of the U. P. Agriculturists' Relief Act passed only a short time before the institution of the suit—Proceedings *held* carried on in good faith.)

('97) 19 All 348 (349, 351, 352): 1897 All W N 86 (FB), *Brij Mohan* v. *Mannu Bibi.* (Suit under O. 21 R. 63, C. P. C.—Mistake of law in supposing that jurisdiction was determined by value of property attached and not the value of the decree.)

('99) 26 Cal 414 (416, 417) : 3 Cal W N 233 (FB), *Bishambhur Haldar* v. *Bonomali Haldar.* (*Bona fide* mistake of law upon a doubtful point of jurisdiction or procedure is as much entitled to benefit of S. 14 as a *bona fide* mistake of fact.)

('21) 8 AIR 1921 Oudh 100 (100, 101) : 61 Ind Cas 203 : 24 Oudh Cas 137, *Bahadur Khan* v. *Abbu Saheb.*

('16) 3 AIR 1916 Sind 82 (83, 84) : 9 Sind L R 167 : 32 I. C. 616 (DB), *Gehimal* v. *Manager Encumbered Estates, Sind.* (Omission to give notice under S. 80, C. P. C., before suit, relying upon a ruling of the High Court that it is not necessary in injunction suits.)

('12) 13 Ind Cas 260 (260, 261) : 5 Sind L R 181, *Manghammal Lal Chand* v. *Fernandez.* (But a deliberate omission to give notice required under S. 80, C. P. C., to secure an advantage over the defendant is not in good faith.)

('36) 23 AIR 1936 Rang 184 (185, 186) : 162 Ind Cas 865, *M. P. L. Chettiyar Firm* v. *Vanappa Chettiar.* (Especially where there is no clear indication in the law as to the proper procedure. There is no clear indication in the C. P. C., as to the proper procedure to be followed in respect of an order by an executing Court to which a decree has been transferred staying the execution of decree under O. 21 R. 29. Hence time spent in appeal should be excluded from time for revision application.)

('28) 15 AIR 1928 Nag 227 (228) : 107 Ind Cas 910, *Sadashiv Rao* v. *Laxman Sao.* (Suit wrongly filed in *civil Court* for apportionment of land revenue—The civil Courts had jurisdiction before the then new Land Revenue Act.)

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai* v. *Ganesh Parshad.* (Circumstances leading both parties to entertain doubts as to proper forum for institution of suit present.)

('96) 20 Bom 133 (143, 144) (DB), *Ram Ravji Jambhekar* v. *Prahaladdas Subkarn.* (Error of law does not by itself negative *bona fides.*)

('01) 28 Cal 238 (241) : 5 Cal W N 150 (DB), *Sheik Jafar* v. *Kamalini Debi.* (Execution application made *bona fide* to wrong Court—Time excluded.)

('89) 13 Mad 394 (395) (DB), *Hall* v. *Venkatakrishna.*

('82) 1882 All W N 59 (59) (DB), *Seth Mul Chand* v. *Seth Samir Mal.* (Preferring an appeal from an adverse order under S. 73, C. P. C., instead of a suit.)

[*See* ('88) 10 All 524 (529, 530) : 1888 All W N 218 (DB), *Jaglal* v. *Har Narain Singh.* (Prior proceedings in Court without jurisdiction in point of value of subject-matter—No *bona fides.*]

[20a] ('40) 27 AIR 1940 Bom 5 (9) : 187 I. C. 85, *Brij Mohandas Damodardas* v. *Sadashiv Laxman.* (AIR 1929 Rang 297 relied on.)

('29) 16 AIR 1929 Rang 297 (298) : 7 Rang 466 : 120 Ind Cas 236 (DB), *Firm S. R. M. M. A.* v. *Maung Po Saung.* (Person not filing a suit as provided in C. P. C., O. 21 R. 63 but preferring revision — *Held* that time could not be excluded under Section 14.)

an application in reckless disregard of the provisions of O. 21 R. 16 of the Civil Procedure Code will not be deemed to be in good faith.[20b] Where the circumstances are such, that the party ought to have known the law, there can be no *bona fide* mistake,[21] as for example, where the party is a Deputy Commissioner who has a Government Pleader for his legal adviser.[22] So also, when the law clearly requires an application to be made to a *Court* but the party presents it to the Collector or a revenue officer, he cannot be credited with good faith.[23] Similarly, the prosecution of an execution petition wrongly in the Court of a Munsif by negligence, while previous petitions were presented in the Court of a Subordinate Judge whose decree it was, cannot be deemed to be in good faith.[24]

The prosecution of a wrong proceeding induced by a *bona fide* mistake is covered by the section. An assignee of a mortgage decree passed in terms of a compromise applied, in execution, for the sale of properties, other than the property mortgaged which had been already sold under the decree in satisfaction of a portion of the decree amount. The judgment-debtor objected that no personal decree under O. 34 R. 6 of the Civil Procedure Code had been obtained and that, as such, the execution was not sustainable. The first Court held in favour of the assignee decree-holder on the ground that the decree being a compromise decree, no personal decree was necessary. On appeal, the High Court, however, upheld the judgment-debtor's objection and dismissed the execution. The assignee then made an application for a decree under Order 34 Rule 6 and when the records were looked into in that connexion, it was discovered that the *assignor* himself had obtained a decree under O. 34 R. 6. The assignee then filed a second application for execution and the period between the date of the prior application for execution and the date of the discovery of the existence of the

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20b. ('40) 27 AIR 1940 Bom 5 (9) : 187 Ind Cas 85, *Brijmohandas Damodardas* v. *Sadashiv Laxman.*

21. ('11) 11 Ind Cas 880 (881) : 1912 Pun Re No. 22, *Moti Singh* v. *Maghar.* (Sufficient publication of a ruling that no appeal at all lay.)

22. ('33) 20 AIR 1933 Lah 58 (58) : 145 Ind Cas 245, *Deputy Commissioner, Jhang* v. *Devi Ditta.*

('36) 23 AIR 1936 Lah 857 (858) : 167 Ind Cas 501, *Jhanda Ram Wadhava Ram* v. *Allah Yar.*

('33) 20 AIR 1933 Lah 589 (589) : 144 Ind Cas 690, *Deputy Commissioner, Jhang* v. *Shankar Das Lachman Das.*

23. ('20) 7 AIR 1920 Bom 130 (130, 131) : 44 Bom 50 : 54 I. C. 670 (DB), *Tipangavda* v. *Ramangavda.* (Application to set aside sale on deposit under O. 21, R. 89, Civil Procedure Code.)

('99) 23 Bom 531 (532, 533, 535) : 1 Bom L R 33 (DB), *Narayan* v. *Rasulkhan.* (Government rules and decided cases (in Bombay) being clear that Collector has no power to entertain an application to set aside a sale by him in execution of decree under Civil Procedure Code.)

[*See* ('78) 1878 Pun Re No. 52, *Khana* v. *Hossein Khan.*]

24. ('27) 14 AIR 1927 Pat 256 (256, 257) : 101 Ind Cas 674 (DB), *Fazul Jamil* v. *Helaluddin.*

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decree under O. 34 Rule 6 was deducted as being spent in good faith under a mistake of fact.[25] A claim petition against an attachment of property was wrongly described by the claimant as falling under O. 21, R. 58 of the Civil Procedure Code instead of section 47. Misled by this mistake, the opposite party, the decree-holder, filed a claim suit in which it was held finally by the High Court that an appeal, and not a suit, lay from the original claim order. In the appeal subsequently filed, it was held that the prosecution of the claim suit and the appeals therefrom was in good faith.[26]

Suppose a person does not file a suit within one year from an adverse order made against him as provided in O. 21 R. 63 or R. 103 of the Civil Procedure Code, but prefers an appeal or a revision petition from the adverse order, not doing so under any mistake; can it be said that he is prosecuting the latter proceeding in good faith ? It has been held in some cases[27] that the prosecution of such a proceeding is not in good faith because it is contrary to the clearly expressed provision of law and because also the High Court, in revision, is known not to interfere when another remedy is open. But this rule is not to be rigidly enforced, as good faith should be ascertained with reference to particular facts and circumstances of each case.[28] But the period during which the party was contemplating revision cannot be deducted.[29] See also Note 14 above.

Where there is no clear indication in the law as to the proper procedure, a party taking a proceeding, believed to be open to him, cannot be said to be wanting in good faith.[30]

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[25] ('20) 7 AIR 1920 Pat 462 (462, 463): 58 Ind Cas 40 (DB), *Karimulla Shah* v. *Mirza Mohamed Raza.*

[26] ('30) 17 AIR 1930 Pat 307 (307, 308) : 129 Ind Cas 660 (DB), *Jiwan Ram Ram Chander* v. *Hazari Lal Bhagat.* (Section 14 though not applicable to appeals was applied in this case to appeal.)

[27] ('30) 17 AIR 1930 Bom 505 (505, 506): 128 Ind Cas 621, *Narayan Ambaji* v. *Hari Ganesh.*

('29) 16 AIR 1929 Rang 297 (297, 298) : 7 Rang 466: 120 Ind Cas 236 (DB), *S. R. M. M. A. Firm* v. *Maung Po Saung.*

('15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Mg. Tun U* v. *Palaniappa Chetty.*

(1864) 1864 Suth W R (Gap) 371 (372, 373) (DB), *Ramdas Baboo* v. *R. Watson & Co.* (Appeal.)

('68) 3 Agra 39 (39) (DB), *Futteh Ram* v. *Manohur Lall.* (Do.)

('15) 2 AIR 1915 Mad 405 (407): 26 Ind Cas 219: 39 Mad 62 (DB), *Baisnath Lala* v. *Ramadass Doss.* (Adverse order under S. 73, Civil Procedure Code, for rateable distribution — Revision instead of filing suit.)

[28] ('31) 18 AIR 1931 Nag 17 (19) : 27 Nag L R 251 : 130 Ind Cas 145, *Laxman Das* v. *Chunnilal.* (The party may have reasonable grounds for believing that he would succeed in revision.)

[29] ('31) 18 AIR 1931 Nag 17 (19) : 27 Nag L R 251 : 130 Ind Cas 145, *Laxman Das* v. *Chunnilal.*

[30] ('36) 23 AIR 1936 Rang 184 (185, 186) : 162 Ind Cas 865, *M. P. L. Chettiar Firm* v. *Vanappa Chettiar.* (An order under O. 21 R. 29, C. P. C., by transferee

The fact that the Court considered the prior proceeding as misconceived cannot, by itself, negative good faith where the party, acting on legal advice, *bona fide* believed that the action was sustainable.[31] Where two Courts concur in decreeing a plaintiff's claim, it is difficult to hold that the claim is not *bona fide*, although the final Court of appeal dismissed it.[32] But a clearly unnecessary and unsustainable action is not taken into account.[33] The plaintiffs sued for possession alone and obtained a decree. They, subsequently, sued for mesne profits and claimed to deduct the period occupied by a proceeding carried on by them for mesne profits by way of restitution under the former decree. The application for restitution was held not to be in good faith, the former suit and decree being only for possession.[34]

The prosecution of an application to sue in *forma pauperis* made *mala fide* as to pauperism cannot entitle the party to the benefit of this section.[35]

Court staying execution of the decree—Whether an appeal lies in respect of such an order is not clearly indicated in the Civil Procedure Code.)

[31] ('33) 20 AIR 1933 Mad 197 (199, 200) : 140 Ind Cas 270 (DB), *Narasimhacharyulu* v. *Appa Rao.* (Application in the executing Court under S. 47, C. P. C., by a judgment-debtor that the decree is not binding on him by reason of fraud of guardian *ad litem* and resisting attachment in execution of that decree.)

('13) 20 Ind Cas 3 (6, 7) (DB) (Lah), *Mt. Husaina* v. *Mt. Sahib Nur.* (Prior proceedings prosecuted on advice of one of the leading counsel of the province.)

[*See* ('07) 29 All 638 (639, 640) : 1907 All W N 219 : 4 All L Jour 515, *Anjora Kunwar* v. *Babu.* (Case of an appeal.)

(1865) 3 Suth W R 101 (101, 102) (DB), *Shah Karamut Hossein* v. *Golab Koonwur*. (Form of suit erroneous—Time excluded.)]

[32] ('25) 12 AIR 1925 Cal 456 (460) : 86 I. C. 130 (DB), *Dina Nath* v. *Jadu Nath.*

('21) 8 AIR 1921 Sind 13 (15) : 15 Sind L R 11 : 62 Ind Cas 507 (DB), *Ibrahim* v. *Ghulam Hussain.*

[*See* ('40) 1940 Oudh W N 818 (819), *Birendra Kant Singh* v. *Jageshar Singh.* (First Court holding that the proceedings were legal while the second Court holding otherwise—*Held* that the proceedings were *bona fide*.)]

[*See also* ('35) 22 AIR 1935 Pat 82 (83) : 153 I. C. 155 (DB), *Brijlal* v. *Jnanendra.*]

[33] ('38) 25 AIR 1938 Rang 318 (318, 319) : 177 Ind Cas 923 (DB), *Hasanar* v. *Kandan Chettyar.* (An unnecessary application prosecuted under the belief that there existed an order which, in fact, was non-existing.)

('87) 1887 All W N 198 (198), *Madho Rai* v. *Raj Kali Kuar.* (Instead of executing a decree already obtained, the plaintiff filed a fresh suit on the same cause of action and after its dismissal applied for execution of the former decree—*Held*, the second suit was not in good faith.)

('22) 9 AIR 1922 Mad 417 (418, 420) : 70 Ind Cas 743 (DB), *Ganapathi Mudaliar* v. *Krishnamachari.* (The time taken up in prosecuting a wholly misconceived proceeding by way of a suit cannot be deducted.)

('32) 19 AIR 1932 Cal 171 (174) : 144 Ind Cas 561 (DB), *Secretary of State* v. *Hindustan Co-operative Insurance Society Ltd.* (Application, for review, by the Secretary of State after the termination of a clearly unsustainable appeal to the Privy Council.)

[34] ('35) 22 AIR 1935 Mad 731 (732, 733) : 156 Ind Cas 640 (DB), *Siddalingana Gowd* v. *Bhimana Gowd.*

[35] ('39) 26 AIR 1939 Cal 394 (398) : ILR (1939) 2 Cal 68 : 184 Ind Cas 345, *Biswanath* v. *Khejerali Molla.*

21. "Good faith," whether a question of fact. — It has been held in some cases[1] that whether a person has acted in good faith is a question of fact while the undermentioned cases[2] have adopted the view that it is a mixed question of law and fact.

22. "Which, from defect of jurisdiction, ... is unable to entertain it." — In order that this section may apply, it is essential that the Court in which the prior civil proceeding was prosecuted, must have been unable to entertain it *for the reasons specified*, namely, *defect of jurisdiction or other cause of a like nature.*[1a] It is not sufficient to show merely that there were prior proceedings and that they went against the plaintiff.[1b] The words

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('29) 16 AIR 1929 Nag 268 (269) : 118 Ind Cas 687, *Jagannath Puri* v. *Nathoo.* (Payment of court-fee after limitation.)

('28) 15 AIR 1928 Nag 296 (296, 297) : 112 Ind Cas 875, *Model Mills Ltd., Nagpur* v. *Kurban Hussain.* (Do.)

('07) 9 Bom L R 204 (207) (DB), *Keshavlal* v. *Mayabhai.*

Note 21

[1] ('38) 25 AIR 1938 Nag 300 (302) : I L R (1939) Nag 422 : 179 Ind Cas 837, *Dinkarrao Dharrao* v. *Ratansi Asaram.*

('38) 25 AIR 1938 Oudh 100 (101) : 14 Luck 4 : 173 Ind Cas 648 (DB), *Jagdeo Prasad* v. *Pearey Lal.* (In this case the Oudh Chief Court expressed its inclination to this view without deciding the point definitely. The Chief Court further held that it would not interfere where the lower Court's conclusion was not improper.)

('32) 19 AIR 1932 Lah 531 (532): 138 Ind Cas 646 : 14 Lah 136, *Kala* v. *Gehna.*

('27) 14 AIR 1927 Lah 909 (910) : 102 Ind Cas 628, *Gangaram Bishen Das* v. *Hari Ram Ram Lal.*

('21) 8 AIR 1921 Sind 13 (15) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim* v. *Ghulam Hussain.*

('26) 13 AIR 1926 Mad 178 (179) : 92 Ind Cas 373, *Sinna Karuppan* v. *Muthiah Chettiar.* (Due diligence is a question of fact.)

[2] ('38) 25 AIR 1938 Lah 704 (706) : 181 Ind Cas 290, *Maya Singh* v. *Udham Singh.* (AIR 1916 Oudh 139 followed.)

('27) 14 AIR 1927 Pat 256 (256) : 101 Ind Cas 674 (DB), *Fazlul Jamil* v. *Helaluddin.*

('16) 3 AIR 1916 Oudh 139 (140) : 36 Ind Cas 702 : 19 Oudh Cas 367, *Ram Jag* v. *Bhagwan Dat.*

Note 22

[1a] ('31) 18 AIR 1931 Nag 47 (48) : 130 Ind Cas 157, *Krisna* v. *Sitaram.*

('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayan Ambaji* v. *Hari Ganesh.* (Application under O. 21 R. 97, C. P. C., dismissed under O. 21 R. 99— Party, instead of filing suit under O. 21 R. 103, C. P. C., within one year, applying for revision of order — High Court refusing to interfere on the ground that another remedy was available—*Held*, S. 14 did not apply.)

('28) 15 AIR 1928 Bom 252 (256, 257, 259) : 52 Bom 477 : 110 Ind Cas 33 (DB), *Maneklal Mansukhbhai* v. *Suryapur Mills Co. Ltd.*

('25) 12 AIR 1925 Mad 464 (465) : 86 Ind Cas 13, *Mallayya* v. *Narayanagajapathiraju.*

[*See* ('16) 3 AIR 1916 Lah 234 (236) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu* v. *Mehru Mal.*]

[1b] ('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayan Ambaji* v. *Hari Ganesh.*

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"defect of jurisdiction or other cause of a like nature" indicate that the ground of dismissal of the prior proceedings must be one in the nature of a *preliminary* ground. The benefit of the section cannot, therefore, be had in cases where the prior proceedings were dismissed on merits,[1c] or on the ground that the action was misconceived.[1],

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[1c] ('38) 25 AIR 1938 Nag 534 (537) : I L R (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji* v. *Paiku.*
('32) 19 AIR 1932 Cal 558 (559) : 59 Cal 1057 : 138 Ind Cas 748 (DB), *Rajendra Nath* v. *Kamal Krishna.*
('28) 15 AIR 1928 Bom 323 (325,326, 328) : 113 Ind Cas 515 (DB), *Hari* v. *Krishnaji.*
('24) 11 AIR 1924 Bom 39 (40) : 76 Ind Cas 557 (DB), *Somshikharswami* v. *Shivappa.* (Plaintiff defending another suit concerning same subject-matter.)
('24) 11 AIR 1924 Cal 419 (420) : 74 Ind Cas 279 (DB), *Rajani Bandhu* v. *Kali Prasanna.*
('27) 14 AIR 1927 Lah 186 (186) : 101 Ind Cas 254 (DB), *Abbas Ali* v. *Yusaf Ali.*
('27) 14 AIR 1927 Lah 785 (786) : 104 Ind Cas 726 (DB), *Mt. Sat Bhirai Khurd* v. *Ahmad.* (Proceedings by defendants.)
('16) 3 AIR 1916 Mad 57 (59) : 28 Ind Cas 290 : 38 Mad 260 : 28 Mad L Jour 347 (DB), *Kaliba Mavulija* v. *Saran Bivi Saila.* (Claim disallowed as a matter of law.)
('05) 32 Cal 118 (121) (DB), *G. S. Hays* v. *Padmanand Singh.* (Relief not granted in prior suit by inadvertence or by not being pressed.)
(1900) 23 Mad 583 (590) (DB), *Commercial Bank of India* v. *Allavooddeen Sahib.* (Suit dismissed because no cause of action established.)
('05) 28 Mad 338 (341, 342) (DB), *Narayanan Chetty* v. *Kannammai Achi.*
('78-80) 2 Mad 407 (413) : 5 Ind Jur 188 (DB), *Parry & Co.* v. *Appasamy Pillai.*
(1900) 4 Cal W N 75*n* (75*n*), *Sm. Matungini* v. *Surja Kumar Pal.*
(1865) 2 Suth W R 9 (10) (DB), *Nund Doolal Sirkar* v. *Dwarkanath Biswas.*
(1865) 3 Suth W R 13 (13) (DB), *Issureenund Dutt Jha* v. *Parbutty Churn Jha.*
('68) 9 Suth W R 455 (455) (DB), *Oodoy Monee Dabee* v. *Bishonath Dutt.*
('74) 22 Suth W R 162 (163) (DB), *Rughoonath Pershad* v. *Surjo Pershad Singh.*
('98) 1898 Pun Re No. 34, *Rajah of Faridkote* v. *Sardar Gurdayal Singh.* (Suit on a foreign judgment which is a mere nullity.)
('33) 20 AIR 1933 Nag 130 (132, 133) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai* v. *Kedar Nath.* (Adjudication on merits by arbitrators.)
(1865) 2 Suth W R Misc 1 (1) (DB), *Kalee Chunder Chowdhury* v. *Ruttun Gopal Bhadooree.*
('83) 13 Cal L R 214 (216) (DB), *Hafizunnessa Khatun* v. *Bhyrub Chunder Das.* (Set-off claimed in a prior suit dismissed as unsustainable in law.)
('67) 7 Suth W R 160 (160) (DB), *Dhun Monee Chowdrain* v. *Brindabun Chunder Sircar Chowdhry.* (Though the dismissal may be erroneous.)
[*See* ('29) 16 AIR 1929 Pat 694 (697) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prasad* v. *Bhupal Ram.*
('20) 7 AIR 1920 Pat 504 (506) : 58 Ind Cas 434 : 5 Pat L Jour 697 (DB), *Thakur Jagdeshwar Dayal Singh* v. *Bhagdi Mahton.*
('70-71) 5 Mad H C R 93 (97) (DB), *Kristnayya* v. *Rajahlakshmi Venkamma Rao.*]

[1] ('30) 17 AIR 1930 Lah 211 (212) : 120 I. C. 70 (DB), *Amar Nath* v. *Mt. Ralli.*
('22) 9 AIR 1922 Mad 417 (420) : 70 Ind Cas 743 (DB), *Ganapathi Mudaliar* v. *Krishnamachari.* (Prior proceedings being by way of suit where remedy lay only in execution under S. 47, Civil Procedure Code.)
(1900) 23 Mad 621 (625) (DB), *Murugesa Mudaliar* v. *Jattaram Davy.* (Suit misconceived—Claim to recover specific property instead of for value of goods.)
('72) 17 Suth W R 266 (267, 269) (DB), *Luchman Parshad* v. *Nimhoo Pershad.* (Cause of action misconceived.)

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Grounds of dismissal, such as the following, are not covered by the section:

(1) That the *darkhast* is not sustainable on a construction of a decree.[2]

(2) That the alleged fraud is not proved.[3]

(3) A suit was filed for money in the Union Court of Bahar which passed the following order: "It being desirable that there should be a proper trial conducted by persons versed in law of the question regarding the document filed by the plaintiffs and regarding the question of the rate of interest, this Court orders that the suit be conducted in the proper Court." It was held that this was not a case contemplated by the section.[4]

(4) That the claim in the prior proceedings was premature.[5]

(5) That the plaintiffs, not being the nearest reversioners, were not entitled to sue.[6]

(6) In an application for transfer of a decree, that it was barred by limitation and that it was not shown that the judgment-debtor had no property within the local limits of the Court which passed the decree.[7]

(7) In an application for execution, that it was not in accordance with law.[8]

(8) That the plaintiff was negligent.[9]

(9) That the suit disclosed no cause of action.[10]

(10) That the final decree having been already passed an application for a final decree could not be sustained.[11]

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[2] ('28) 15 AIR 1928 Bom 323 (325, 326) : 113 Ind Cas 515 (DB), *Hari Janardhan* v. *Krishnaji Balkrishna.*

[3] ('24) 11 AIR 1924 Bom 39 (39, 40) : 76 Ind Cas 557 (DB), *Somshikharswami* v. *Shivappa Mallappa.*

[4] ('28) 15 AIR 1928 Cal 46 (47) : 106 I. C. 324, *Bonomali Gope* v. *Fakir Chand.*

[5] ('19) 6 AIR 1919 Cal 381 (382) : 46 Cal 870 : 51 Ind Cas 922 (DB), *Dwarka* v. *Atul Chandra.*
[But see ('39) 26 AIR 1939 Bom 26 (30) : ILR (1939) Bom 9 : 179 Ind Cas 441 (DB), *Maneklal Kalidas* v. *Shivlal Dayaram.*]

[6] ('30) 17 AIR 1930 Lah 211 (212) : 121 I. C. 70 (DB), *Amar Nath* v. *Mt. Ralli.*

[7] ('18) 5 AIR 1918 Mad 23 (23, 24): 45 I. C. 460 (DB), *Vidhya Thirtha Swamigal* v. *Venkatarama Iyer.*

[8] ('08) 1908 Pun L R No. 125, p. 378 (381), *Ganga Ram* v. *Mt. Durgi.*
('37) 24 AIR 1937 Mad 760 (761, 762) : 174 I. C. 28, *Appaji Chetty* v. *Govindasamy Reddi.* (Execution petition filed neither by party nor by duly authorized vakil — Application not being in accordance with law under Article 182 (5) held did not save limitation.)

[9] ('31) 18 AIR 1931 Nag 109 (110) : 121 Ind Cas 55, *Baliram* v. *Supadasa.*

[10] ('88) 1888 Pun Re No. 19, *Ram Chand* v. *Shadi Ram.* (Suit on dishonoured *hundi*—No allegation in the plaint of presentment and dishonour.)

[11] ('38) 25 AIR 1938 Lah 117 (119) : ILR (1937) Lah 671 : 175 I. C. 846 (DB), *Jodh Singh* v. *Firm Bhagwan Das Nanak Chand.* (AIR 1937 Lah 404 Reversed.)

It is clear that the section does not apply where the prior suit has ended in a decree in favour of the plaintiff. In such cases, however, there *may* be a revival of the cause of action and the plaintiff may be entitled to a fresh period of limitation on the principles discussed in section 9 Note 11.[12]

23. **"Jurisdiction."**—A defect of jurisdiction may be territorial,[1] or in relation to the subject-matter.[2]

The want of jurisdiction may arise after the institution of the proceeding, as for instance, where by a later *ruling* of a competent Court, the jurisdiction is taken away.[3] Similarly, where after the

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[12] **See however ('38) 25 AIR 1938 Pat 321 (322): 174 I. C. 630 (DB),** *Gajanand Marwari* v. *Nonidh Lal.* (In this case prior suit was one for possession and it was decreed and the plaintiff also obtained possession in execution but was subsequently dispossessed by the same defendant—In deciding that the subsequent suit was not barred by limitation the Patna High Court held that the period of the prior suit should be excluded in computing limitation—This decision purported to follow AIR 1916 P C 96—But it is submitted that the true principle in such cases is that of satisfaction and revival of cause of action above referred to and not that of exclusion of time under this section.)

Note 23

[1] ('26) 13 AIR 1926 Mad 813 (813, 815) : 95 Ind Cas 587, *Panchapakesa Iyer* v. *Natesa Pattar.*

('80) 5 Bom 48 (57, 60) : 7 Ind App 181 : 4 Sar 173 : 3 Suther 778 : 3 Shome L R 217 : 4 Ind Jur 472 : 7 Cal L R 320 (PC), *Lukshman Dada Naik* v. *Ramchandra Dada Naik.* (No jurisdiction over the place in which the land in suit was situate.)

('71) 15 Suth W R 69 (69) (DB), *Banee Madhub Lahoree* v. *Bipro Dass Dey.*

[2] ('78-79) 3 Bom 223 (226, 227) (DB), *Putali Mehati* v. *Tulja.* (Non-production of certificate of Collector under Section 6, Pensions Act, which gave jurisdiction to Court.)

('84) 1884 Pun Re No. 59, *Dharam Das* v. *Eshri Pershad.* (Summary proceedings to enforce an award—Award being indefinite was incapable of being dealt with in *summary* proceedings.)

('89) 1889 Pun Re No. 67, *Niadar Mal* v. *Shankar Das.* (Do.)

('11) 9 Ind Cas 642 (642) (Mad), *Gopisetty Narainsawmi Naidu* v. *Tallanraju Vencatasubrayudu.* (Revenue Court having no jurisdiction to entertain a suit for kattubadi against an inamdar in Madras.)

('70) 12 Suth W R 45 (46) : 3 Beng L R A C 233 (DB), *Mohun Chunder* v. *Azeem Gazee.* (Suit against a dead person — No jurisdiction.)

[*See* ('07) 34 Cal 619 (626, 627) : 11 Cal W N 649 : 5 Cal L Jour 405 : 2 Mad L Tim 406 (DB), *Laliteshwar Singh* v. *Rameshwar Singh.* (Leave granted by Registrar of High Court—Leave invalid as being not of the proper authority as required by Clause 12, Letters Patent (Calcutta).)]

[3] ('41) 28 AIR 1941 Pesh 3 (5) : 192 Ind Cas 758 (DB), *Peoples Bank of Northern India Ltd.* v. *Lekhu Ram.* (Award between Bank and private individual—Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court —Subsequent ruling declaring that such awards were cognizable by District Judge —*Held* Section 14 applies.)

('22) 9 AIR 1922 All 74 (76) : 44 All 296 : 66 Ind Cas 214 (DB), *Parbati* v. *Rajah Shyam Rikh.* (Rent decree-holder under Agra Tenancy Act suing in civil Court to set aside alienation by insolvent tenant — Later decision negativing right of civil suit.)

('96) 19 Mad 90 (93, 94, 95) (DB), *Subbarau Naidu* v. *Yagana Pantulu.* (Suit in Madras Presidency Small Cause Court — Defendant outside jurisdiction — Leave institution of a suit on a mortgage, the plaintiff amends the plaint by the deletion of the relief as to sale and thereupon the plaint is returned from the regular side for presentation to the Small Cause Court, the plaintiff is entitled to the benefit of this section.[3a]

The expression "defect of jurisdiction" means a defect of jurisdiction peculiar to the Court in which the proceedings were taken, and does not cover such mistakes as the presentation and prosecution of an appeal which does not lie at all to any Court.[4] A defect of jurisdiction is due to the provisions of the law itself and not due to the laches of parties.[5]

The word "jurisdiction" occurring in this section has been interpreted liberally.[6] In a case where an execution application for sale of properties, not included in the mortgage, was dismissed on the ground that no decree under O. 34 R. 6 of the Civil Procedure Code had been obtained, the Patna High Court[7] held that as the executing Court would be acting without jurisdiction if execution were ordered in the absence of such a decree, the dismissal was on account of defect of jurisdiction.

Where a Court has no *power* to make an order, it does not mean that it has no jurisdiction in the matter.[8]

24. "Other cause of a like nature." — In construing these words, it has been observed in some cases[1] that, if there was an inability

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of Registrar obtained under Rules for filing suit—Subsequently the rule declared *ultra vires* and leave of Court made necessary.)

[3a] ('40) 27 AIR 1940 All 145 (147) : 187 I. C. 336, *Dal Singar Koeri* v. *Chandi Singh.*

[4] ('11) 11 Ind Cas 880 (881) : 1912 Pun Re No. 22, *Moti Singh* v. *Maghar.*
('93) 1893 Pun Re No. 45, *Sultan* v. *Ala Bukhsh.*

[5] ('86) 10 Bom 604 (609) (DB), *Bai Jamna* v. *Bai Ichha.* (Prior suit dismissed owing to plaintiff not having registered sale certificate at date of institution of suit.)

[6] ('33) 20 AIR 1933 Mad 197 (199) : 140 Ind Cas 270, *Narasimhacharyulu* v. *Sabhnadri Appa Rao.*

[7] ('20) 7 AIR 1920 Pat 462 (462, 463): 58 Ind Cas 40 (DB), *Karimullah Shah* v. *Muhammad Raza.*

[8] ('68) 9 Suth W R 402 (408, 412, 413) : Beng L R Supp Vol 985 (FB). *Hurro Chunder Roy Chowdhury* v. *Sooradhonne Debia.* (Dismissal of an application for mesne profits on the ground that the decree does not grant it is not for want of jurisdiction—Per Macpherson and Kemp, JJ.—Loch, J., concurring; Peacock, C. J., dissenting.)
('76) 25 Suth W R 540 (541) (DB), *Perhlad Sein* v. *Gunness Lall Tewary.*
[See however ('25) 12 AIR 1925 Cal 1258 (1260) : 89 Ind Cas 744 (DB), *Kayem Biswas* v. *Bahadur Khan.* (The word 'jurisdiction' may be used in the sense of power to make an order.)]

Note 24

[1] (1900) 22 All 248 (257, 258) : 1900 All W N 64 (FB), *Mathura Singh* v. *Bhawani Singh.* (Strachey, C. J.)
('12) 14 Ind Cas 437 (438) : 6 Low Bur Rul 43 (DB), *Po Nyun* v. *Muthu Karappan Chetty.*

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in the Court to entertain the former suit, produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of a like nature to defect of jurisdiction. Adopting this view, the following were held not to be causes of a like nature :

(1) A wrong party suing.[2]

(2) Plaintiff's inability to produce a registered certificate of sale with the suit.[3]

(3) "Non-suit" of plaintiff for neglect to state the boundaries of property.[4]

(4) Neglect or laches of plaintiff in stating or prosecuting his case.[5]

(5) Want of notice required by S. 80 of the Civil Procedure Code.[6]

(6) Dismissal of prior suit for default.[7]

(7) Dismissal of an application for want of a necessary affidavit.[8]

(8) Prior application for execution not being presented by the decree-holder or by a vakil duly authorized on his behalf.[9]

But, a liberal construction of these words has been also favoured[10] and it has been observed that a cause of a like nature need not be always one, which the plaintiff could have avoided, because it is equally in the plaintiff's own power to avoid suing in a Court without jurisdiction.[11] In other words, given good faith and due diligence, a cause is not prevented from being of a like nature to defect of jurisdiction merely because it was in the plaintiff's own power to avoid, or

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('75) 7 N W P H C R 284 (287) (DB), *Bahal Singh* v. *Mt. Gauri.*
('72) 17 Suth W R 266 (267, 269) (DB), *Luchmun Pershad* v. *Nimhoo Pershad.*

[2] ('81) 7 Cal 367 (368, 369) (DB), *Rajendro Kishore Singh* v. *Bulaky Mahton.* (Manager of plaintiff suing instead of plaintiff himself.)

[3] ('86) 10 Bom 604 (609) (DB), *Bai Jamna* v. *Bai Ichha.*

[4] ('66) 6 Suth W R 184 (185, 186) : Beng L R Sup Vol 553 (FB), *Chunder Madhub Chuckerbutty* v. *Ram Coomar Choudhry.* (Loch and Pundit, JJ., dissenting.)

[5] ('98) 1898 Pun Re No. 34, *Raja of Faridkote* v. *Sardar Gurdayal Singh.*

[6] ('12) 13 Ind Cas 260 (261) : 5 Sind L R 181, *Manghammal* v. *V. Fernandez.* (Want of notice due to plaintiff's laches and disregard of law — *Obiter.*)

[7] ('29) 16 AIR 1929 Nag 219 (221) : 25 Nag L R 99 : 116 I. C. 509, *Chintaman* v. *Kisan.*

[8] ('24) 11 AIR 1924 Pat 40 (41) : 79 Ind Cas 696 (DB), *Akhaj Khalifa* v. *Ramlal Marwari.* (It is not defect of jurisdiction.)

[9] ('37) 24 AIR 1937 Mad 760 (762) : 174 Ind Cas 28, *Appaji Chetti* v. *Govindasami Reddi.*

[10] ('39) 26 AIR 1939 Bom 26 (30) : I L R (1939) Bom 9 : 179 Ind Cas 441 (DB), *Manek Lal Kalidas* v. *Shivlal Dayaram.* (Former suit dismissed because the cause of action had not accrued though it was the same — *Held* S. 14 applied.)
('19) 6 AIR 1919 Mad 1071 (1074) : 41 Mad 701 : 46 Ind Cas 265 (DB), *Kannusamy Pillai* v. *Jagathambal.*

[11] ('86) 10 Cal 86 (88) : 13 Cal L R 218 (DB), *Deo Prasad Singh* v. *Pertab Koeree.* (A case of misjoinder of causes of action under the Act of 1871.)

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the dismissal resulted from his own act or from a *bona fide* mistake of law or procedure.[12] The test, accordingly, appears to be whether, like jurisdiction, the cause in question led to the inability of the Court to entertain the suit, good faith and diligence being granted.

In the following instances, the causes were held to be of a like nature to defect of jurisdiction:

(1) The present plaintiff having claimed the relief in the prior suit in a wrong capacity.[13]

(2) Prior proceedings being barred by the existence of an unvacated previous order on the matter.[14]

(3) When the plaintiffs had applied to continue a suit begun by another but their application was dismissed on the ground that it was one which the Court was not competent to entertain, they instituted an independent suit by themselves.[15]

(4) Failure to obtain sanction necessary to try a suit relating partly to property outside jurisdiction.[16]

(5) Decree in a suit being vacated on the ground of non-service of summons.[17]

(6) Want of power of attorney in favour of a mother who sued on behalf of her sons.[18]

(7) Where jurisdiction of the Court to entertain the suit depends on leave being granted by the Court, and the Court grants

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[12] (1900) 22 All 248 (255) : 1900 All W N 64 (FB), *Mathura Singh* v. *Bhawani Singh.* (Per Strachey, C. J.)

('12) 14 Ind Cas 437 (438) : 6 Low Bur Rul 43 (DB), *Po Nyun* v. *Muthukaruppan Chetty.* (One partner of a firm suing on a promissory note executed in favour of all the partners without an endorsement in his favour by the other partners who were alleged to have sold their interests to plaintiff—*Held*, this was too obscure and legal a point for the party.)

('35) 22 AIR 1935 Lah 736 (737, 738) : 156 Ind Cas 378 (DB), *Lorind Chand Parmanand & Sons* v. *Bahadur Khan.* ('Act of insolvency' held to be too technical an expression for the party.)

[13] ('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 Ind Cas 452 (PC), *Sm. Nrityamoni Dassi* v. *Lakhan Chandra Sen.* (Defendants claiming a relief without getting themselves transferred as plaintiff and claim being therefore disallowed.)

[14] ('28) 15 AIR 1928 All 10 (11) : 108 Ind Cas 134 (DB), *Kanhaiya Lal* v. *Suraj Karan.*

[15] ('19) 6 AIR 1919 Mad 572 (573) : 52 Ind Cas 465 (DB), *Arunachallam Pillai* v. *Vellaya Pillai.*

[16] ('74) 6 N W P H C R 225 (230, 231) (DB), *Stewart Skinner* v. *William Orde.*

[17] ('72) 17 Suth W R 518 (518, 520) (DB), *Nobo Coomar Chuckerbutty* v. *Koylashchunder Baroore.*

[See however ('73) 1873 Pun Re No. 17, *Lallu Mull* v. *Shahzada Mahomed.*]

[18] ('75) 1875 Pun Re No. 69, *Sirdar Bakshish Singh* v. *Futteh Singh.* (Court's inability to try the suit on merits in the absence of power of attorney is a cause of a like nature.)

such leave but subsequently recalls it and rejects the plaint.[18a]

This divergence of view on the construction of the words 'a cause of a like nature' has led to divergent decisions in almost identical circumstances. Where in a suit for a mere declaration, the consequential relief of possession was not asked for, and the suit was dismissed under S. 42 of the Specific Relief Act, the Madras High Court[19] has held that the Court being deprived of its discretion of granting a declaratory decree in such a case, the cause was in the nature of a defect of jurisdiction. The same Court has also held that the inability of a Court to decide on the lawfulness of the plaintiff's claim, owing to his wrongly framing his action, involves a cause of a like nature.[20] The Patna High Court[21] similarly, held that where a decree-holder joined in his execution petition a relief, which was not in conformity with the decree, the case was analogous to misjoinder of causes of action and the cause in question was in the nature of a defect of jurisdiction. The Rangoon High Court has, on the other hand, held that the mistake of a party with regard to the relief he seeks arises out of the incompetence of his advisers and that, as such, it is not a cause of a like nature.[22] Again, where a person proceeded by way of a suit instead of making an application for his remedy, the Bombay High Court[23] held that such an error of law was a cause of a like nature. But the Madras High Court[24] has held that the failure of the plaintiff in the prosecution of his claim by a suit cannot be attributed to anything connected with the jurisdiction of the Court. In a Nagpur case, an application under S. 144, Civil Procedure Code, was made instead of a suit being instituted for money wrongly paid. It was held that the time of the proceeding of the application ought to be excluded.[24a] In a recent case,[24b] where an appeal was filed (in a case under S. 47, Civil Procedure Code) as being the proper remedy under the decisions then prevailing, but it was subsequently held that a suit under O. 21 R. 63 was the proper remedy, and thereupon a suit was filed, it was held by the Madras High Court that the failure of the appeal was due to a "cause of a like nature."

[18a] ('39) 26 AIR 1939 Pat 86 (88) : 182 Ind Cas 632 (DB), *Kaluram* v. *Janistha Lal.* (Master on the Original Side of the Calcutta High Court granting leave and subsequently recalling it.)

[19] ('26) 13 AIR 1926 Mad 1081 (1081, 1082) : 98 Ind Cas 14, *Venkamma* v. *P. Parthasarathy & Brothers.*

[20] ('23) 10 AIR 1923 Mad 347 (348, 349) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali* v. *Kunhammad.*

[21] ('24) 11 AIR 1924 Pat 471 (473) : 3 Pat 42 : 75 Ind Cas 312 (DB), *Kishore Mal* v. *Jagdish Narain Singh.*

[22] ('34) 21 AIR 1934 Rang 158 (158) : 152 Ind Cas 415, *Maung Pu* v. *U Paing.*

[23] ('20) 7 AIR 1920 Bom 208 (209) : 44 Bom 97 : 55 Ind Cas 967 (DB), *Ganpat Rao* v. *Anand Rao.* (*Suit* for refund of excess amount recovered by defendant in prior execution against plaintiff dismissed as not being maintainable. A subsequent execution petition filed on the execution side.)

[*See* ('20) 7 AIR 1920 Bom 351 (352) : 57 Ind Cas 551 (DB), *Ibrahim Harun Jaffer* v. *Jusaf Hussain Jaffer.* (Prior *suit* to set aside *ex parte* decree not lying—Subsequent application under O. 9 R. 13—*Obiter.*)]

[24] ('22) 9 AIR 1922 Mad 417 (418, 420) : 70 Ind Cas 743 (DB), *Ganapathy Mudaliar* v. *Krishnamachari.*

[24a] ('23) 10 AIR 1923 Nag 94 (94, 95) : 71 Ind Cas 42, *Lakshman* v. *Bishram.*

[24b] ('38) 25 AIR 1938 Mad 41 (42) : 175 Ind Cas 767, *Kesavan Nambudri* v. *Theva Amma.*

Defect of jurisdiction or a cause of a like nature must be such that it has prevented the Court from *entertaining* the suit. It has no application where the suit is entertained and decided, even if it be on grounds, such as the following :

(1) Res judicata.[25]

(2) Limitation.[26]

(3) That the award in question was void and not binding.[27]

See also Note 25.

25. "Unable to entertain."—The Act of 1859 used the words "unable to decide upon it." The Act of 1871 used the words "unable to try it." In *India Publishers, Ltd.* v. *Aldridge*,[1] a case of misjoinder of parties arising before the Act of 1908, i.e., before explanation III was added to the section, Maclean, C. J., observed as follows:

> "There is a marked difference between the language of the Act of 1859 and that of the existing Limitation Act. In the present Act the words are 'unable to entertain;' in the previous Act the words are 'unable to decide upon it.' A Court may be able to entertain a suit in its inception, but be unable to decide it on the merits, owing to some defect, not in jurisdiction, but in procedure. There must have been some reason for this change of language, and a possible reason is that the Legislature intended to limit the benefit of the section to cases, where the Court had no power to *embark upon the case at all.*"

The section would seem to apply not only where the Court in which the prior proceedings were pending *rightly* thought it had no jurisdiction in the matter, but also where it thought so *erroneously*.[2]

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[25] ('21) 8 AIR 1921 Pat 225 (226) : 63 Ind Cas 593 : 6 Pat L Jour 593 (DB). *Braja Gopal Mukherji* v. *Tara Chand Marwari.*

[26] ('85) 11 Cal 264 (265, 266) (DB), *Nobin Chunder Kurr* v. *Rojomoye Dossee.* (Though the suit would have been within time if certain payments made had been alleged in the plaint.)

('99) 26 Cal 414 (416, 417, 422) : 3 Cal W N 233 (235) (FB), *Bishambhar Haldar Bonomali Haldar.*

[27] ('33) 20 AIR 1933 Nag 130 (133) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai* v. *Kedar Nath.* (Cancellation of the award is not a cause of a like nature.)

Note 25

[1] ('08) 35 Cal 728 (733) : 12 Cal W N 473 (DB). ("Entertain—Receive and take into consideration"—From Webster's International Dictionary.)

[2] ('35) 22 AIR 1935 Oudh 501 (503) : 158 Ind Cas 267 (DB), *Gappoo Singh* v. *Harcharan.*

('32) 19 AIR 1932 All 340 (342) : 54 All 423 : 140 Ind Cas 178, *Raghunandan Chaube* v. *Bhuwal Tewari.*

There was a decree against several defendants in the trial Court fixing each defendant with distinct and several liability. The decree against R, one of the defendants, was *ex parte*. The other defendants appealed against the decree making R a respondent. No notice of appeal was, however, served on R and the appeal was dismissed. R filed an application to the trial Court to have the *ex parte* decree against him set aside but the Court dismissed the application on the ground that the application should have been made to the appellate Court. Subsequently, R applied to the appellate Court to have the appeal re-opened on the ground that he had no notice of the appeal, and his application was dismissed as barred by limitation. The High Court[2a] reversed the decisions of the Courts below and held that in the particular case, the Court of the first instance was wrong in holding that it had no jurisdiction to entertain an application to have the *ex parte* decree set aside and that the lower appellate Court was also wrong in not applying S. 14 to the application made by R to re-hear the appeal. The High Court held that R was right in having applied to the trial Court to have the *ex parte* decree set aside and that the lower appellate Court ought to have excluded the time occupied in the prior proceedings in computing the period of limitation for the application by R to have the appeal re-opened. Similarly, where a prior execution application was presented in the proper Court but the Judge presiding over the Court sat for some time in a Court at another place and taking up the application in the latter Court, ordered execution to proceed, and on appeal, the order was set aside for want of jurisdiction in the Judge at the latter place, the time taken in these proceedings was excluded.[3]

The section is also applicable where the prior proceeding was pending in a wrong Court on account of a *mistake on the part of the Court* and not of any fault of the party.[4]

('37) 24 AIR 1937 Nag 69 (69, 70) : 170 Ind Cas 115 : I L R (1937) Nag 311, *Motilal Madanlal* v. *Musa Muhammad*.

('25) 12 AIR 1925 Oudh 493 (494) : 89 Ind Cas 443, *Raghubar Dayal Singh* v. *Kanhaya Bux*.

('73) 20 Suth W R 433 (437) (DB), *Bibee Khodajamnissa* v. *R. F. Stevens*.
[*See* ('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali* v. *Akhtar*.]
[But see ('18) 5 AIR 1918 Mad 94 (95, 96) : 43 Ind Cas 6 (DB), *Abdulla Koya* v. *Kallumpurath Kanaran*. (Execution application for compensation under Ss. 5 and 6, Malabar Compensation for Tenants' Improvements Act, 1900. First Court dismissed execution petition for want of proof of allegations. Sub-Court in appeal also added that plaintiff's remedy was not in execution but was by suit. No appeal from latter. In the subsequent suit for same relief *held* that S. 14 did not apply to exclude the time of the pendency of execution proceedings as on a correct view of the law, the remedy was on the execution side.)]

[2a] ('32) AIR 1932 All 340 (341, 342) : 54 All 423 : 140 Ind Cas 178, *Raghunandan Chaube* v. *Bhuwal Tewari*. (The two applications by *R* were for the *same relief*.)

[3] ('25) 12 AIR 1925 Bom 113 (114, 115) : 85 Ind Cas 778 (DB), *Pandu Dagadu* v. *Jamnadas Cholumal*. (Affirming A I R 1923 Bom 218.)

[4] ('35) 22 AIR 1935 Oudh 501 (503) : 158 Ind Cas 267 (DB), *Gappoo Singh* v. *Harcharan*. (A Subordinate Judge sent a suit pending before him to an Additional Subordinate Judge who was found subsequently to have no jurisdiction.)

A held a decree against B with a charge on his property. C, who also obtained a decree against B, brought the property to sale. In more applications than one, A applied for and obtained amounts from out of the sale proceeds towards the discharge of his decree-debt. Subsequently, the sale being set aside A was ordered to refund the amounts he had obtained. A, after making the refund, filed an application to execute his decree. The Punjab Chief Court[5] *held* that the Court was *ultimately* "unable to grant" the remedy as the auction sale was set aside and excluded the period of the prior application under S. 14. It is submitted that this view of the inability of the Court is wrong as it did not originate in any defect of jurisdiction or a cause of a like nature.

Where the prior suit was decreed in the first Court but was dismissed in appeal on the grounds mentioned in the section, it is not as if the period of the appellate proceedings alone is to be excluded. The period from the institution of the suit is to be deducted provided it was spent in good faith.[6]

The section only says that the Court was unable to entertain the prior proceeding. It does not mean that the prior proceeding ought to have been *dismissed* by the Court. The section applies even where the plaint or an application in the prior proceeding is returned for presentation to the proper Court.[7] It has been held to apply even where the prior proceeding has not terminated at the date of the second suit, but is pending before the Court not having jurisdiction. A filed a suit against B in the Small Cause Court of Kumbakonam for rent within limitation. While it was pending trial, he filed another suit against the same defendant for rent for the same period in the Small Cause Court of Tiruvadi after the period of limitation had expired. The former Court *subsequently* returned the plaint on the ground that it had no jurisdiction. In computing the period of limitation for the latter suit, the Madras High Court[8] held that the period between the date of the institution of the former suit and the date of the institution of the latter should be excluded notwithstanding the pendency of the former suit on the date of the institution of the latter.

26. Misjoinder — Explanation III. — Before explanation III was enacted, there was a conflict of opinions among the High Courts on the question whether misjoinder was a defect coming under the section.[1] It had also been decided in some cases that nonjoinder was not a cause of a like nature to defect of jurisdiction.[1a] It was to set at rest this conflict that explanation III was added to the section,[2] under which, misjoinder of parties or causes of action is deemed to be a cause of a like nature to defect of jurisdiction.[3]

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[5] ('09) 2 Ind Cas 102 (103, 105) : 1909 Pun Re No. 52 (DB), *Peachey* v. *Punjab Banking Co. Ltd., Lahore.*

[6] ('29) 16 AIR 1929 Rang 55 (57) : 6 Rang 691 : 117 Ind Cas 52 (DB), *G. Bhandari* v. *R. Nihalchand.* (The technical point taken and decided against the plaintiff in the appeal was not in issue in the first Court stage.)

[7] ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati* v. *Phool Singh.*
[See however ('71) 1871 Pun Re No. 64, *Heera Lal* v. *Sheo Buksh.*]
See also Section 14 Note 12.

[8] ('72-73) 6 Mad H C R 45 (46, 50) (DB), *Lee Morris* v. *Sapamhteetha Pillay.*

Explanation III speaks only of misjoinder. Is *nonjoinder* covered by the principle of the section ?[4] In a case of nonjoinder of a person as *plaintiff*, the Madras High Court decided that it is a cause of a like nature to defect of jurisdiction.[5] There was, however, no discussion of the distinction between nonjoinder and misjoinder. In a Sind case,[6]

Note 26

[1] ***Misjoinder is not such a defect:***
('11) 9 Ind Cas 680 (681) : 1911 Pun Re No. 8, *Allan Khan* v. *Dost Muhammad.*
('05) 29 Bom 219 (225, 226) : 7 Bom L R 90 (DB), *Varajilal* v. *Someshwar.*
('08) 35 Cal 728 (735, 736) (DB), *India Publishers Ltd.* v. *Aldridge.*
('96) 17 Mad 299 (302) (DB), *Thirtha Sami* v. *Seshagiri Pai.* (Misjoinder of parties and causes of action.)
('78-80) 2 All 622 (625), *Ram Subhag Das* v. *Gobind Prasad.* (Overruled in 22 All 248.)
Misjoinder is a cause of a like nature :
(1900) 22 All 248 (258, 259, 260, 261) : 1900 All W N 64 (FB), *Mathura Singh* v. *Bhawani Singh.* (Overruling 2 All 622.)
('84) 10 Cal 86 (88) : 13 Cal L R 218 (DB), *Deo Prosad* v. *Pertab Kairee.*
('01) 24 Mad 361 (363) (DB), *Venkataratnam Naidu* v. *Ramaraju.*
('99) 22 Mad 494 (500, 501, 506) (DB), *Assan* v. *Pathumma.*
('96) 23 Cal 821 (825, 826) (DB), *Mullick Kefait Hossein* v. *Sheo Prasad.*
('97) 20 Mad 48 (50, 51) (FB), *Venkiti Nayak* v. *Murugappa Chetty.* (Misjoinder of causes of action without leave under O. 2 R. 4, C. P. C.)

[1a] ('90) 12 All 207 (208, 209) : 1890 All W N 76 (DB), *Jema* v. *Ahmad Ali Khan.* (Non-joinder of a *plaintiff* not a cause of a like nature.)
('66) 5 Suth W R 281 (281) (DB), *Nilamdhub Surnokar* v. *Kristo Doss Surnokar.* (Non-joinder of *defendant.*)

[2] ('34) 21 AIR 1934 All 688 (692) : 57 All 145 : 150 Ind Cas 135 (FB), *Sadayatan Pande* v. *Ramchandra Gopal.*
('12) 14 Ind Cas 437 (437) : 6 Low Bur Rul 43 (DB), *Po Nyun* v. *Muthukarappan.*

[3] ('15) 2 AIR 1915 Lah 474 (475) : 27 Ind Cas 927, *Ahmad* v. *Sultan.*
('24) 11 AIR 1924 Pat 471 (473) : 3 Pat 42 : 75 Ind Cas 312 (DB), *Kishori Mal* v. *Jagdish Narain Singh.*

[4] ('16) 3 AIR 1916 Lah 234 (236) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu* v. *Mehru Mal.* (Question raised but not considered.)

[5] ('23) 10 AIR 1923 Mad 347 (348, 349) : 73 Ind Cas 139 (DB), *Kunhikuttiali* v. *Kunhammad.* (Non-joinder of *co-trustees* in a suit to remove manager of a mosque and for appointment of a receiver for the mosque properties.)
[*See also* ('90) 13 Mad 451 (452, 453) (DB), *Narasimma* v. *Muttayyan.* (Some of the mortgagees suing for their share of the mortgage money—Suit dismissed as not maintainable—All the mortgagees then suing — *Held*, S. 14 applied—This case was before Act of 1908.)]

[6] ('21) 8 AIR 1921 Sind 13 (14, 15) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim* v. *Firm of Gulam Hussain.* (Non-joider of *plaintiff.*)

also of nonjoinder of a plaintiff, it was observed that misjoinder and nonjoinder are only variations of the same defect, viz., the omission to have the proper parties or causes of action included in a suit or application.

27. **Explanation I.** — When a plaint is ordered to be returned for presentation to the proper Court, the proceedings cannot be said to be "*ended*" until the plaint is made ready for return. Hence, the period between the date of the order and the date on which the plaint is *made ready* for return as per O. 7 R. 10 of the Civil Procedure Code is to be deducted.[1] That is, if after an order for return of the plaint is made by the Court, the plaint is actually returned to the party by the Court sometime afterwards, the period of delay so caused must also be deducted.[2] But no period after the actual return can be deducted. Thus, the time taken after the return of the plaint, for getting back the promissory note sued on, cannot be excluded : the absence of an endorsement of return is only an irregularity and cannot extend the period of exclusion where the plaint has been actually returned.[3]

The Court, which returns the plaint, has no power to fix a period within which it should be presented to the proper Court and no such

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Note 27

[1] ('39) 26 AIR 1939 Lah 47 (48) : 182 Ind Cas 732, *Gurdit Singh* v. *Mota Singh*.

('33) 20 AIR 1933 Cal 914 (915, 916, 917, 918) : 60 Cal 1122 : 149 Ind Cas 79 (DB), *Neerendrabhooshan Lahiri* v. *Berhampur Oil Mills Ltd.* (Authorities of all Courts reviewed.)

('33) 20 AIR 1933 Lah 611 (611) : 144 Ind Cas 5 (DB), *Muhammad Din* v. *Gurbaksh Singh*. (Party should not suffer by laches of Court.)

('26) 13 AIR 1926 Mad 178 (178, 179) : 92 Ind Cas 373, *Sinna Karuppan* v. *Muthuiah Chettiar*.

[*See* ('13) 20 Ind Cas 183 (183, 184) (DB) (Cal), *Mohendra Prasad Singh* v. *Nanda Prosad Singh*. (Where the order of return was promulgated on a day subsequent to its signing, held limitation would not run till the date of promulgation.)]

[*See also* ('38) 25 AIR 1938 Pat 203 (203, 204) : 175 Ind Cas 89, *Iswar Dayal* v. *Badri Lal*. (Plaint ordered to be returned—Costs awarded to defendant—Plaint required for preparing decree — Proceedings terminate only when the decree is prepared and signed.)]

[But see ('75) 24 Suth W R 26 (27, 28) (DB), *Abhaya Churn Chuckerbuty* v. *Gour Mohun Dutt*. (This was based on the then Code of Civil Procedure.)]

[2] ('39) 26 AIR 1939 All 590 (591) : ILR (1939) All 709 : 184 Ind Cas 860, *Jafar Uddin* v. *Debi Prasad*.

('22) 9 AIR 1922 Bom 160 (160) : 64 Ind Cas 160 : 46 Bom 211 (DB), *Nagindas Kapurchand* v. *Maganlal Panachand*.

('21) 8 AIR 1921 Bom 379 (379) : 45 Bom 443 : 59 Ind Cas 743 (DB), *Basavanappa* v. *Krishnadass*.

('17) 4 AIR 1917 Cal 794 (795) : 35 Ind Cas 595 (DB), *Ganga Charan* v. *Akhil Chandra*.

('97) 7 Mad L Jour 261 (262) (DB), *Bapu Ammal* v. *Govinda Padayachi*.

('87) 1887 All W N 302 (303), *Bisheshar Singh* v. *Ram Daur Singh*.

[3] ('37) 24 AIR 1937 Lah 464 (465) : 173 Ind Cas 740, *Bhuja Mal Gainda Mal* v. *Mukta Parshad*.

period can be deducted.[4] See also Authors' Commentary on the Civil Procedure Code, 3rd Edition, O. 7 R. 10 Note 9.

Where the order returning the plaint undergoes first and second appeals, the proceedings started by the presentation of the plaint do not come to an end till *final* orders are passed in appeal and in case of a remand by any appellate Court, till the proceedings after remand are also concluded.[5] (See also Note 11.)

28. Time for obtaining copy of the order in prior proceedings — Explanation I. — The party is not entitled, under this section, to exclude the time required to obtain a copy of the order which ended the prior proceedings when the subsequent suit can be instituted without such copy.[1] But when a plaintiff has applied for a copy of the judgment and decree in order to enable him *to prefer an appeal* therefrom, he may be deemed to have been prosecuting the proceeding, at least during the period occupied in the preparation of the copies.[2] This will only be giving effect to the intention of the Legislature upon a reasonable construction of the section, though the period may not strictly fall within the term "in a Court of appeal." See also Article 163 Note 11.

29. Exclusion of a portion of the time. — The section says that the time *during which* the party was prosecuting with due diligence shall be excluded. It would, therefore, seem to follow that, in any particular case, though the whole period of the pendency of the prior proceedings may not be excluded, such portion of it during which he acted with due diligence and in good faith may be deducted.[1] The

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4. **('19) 6 AIR 1919 Cal 4 (5) : 53 Ind Cas 955 (DB),** ***Ramgopal Mandal* v. *Kumar Kamala Ranjan Roy.***

('17) 4 AIR 1917 Cal 794 (795) : 35 I. C. 595 (DB), ***Ganga Charan* v. *Akhil Chandra.***

('13) 18 Ind Cas 121 (121, 122) (DB) (Cal), ***Haridas Roy* v. *Sarat Chandra Dey.***

('70-71) 5 Mad H C R 407 (410) (DB), ***Cheigu Nangiah Gauri Nangiah* v. *Pidatala Venkatuppah.***

('37) 24 AIR 1937 Pat 495 (496) : 167 Ind Cas 941 (DB), ***Jiwan Ram Ramachandra* v. *Jagernath Sahu.***

[But see ('10) 6 Ind Cas 637 (637) (DB) (Cal), ***Nibaran Chandra* v. *S. C. Mukerjee.*** **(Reasonable time may be granted.)]**

5. **('89) 12 Mad 434 (438, 439) (DB),** ***Sankaran* v. *Parvathi.*** **(Munsif returns plaint for presentation to proper Court — District Judge on appeal reverses the order — On appeal to High Court, District Judge directed to enquire into valuation and decide—District Judge on enqiry confirms Munsif's order.)**

Note 28

1. **('28) 15 AIR 1928 Cal 46 (47) : 106 I. C. 324,** ***Bonomali Gope* v. *Fakir Chand Pal.*** **(Order returning plaint.)**

2. **('10) 7 Ind Cas 775 (776, 777) (DB) (Cal),** ***Lakshiram Mandal* v. *Sonatun Basar.*** **(Time requisite for obtaining copies for filing the appeal was held to be deductible as part of time taken in due prosecution.)**

Note 29

1. **('15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347,** ***Radha Kishen* v. *Firm of Ladha Mal-Ram Chand.***

plaintiff who had purchased the assets of an insolvent firm filed a suit for Rs. 500 in a Munsif's Court in the *bona fide* belief that that was the amount due to him. After some time, he learnt that the amount due to the insolvent firm from the defendant was something less which would make the suit cognizable by a Court of Small Causes. He asked for the return of the plaint for amendment and instead of presenting it in the Court of Small Causes, he again re-presented it to the same Court. As the plaintiff ought to have known that the same Court had no jurisdiction to entertain the amended suit, the plaintiff was held to be guilty of want of due diligence and the time after he came to know that he was entitled to a smaller amount was not excluded.[2]

It also follows that want of good faith or due diligence during a portion of the period will not deprive the party of the whole period.[3]

A was prosecuting in good faith and with due diligence the execution of a decree obtained by him, by filing successive applications for execution, until it was finally discovered that his remedy was by suit and not by execution. A, thereupon, filed a suit and claimed to exclude the whole period from the date of the decree to the date of the discovery of the error. It was contended that, if anything, the periods only, during which the execution applications were actually pending, should be excluded and not the intervals between the dismissal of one execution application and the filing of another. It was held by the High Court of Madras that even those intervals should be excluded on the ground that the suit must be deemed to be a *lis* pending until realization.[4]

30. Failure to plead the exemption under this section. — The non-mention of a claim to exclusion of time under this section is not fatal to the suit.[1]

('11) 11 Ind Cas 338 (339) (DB) (Mad), *Kakamani Rayappa* v. *Kotta Venkanna of Rajahmundry.*

('72) 17 Suth W R 518 (519, 520) (DB), *Nobo Coomar Chuckerbuty* v. *Koylash Chunder Baroore.*

[*See* ('28) 15 AIR 1928 Rang 21 (22, 23) : 5 Rang 600 : 105 Ind Cas 701 (DB), *Nadesan Chettiar* v. *Shankaran Chettiar.*

('76) 1876 Pun Re No. 35, *Jymal Singh* v. *Bhagwan Das.*]

[2] ('15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347, *Radha Kishen* v. *Firm of Ladha Mal-Ram Chand.*
See also Note 11.

[3] ('34) 21 AIR 1934 Nag 145 (146) : 30 Nag L R 294 : 149 Ind Cas 956, *Model Mills Nagpur, Ltd.* v. *Hiralal-Ram Gopal.* (It is no concern of Court how plaintiff spends his time till expiry of ordinary period of limitation, excluding time allowed under Section 14.)

[4] ('37) 24 AIR 1937 Mad 357 (358, 359) : I L R (1937) Mad 161 : 170 Ind Cas 524 (DB), *Dugarajulum Garu* v. *Aryan Bank, Vizagapatam.*

Note 30

[1] ('08) 7 Cal L Jour 560 (562) : 12 Cal W N 617 (DB), *Raghu Nath Bhagat* v. *Syed Samad Shah.*

15.* *(1)* In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Exclusion of time during which proceedings are suspended.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

Synopsis

1. Legislative changes.
2. Scope.
3. " Prescribed."
4. " Suit." See Notes to S. 2 cl. (10).
5. " Application for the execution of a decree."
6. " Stayed by injunction or order."
7. Stay by agreement of parties.
8. Insolvency, whether operates as a stay or injunction.
9. Partial stay of execution.
10. Order granting time to judgment-debtor to pay, if amounts to stay order.
11. Institution of collateral suit or proceeding, if will operate as stay.
12. Attachment, if amounts to an injunction or a stay order.
13. Order allowing execution only on condition.
14. Adjournment of case is not stay.
15. Appeal does not operate as a stay.
16. " The day on which it was issued or made, and the day on which it was withdrawn."
17. Duration of stay in case of an appeal.
18. " Revival " of execution application and Section 15.
19. Notice of " suit " — Sub-section (2).
20. Notice required in case of only one or some only of the defendants.
21. Adverse possession (Section 28) and extension of limitation under sub-section (2).
22. Sub-section (2) : " Enactment for the time being in force."
23. Section 15 sub-section (2) and Sections 6 and 8. See Note 41 to S. 6.
24. Section 15 and res judicata.

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* Act of 1877 : S. 15.

Exclusion of time during which commencement of suit is stayed by injunction or order.

In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Other Topics (miscellaneous)

Absolute stay contemplated by section. See Note 9.
Application for delivery of possession by auction purchaser — Not application for execution. See Note 5.
Application for final decree in mortgage suit. See Notes 5 and 11.
Attachment of decree — Whether operates as stay or injunction. See Note 12.
Civil Procedure Code, S. 48 — Not controlled by this section. See Note 3.
Disability to sue or apply from other circumstances. See Notes 6, 7 and 8.
Order for taxation of solicitor's costs. See Note 6.
Proceedings consigned to record room—No stay. See Note 10.
Refusal of leave to proceed against insolvent — Whether amounts to injunction or stay. See Note 8.
Stay against one judgment-debtor is not stay against other judgment-debtors. See Note 9.
Unnecessary notice to Secretary of State or public officer — No deduction against private individual. See Note 20.

1. Legislative changes.

(1) The corresponding S. 16 of the Act of 1871 applied only to a stay by *injunction*.

(2) Section 15 of the Act of 1877 introduced the words "or order" after the word "injunction" and also the words "the day on which it was issued or made and the day on which it was withdrawn."

(3) Neither of the above two sections applied to *applications for execution of decrees*[1] and this resulted in hardship in many cases under the Act of 1877 where the decree-holder could not execute his decree owing to an injunction or a stay order, but found himself barred by limitation when the bar was removed. In order to meet this difficulty the Courts adopted various methods of relieving the parties of this hardship. In some cases[2] where

Act of 1871 : S. 16.

Exclusion of time during which commencement of suit is stayed by injunction.

In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.

Act of 1859.

No corresponding provision.

Section 15 — Note 1

1. ('10) 7 Ind Cas 886 (888, 889) (DB) (Cal), *Amulya Ratan* v. *Preo Nath*.

('03) 26 Mad 780 (782) : 13 Mad L Jour 412 (DB), *Rungiah Goundan & Co.* v. *Nanjappa Rao*.

('88) 11 Mad 103 (105) (DB), *Rajarathnam* v. *Skevalayammal*.

('82) 8 Cal 248 (250) : 10 Cal L R 143 : 6 Ind Jur 357 (DB), *Lutful Huq* v. *Sumbhudin Pattuck*. (Per Prinsep, J.)

2. ('03) 26 All 156 (161) : 1903 All W N 221 (DB), *Rudder Singh* v. *Dhanpal Singh*.

('95) 17 All 425 (427) : 1895 All W N 82, *Lakhmi Chand* v. *Ballam Das*.

('83) 6 All 23 (24) : 1883 All W N 181 (DB), *Basant Lal* v. *Batul Bibi*. (Article 178 of Act of 1877 also applied.)

('77) 1 All 355 (358-360) (FB), *Paras Ram* v. *Gardner*.

(1900) 24 Bom 345 (349) : 1 Bom L R 846 (DB), *Narayan Govind Manik* v. *Sono Sadashiv*.

('92) 16 Bom 294 (302, 303) (DB), *Chintaman Damodar Agashe* v. *Balshastri*.

a stay or an injunction had been obtained after an application had been filed, the subsequent application filed after the removal of the bar was regarded as one for *revival* of the prior proceeding which was regarded as suspended during the injunction or stay. In some cases[3] the subsequent application was held not to fall within Art. 179 of the Act of 1877 (now Art. 182) but to fall under Art. 178 (now Art. 181) of the Limitation Act, and the right to apply was taken to arise on the removal of the bar. In the undermentioned case[4] it was held that time did not run at all during the pendency of the bar and that S. 9 would not apply.

(4) The difficulty has now been removed in the present S. 15 by inclusion in the section of applications for the execution of decrees.[5] The second paragraph is new.

2. Scope. — This section is intended to prevent the accrual of any injury to the person who is interdicted by an *injunction or order* from exercising his right of suit or of execution of the decree obtained by him.[1] It is, however, only the period during which he is actually so interdicted that will be excluded. In the same matter there may be several interrupted periods of interdiction. In such cases the party

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('80) 5 Bom 29 (35) (DB), *Kalyan Bhai Dipchand* v. *Ghanashamlal Jadu Nathji.* (Article 178 of Act of 1877 applied.)

('03) 30 Cal 407 (411) (DB), *Ashrafuddin Ahmed* v. *Bepin Behari Mullick.*

('95) 23 Cal 397 (402) (DB), *Raghunath Sahay Singh* v. *Lalji Singh.*

('06) 33 Cal 689 (692) (DB), *Gurudeo Narayan Sinha* v. *Amrit Narāyan Sinha.* (A case where injunction affected only a portion of the property proceeded against in execution.)

('05) 28 Mad 50 (53) : 14 Mad L Jour 401 (FB), *Suppa Reddiar* v. *Avudi Ammal.* (Previous application was wrongly dismissed.)

('98) 21 Mad 261 (263) : 8 Mad L Jour 18 (DB), *Sasivarna Tevar* v. *Arulanandun.*

('10) 6 Ind Cas 537 (539) : 37 Cal 796 (DB), *Madhab Moni Dasi* v. *Pamela Lambert.*

('10) 7 Ind Cas 886 (888) (DB) (Cal), *Amulya Ratan* v. *Preo Nath.*

('73) 19 Suth W R 186 (187) (DB), *Gunesh Dutt* v. *Mungree Ram.*

See also Article 182 Note 143.

[3] ('03) 26 Mad 780 (782, 783, 784) : 13 Mad L Jour 412 (DB), *Rungiah Goundar & Co.* v. *Nanjappa Rao.*

[*See* ('96) 19 All 71 (72, 73) : 1896 All W N 188 (DB), *Desraj Singh* v. *Karam Khan.*

('03) 26 All 156 (161) : 1903 All W N 221 (DB), *Rudder Singh* v. *Dhanpal Singh.*]

[4] ('03) 26 All 140 (143) : 1903 All W N 211 (DB), *Beni Prasad* v. *Sarju Prasad.*

[5] ('26) 13 AIR 1926 All 473 (474) : 94 Ind Cas 482 (DB), *Mt. Sahodra* v. *Bhagwan Das.* (4 All 60 and 4 All 155 distinguished.)

('27) 14 AIR 1927 All 16 (19) : 100 Ind Cas 692 : 49 All 276 (FB), *Chattar Singh* v. *Kamal Singh.* (Per Lindsay, J.)

('36) 23 AIR 1936 Cal 239 (241) : 63 Cal 57 : 162 I. C. 654 (DB), *Kristo Kamini Debi* v. *Girish Chandra Mondal.*

Note 2

[1] ('85) 8 Mad 229 (234) (DB), *Shunmugam* v. *Moidin.*

cannot claim to exclude the time or the periods during which there is no stay or injunction in force.[2]

3. "**Prescribed.**" — As to the applicability of this section to the twelve years' period prescribed by S. 48 of the Civil Procedure Code, see S. 29 Note 6a.

4. "**Suit.**" — See Notes to Section 2 clause (10).

5. "**Application for the execution of a decree.**" — The section applies only to applications *for* execution of a decree. An application for delivery of possession by the auction purchaser under O. 21 R. 97 of the Civil Procedure Code is not an "application for execution" within this section.[1] Also, an application for a final decree in a mortgage suit is not an application for execution and it would follow that S. 15 does not apply to such an application. It has, however, been held by the Calcutta and Patna High Courts[2] that where proceedings after a preliminary decree are stayed, the right to apply for a final decree arises under Art. 181 only when the stay is removed. According to the Bombay High Court, limitation is saved in such a case because the right to apply for a final decree is *suspended* during the continuance of the stay.[3] It is submitted that none of the above views is correct under the Limitation Act as it stands. It is a case for amending the statute.

In order that the section may apply to an application for the execution of a decree, it is not necessary that such application must have been *pending* at the date the injunction or stay order was passed.[4]

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[2] ('15) 2 AIR 1915 Mad 756 (758) : 26 Ind Cas 267 (DB), *Doraisamy Reddy* v. *Venkatachallam Pillai.* (Order of remand by High Court is not tantamount to issue of injunction.)

('07) 31 Mad 71 (73) : 18 Mad L Jour 46 (DB), *Chalavadi Kotiah* v. *Poloori Alimelammah.* (Order removing bar to execution—Appeal against the order—But no stay by appellate Court.)

Note 5

[1] ('35) 22 AIR 1935 Cal 333 (334) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra* v. *Rebateemohan Das.*

See also Article 180 Note 5 and Article 182 Note 16.

[2] ('33) 20 AIR 1933 Cal 508 (509) : 144 Ind Cas 768 (DB), *Pulin Chandra* v. *Amin Miah.* (Stay under C. P. C., O. 32 R. 10.)

('22) 9 AIR 1922 Pat 201 (203) : 66 Ind Cas 97 : 1 Pat 435 (DB), *Chhotey Narain Singh* v. *Kedar Nath Singh.*

[3] (41) 28 AIR 1941 Bom 203 (204) (DB), *Govindnaik Gurunath Naik* v. *Basawannewa Parutappa.* (Stay under O. 32 R. 10, C. P. C.)

[4] ('21) 8 AIR 1921 Mad 113 (114) : 62 Ind Cas 255 (DB), *Govindarajalu Naidu* v. *Ranga Rao.*

[But see ('01) 6 Cal W N 735 (736) (DB), *Sarup Ganjan Singh Bhuyan* v. *Robert Watson & Co., Ltd.* (Observations to the contrary are not good law though the actual decision in the case as to limitation is otherwise correct on facts.)]

As to exclusion under other Acts of certain periods in computing the period of limitation for execution applications, see the undermentioned cases.[5] See also Article 182 Note 6.

6. **"Stayed by injunction or order."** — Where the institution of a suit or the execution of a decree has been stayed by an injunction or order, the period during which such injunction or order is in force must be excluded in computing the period of limitation for such suit or application.[1]

The words "stayed by injunction or order" have reference to *orders* of Courts and not to a disability to sue or to apply arising from other circumstances such as the declaration of war.[2] Similarly, the section applies only to injunctions and orders judicially made by Court and will not apply to administrative instructions issued to Courts to keep execution cases pending against certain classes of persons until further orders.[2a] See also Notes 7 and 8 below. Further, the order of the Court must be such that it clearly operates as an injunction or a stay of execution.[3] Where there is no such order as to *prevent* the party from instituting the suit or from applying for execution, or the Court from *entertaining* the suit or *proceeding* with the application, no exclusion can be claimed under this section.[4]

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[5] ('10) 7 Ind Cas 860 (860) (DB) (Mad), *Damara Kumar Thimmanayannu* v. *Ranga Bhupala.* (Schedule 3 Para. 11, C. P. C.)

('10) 8 Ind Cas 377 (378) : 13 Oudh Cas 303, *Mohamed Abdul Karim Khan* v. *Nawaz Singh.* (Do.)

Note 6

[1] ('24) 11 AIR 1924 Cal 485 (487) : 51 Cal 150 : 81 I. C. 734 (DB), *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi.* (Injunction staying execution proceedings.)

('28) 15 AIR 1928 Pat 86 (86) : 102 Ind Cas 327 : 6 Pat 635 (DB), *Ramgulam Singh* v. *Raj Kumar Rai.* (Do.)

('21) 8 AIR 1921 Cal 606 (608) : 64 Ind Cas 594 (DB), *Govinda Nath* v. *Basiruddin Mandal.* (Execution may be stayed by injunction in proceedings other than execution proceedings or by order of executing Court.)

('19) 6 AIR 1919 Oudh 375 (376) : 52 Ind Cas 116 : 22 Oudh Cas 75 (DB), *Gulzari Lal* v. *Ram Bhajan.* (Execution stayed by order of Court.)

('16) 3 AIR 1916 Pat 39 (40) : 2 Pat L Jour 24 : 38 Ind Cas 85 (DB), *Baluk Chand* v. *Nadhuni Singh.* (Injunction restraining execution.)

[2] ('19) 6 AIR 1919 Cal 706 (708) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatesche Bank* v. *Hira Lall Burdhan & sons.* (Per Woodroffe, J.)

[2a] ('41) 28 AIR 1941 Oudh 93 (95) : 191 Ind Cas 757, *Gurdin Bhant* v. *Chhedi Bhant.* (In this case the Chief Court issued a letter to District Judges to stay all executions in civil Court decrees passed against agriculturists as defined in the Agriculturists' Relief Bill until the Bill became law—*Held* that it was only an administrative instruction to Courts.)

[3] ('21) 8 AIR 1921 Bom 33 (33) : 60 Ind Cas 916, *Visvanath Parashram* v. *Narsu Tulsidas.* (Though perhaps a *written order* may not be necessary.)

[4] ('40) 27 AIR 1940 Lah 75 (77) : 190 Ind Cas 379, *Kundo Mal* v. *Doulat Ram Vaidya Parkash Firm.* (Sale of particular house attached in execution stayed — Decree-holder cannot claim benefit of section because he is not prevented from proceeding against other properties or against the person of the judgment-debtor.)

Section 15
Note 6

Whether in any particular case there is an order which operates as an injunction or a stay of the institution of a suit or of execution must be decided upon an examination of the circumstances under which the order was passed and on a consideration of the terms and effect of the order.[4a] Thus, an order staying delivery of possession to the court auction purchaser of the property purchased by him does not amount to an injunction preventing the institution of a suit for mesne profits against the person in wrongful possession of the property.[5] The acceptance of a decree by the Court as a security for costs does not amount to an order staying the execution of such decree.[6] An order of a Court for taxation of a solicitor's costs against his client

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('39) 26 AIR 1939 Bom 1 (10, 21) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunathgouda*. (Decree declaring plaintiff in possession of lands as sole owner and ordering defendant not to deprive plaintiff of his possession or to obstruct plaintiff in taking crops and ordering defendant not to receive rents does not operate as an injunction restraining the defendant from filing a suit for possession — S. 15 does not apply.)

('38) 25 AIR 1938 Nag 534 (537) : I L R (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji* v. *Paiku*. (Attachment of property in execution of decree — Attachment raised on objection by third party—Claim suit by decree-holder does not operate as a bar to execution against other properties—Section does not apply when there is no injunction staying execution.)

('33) 20 AIR 1933 Mad 418 (424) : 143 Ind Cas 1 : 56 Mad 490 (FB), *Tripura Sundaramma* v. *Abdul Khader*. (Per Mockett, J.)

('35) 22 AIR 1935 Mad 352 (352, 353): 164 Ind Cas 896 (DB), *Kadimcherja Raju* v. *Ayyappa Raju*. (It was within power of parties to remove the stay.)

('24) 11 AIR 1924 Bom 39 (40, 41) : 76 Ind Cas 557 (DB), *Somshikharswami* v. *Shivappa Mallappa*. (Plaintiff defending suit concerning same subject-matter.)

('19) 6 AIR 1919 Oudh 85 (87) : 54 I. C. 426, *Kalka Singh* v. *Gur Saran Lal*.

[*See* ('29) 16 AIR 1929 Pat 694 (695, 696) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prasad* v. *Bhupal Ram*. (Per Das, J.—Case under S. 2, Chota Nagpur Encumbered Estates Act, 1876.)

('28) 15 AIR 1928 Pat 179 (181, 182) : 105 Ind Cas 643 : 7 Pat 109 (DB), *Khairullah Khan* v. *Lachmi Ram*. (Do.)]

[*See also* ('26) 13 AIR 1926 Pat 260 (262) : 5 Pat 404 : 94 Ind Cas 624 (DB), *Mathura Prasad Singh* v. *Jageswar Prasad Singh*. (The word 'bar' in S. 3, Chota Nagpur Encumbered Estates Act held to mean 'stay' of all proceedings.)]

4a. ('41) 1941 Pat W N 183 (186), *Jagdeo* v. *Babulal*. (Compromise decree providing that it should not be executed till a certain other suit was decided—Provision operates as an order staying execution.)

('39) 26 AIR 1939 Bom 1 (10) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurunath Gauda*. (Such an order may be express or implied.)

5. ('33) 20 AIR 1933 Lah 615 (618): 146 Ind Cas 939, *Basheshar Dass* v. *Diwan Chand*.

6. ('17) 4 AIR 1917 Pat 132 (133) : 3 Pat L Jour 132 : 44 Ind Cas 570 (DB), *Midnapore Zamindari Co.* v. *Deputy Commissioner of Manbhum*.

[*See* ('39) 26 AIR 1939 Nag 81 (82) : I L R (1940) Nag 627 : 181 Ind Cas 516 (DB), *Shankarrao* v. *Hazarimal*. (Decree-holder obtaining stay of execution in previous suit against him by offering security of decree obtained by him against person whose estate was under management of Court of Wards—Court obtaining from decree-holder undertaking not to accept payment direct from Court of Wards—Order held did not amount to stay by injunction.)]

is no bar to the institution of a suit by the solicitor against the client for his costs.[7]

See also Notes 7 to 15.

7. Stay by agreement of parties. — It has been seen in Note 6 that the words "stay by injunction or order" have reference to *orders of Courts.* It follows that the words cannot apply to a disability to sue or to apply arising from the existence of an *agreement between the parties* that the suit or execution should not be instituted or proceeded with.[1] Limitation cannot be extended by agreement of parties.[2] But where the parties consent that a stay order or injunction should be granted and the Court passes an *order* on such consent granting injunction or stay, such order will, of course, be covered by the section.[3]

8. Insolvency, whether operates as a stay or injunction. — The words "stayed by injunction or order" have, as has been seen in Note 6, reference to an *order of a Court* and not to a disability to sue or to apply arising from the other causes. It follows that even assuming that the pendency of insolvency proceedings against a person will prevent any suit or application from being filed against him, such prevention will be not by reason of the order of the Court, but *under the law.* Section 15 will not therefore apply to such cases.[1] But it may be noted here that a creditor can proceed against the insolvent notwithstanding the insolvency proceedings, provided he gets the *leave* of the Court.[2] It is only when the leave is refused that he will be

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[7] ('08) 35 Cal 171 (175) (DB), *Makham Lal Mukerjee* v. *Nalim Chandra Gupta.*

Note 7

[1] ('27) 14 AIR 1927 Mad 347 (348) : 100 Ind Cas 20, *Syamaldoss* v. *Subbayya.*
('15) 2 AIR 1915 All 231 (232) : 28 Ind Cas 381 (DB), *Ibrahimji* v. *Hasanuddin Khan.* (Decree-holder agreeing in judgment-debtor's insolvency proceedings that if insolvency was withdrawn the decree-holder would not take out arrest for two years, but no stay in execution side though insolvency withdrawn.)
('17) 4 AIR 1917 Mad 892 (894) : 35 Ind Cas 575 : 40 Mad 701 (DB), *Ramamurthi* v. *Thimmanna Gopayya.* (Agreement to refer to arbitration.)

[2] ('17) 4 AIR 1917 Pat 132 (133) : 3 Pat L Jour 132 : 44 Ind Cas 570 (DB), *Midnapur Zamindari Co.* v. *Deputy Commissioner, Manbhum.*

[3] ('26) 13 AIR 1926 All 473 (474) : 94 I. C. 482 (DB), *Mt. Sahodra* v. *Bhagwan Das.*

Note 8

[1] ('29) 16 AIR 1929 Mad 715 (718) : 121 Ind Cas 485, *Rama Pillai* v. *Kasamuthu Nadar.*
[*See* ('39) 26 AIR 1939 Lah 270 (272) : 184 Ind Cas 573, *Nawab Khan* v. *Fateh Mohammad.* (Decree passed against judgment-debtor who was subsequently declared insolvent — Subsequent disability cannot suspend time for applying for execution — S. 15 does not apply as the decree-holder could have removed the disability by applying to insolvency Court for permission.)]

[2] ('41) 28 AIR 1941 Nag 60 (61) : 191 I. C. 554, *Nandlal* v. *Ramdatta Hiralal.*
('39) 26 AIR 1939 Lah 270 (272) : 184 Ind Cas 573, *Nawab Khan* v. *Fateh Mohammad.* (Provincial Insolvency Act, S. 28.)
('24) 11 AIR 1924 All 707 (707, 708) : 82 Ind Cas 1, *Ram Bharosay* v. *Sohan Lal.* (There was no adjudication in this case.)

Section 15
Note 8

prevented from so proceeding against the insolvent. Such refusal cannot, however, be considered to be an order granting injunction or stay. A different view seems, however, to have been taken in the undermentioned cases[2a] where it has been held that where leave is refused it can be said that there is an injunction or stay order. It is submitted that this view does not appear to be correct.

The insolvency of A does not operate as a bar to a proceeding against B,[3] or even against A *personally* in the absence of a protection order.[4]

As to the exclusion under the Provincial Insolvency Act, 1920, of certain periods of the pendency of the insolvency proceedings, see S. 78 of that Act and the undermentioned cases.[5] (See also Article 182, Note 5.)

('18) 5 AIR 1918 Pat 505 (507) : 47 Ind Cas 798 (SB), *Sheo Saran Ram* v. *Basudeo Prasad Sahu.* (Presidency Towns Insolvency Act.)

('28) 15 AIR 1928 Mad 627 (628) : 51 Mad 583 : 110 Ind Cas 518 (DB), *Parameswaran Nambudri* v. *Seshan Pattar.* (*Quære.*)

('19) 6 AIR 1919 Mad 656 (657) : 42 Mad 319 : 49 Ind Cas 625 (DB), *Ramaswamy Pillai* v. *Govindasamy Naicker.* (Provincial Insolvency Act.)

('23) 10 AIR 1923 Bom 33 (34) : 67 Ind Cas 757 : 47 Bom 244 (DB), *Sidraj Bhojraj* v. *Ali Haji.* (Presidency Towns Insolvency Act.)

('20) 7 AIR 1920 Low Bur 148 (149) : 64 Ind Cas 50, *Greenburgh* v. *Xavier.* (Do.)

[*See* ('12) 14 Ind Cas 335 (338) (Lah), *Ram Das* v. *Kanshi Ram.* (Mere fact that judgment-debtor has applied to be declared insolvent does not prevent decree-holder from executing his decree.)

('33) 20 AIR 1933 Rang 75 (76) : 146 Ind Cas 124, *Bandeally Jaffer* v. *Peer Muhammad.* (Suit brought before annulment should be allowed to be withdrawn with liberty to sue after annulment.)]

[See however ('74) 1874 Pun Re No. 66, *Wasir Muhammad Khan* v. *Muhammad Imam Khan.* (Period during which an order of discharge was in force till it was set aside on appeal was held deductible—Act IX of 1871.)]

[2a] ('41) 28 AIR 1941 Nag 60 (61) : 191 I. C. 554, *Nandlal* v. *Ramdatta Hiralal.*

('23) 10 AIR 1923 Bom 33 (34) : 67 Ind Cas 757 : 47 Bom 244 (DB), *Sidhraj Bhojraj* v. *Alli Haji.*

[3] ('38) 25 AIR 1938 Pat 395 (396) : 176 Ind Cas 876, *Ram Ranbijaya Prasad* v. *Nagesar Tiwari.* (Insolvency of one judgment-debtor will not save limitation for execution against his co-judgment-debtors.)

('31) 18 AIR 1931 Lah 125 (126) : 131 Ind Cas 345, *Asa Nand* v. *Bishan Singh.*

[4] ('18) 5 AIR 1918 Pat 505 (507) : 47 Ind Cas 798 (DB), *Sheo Saran Ram* v. *Basudeo Prasad Sahu.*

[5] ('41) 28 AIR 1941 Nag 60 (61) : 191 Ind Cas 554, *Nandlal* v. *Ramdatta Hiralal.* (Section 78 (2), Provincial Insolvency Act excludes time only in case of annulment of order of adjudication and therefore it cannot be applied even by anology to a case where an absolute discharge has been granted to insolvent.)

('28) 15 AIR 1928 Mad 977 (978) : 51 Mad 862 : 114 Ind Cas 227 (DB), *Machanjeeri Ahmad* v. *Govinda Prabhu.* (Benefit of Section 78 can be claimed only after adjudication has been annulled.)

('29) 16 AIR 1929 Cal 159 (160) : 114 Ind Cas 415 (DB), *Krishna Chandra Das* v. *Jotindra Nath.*

('33) 20 AIR 1933 Lah 101 (102) : 142 Ind Cas 644, *Rali Ram* v. *Sant Ram Ganpat Rai.*

Where the insolvency Court actually passes an order amounting to an injunction or stay, the section will of course apply.[6]

9. Partial stay of execution. — The section contemplates an *absolute* stay of execution which renders the decree-holder incapable of taking out any execution of the decree.[1] A stay of execution in *one particular* mode is consequently not a stay of execution within the meaning of this section if it is open to the decree-holder to execute his decree in any other mode.[2] An injunction restraining a decree-holder from executing the decree for the principal does not necessarily debar him from realizing the interest.[3] An order staying an *execution sale* pending disposal of questions raised in the pending execution petition is not a stay of the *execution proceedings* within the meaning of this

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('33) 20 AIR 1933 Lah 953 (954) : 14 Lah 426 : 146 Ind Cas 686 (DB), *Amar Singh* v. *Imperial Bank of India, Jullundur.* ('Annulment' in Section 78, Provincial Insolvency Act held to include setting aside of adjudication order on appeal.)

('32) 19 AIR 1932 Oudh 69 (70) : 134 Ind Cas 878 : 7 Luck 397 (DB), *Nak Ched Shah* v. *Kashmiri Bank Ltd., Fyzabad.*

('31) 131 Ind Cas 252 (253) (All), *Kundan Lal* v. *Bishambarnath.*

[6] ('19) 6 AIR 1919 Lah 171 (172) : 51 Ind Cas 64, *Tara Chand-Ghansham Das* v. *Jugal Kishore.* (Under the former Insolvency Act.)

('12) 14 Ind Cas 335 (338) (Lah), *Ram Das* v. *Kanshi Ram.* (No stay order however was passed in this case—Hence section held inapplicable.)

[*See* ('40) 27 AIR 1940 Pat 149 (151) : 184 Ind Cas 701 (DB), *Nathuni Prasad* v. *Firm Radha Kishun Dutt Rai.* (Execution stayed by executing Court till disposal of insolvency case.)

('32) 19 AIR 1932 Lah 281 (288) : 13 Lah 70 : 137 Ind Cas 820 (DB), *Umrao Bibi* v. *Ram Kisen.* (Property of insolvent passing in *custodia legis* under an erroneous order of Insolvency Court — S. 15 was held to be applicable because the creditors could not have sued the insolvent during the period of insolvency.)]

Note 9

[1] ('40) 27 AIR 1940 Lah 75 (77) : 190 Ind Cas 379, *Kundo Mal* v. *Daulat Ram-Vaidya Parkash Firm.* (Only sale of particular house attached in execution stayed—Decree-holder cannot claim benefit of the section as it is open to him to proceed against person and other properties of judgment-debtor.)

('29) 16 AIR 1929 Pat 597 (600) : 120 Ind Cas 315 (DB), *Kirtyanand Singh* v. *Pirthichand Lal.* (Court refusing execution against property in hands of receiver —Decree-holder able to proceed against other properties.)

('24) 11 AIR 1924 Bom 383 (384) : 48 Bom 485 : 80 Ind Cas 239 (DB), *Chanbasappa Nagappa* v. *Holibasappa Basappa.* (Stay order under O. 21 R. 53 (1) (b).)

('89) 17 Cal 268 (271) (DB), *Raghunandan Pershad* v. *Bhugoo Lall.* (Bar only against a portion of the property being proceeded against in execution.)

[2] ('24) 11 AIR 1924 All 707 (708) : 82 Ind Cas 1, *Ram Bharosay* v. *Sohan Lal* (Arrest alone stayed under Section 55, C. P. C.)

('29) 16 AIR 1929 Pat 597 (600) : 120 Ind Cas 315 (DB), *Kirtyanand Singh* v. *Pirthichand Lal.* (Stay of execution against property in hands of receiver — Execution against person or other property not stayed.)

[*See also* ('28) 15 AIR 1928 Mad 1154 (1156) : 113 Ind Cas 260 (DB), *Tandavamurti* v. *Durgamba.* (Injunction restraining execution against only one of the properties of the judgment-debtor — *Obiter.*)]

[3] ('27) 14 AIR 1927 Mad 927 (929) : 101 Ind Cas 750 (DB), *Venkatarama Iyer* v. *South Indian Bank of Tinnevelly.* (Per Odgers, J.)

section.[4] An order for stay of execution against one judgment-debtor alone does not operate as a stay against the other judgment-debtors.[5] In *Kirtyanand Singh* v. *Pirthi Chand Lal Choudhri*,[6] A became a surety for B for the due performance of the decree obtained by X against B. Thereafter an administration suit was filed against B and a receiver was appointed therein for the administration of B's property. X made an application in that suit for leave to execute his decree against B's *properties*, but the Court passed an order that he should wait. This order was subsequently set aside on appeal. X subsequently applied for execution against the surety A under S. 145 of the Civil Procedure Code. It was held by their Lordships of the Privy Council that the order that X should wait and not proceed against B's properties was not an order staying execution of the decree against A.

It has, however, been held in some cases[7] that a stay of execution of a part of the decree or as against a particular property will nevertheless avail to save limitation for the execution of the decree as a whole. The reasoning advanced for this view is that this section does not say that the execution must have been *wholly* stayed and that it is not justifiable to read into the section more than what it actually says.[8] It is submitted that in view of the decision of the Privy Council in *Kirtyanand Singh's case*[6] and the other cases referred to already, these decisions are not good law.

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[4] ('20) 7 AIR 1920 Pat 570 (573) : 53 Ind Cas 85 (DB), *Kesho Prashad Singh* v. *Harbans Lal*. (Stay was entirely due to decree-holder.)

[5] ('40) 27 AIR 1940 Pat 149 (151) : 184 Ind Cas 701 (DB), *Nathuni Prasad* v. *Firm Radha Kishun Dutt Rai*. (Stay of execution during pendency of insolvency proceedings against one judgment-debtor will not operate as a stay of execution against others.)

('28) 15 AIR 1928 Mad 627 (630) : 51 Mad 583 : 110 Ind Cas 518 (DB), *Parameswaran Nambudri* v. *Seshan Pattar*.

('31) 18 AIR 1931 Lah 125 (125, 126) : 131 Ind Cas 345, *Asa Nand* v. *Bishan Singh*. (Only some of the judgment-debtors had applied to be declared insolvents.)

[But see ('21) 8 AIR 1921 Mad 116 (116) : 61 Ind Cas 901 (DB), *Vellayyan Chetty* v. *Muthayya Chetty*. (Dissented from in AIR 1928 Mad 627.)

[6] ('33) 20 AIR 1933 P C 52 (54, 55): 141 Ind Cas 760 : 12 Pat 195 : 60 Ind App 43 (PC).

[7] ('14) 1 AIR 1914 Bom 211 (211) : 38 Bom 153 : 21 Ind Cas 713 (DB), *Bai Ujam* v. *Bai Rukhmani*. (Stay as to part of decree—Subsequent execution seems to have been as to *that* part only—*Held* S. 15 would apply.)

('18) 5 AIR 1918 Upp Bur 4 (5) : 46 Ind Cas 399 : 3 Upp Bur Rul 73, *Nachiappa-Chetty* v. *Maung Pe*.

('21) 8 AIR 1921 Cal 606 (608): 64 Ind Cas 594 (DB), *Govinda Nath Choudhury* v. *Basiruddin Mandal*. (Period of injunction restraining execution against particular property was excluded.)

[*See also* ('06) 33 Cal 689 (692) (DB), *Gurudeo Narayan Sinha* v. *Amrit Narayan Sinha*. (Under Act of 1877 — Injunction only against portions of the property proceeded against — But in the circumstances of the case this injunction was held to have effectually prevented the decree-holder from selling the remaining portion.)

(12) 14 Ind Cas 343 (345) : 34 All 436 (DB), *Ghulam Nasiruddin* v. *Hardeo Prasad*.]

[8] ('18) 5 AIR 1918 Upp Bur 4 (5) : 46 Ind Cas 399 : 3 Upp Bur Rul 73, *Nachiappa Chetty* v. *Maung Pe*.

10. Order granting time to judgment-debtor to pay, if amounts to stay order.—A obtains a decree against B for payment of money. B applies for and obtains an order from the Court granting him time for payment of the amount. It has been held by the High Court of Patna that the order operates as a stay of execution.[1] A contrary view has been taken in the undermentioned cases[2] that such an order will not operate as a stay. It is submitted that this view is not correct. Where time is granted to the judgment-debtor, the decree-holder is clearly prevented from proceeding against the judgment-debtor. The view that the grant of time to pay up the decree amount is similar to an *adjournment* of the execution cannot be accepted as correct.

Where at the request of the parties the execution proceeding was consigned to the record room and no order granting stay or giving time was made, it was held in the undermentioned case[3] that there was no stay order.

11. Institution of collateral suit or proceeding, if will operate as stay. — Where A has obtained a decree against B, the institution of a collateral suit or proceeding by B or some other person in respect of the decree or the subject-matter thereof will not operate as a stay of execution of the decree within the meaning of this section.

Illustrations.

1. *A* obtains a decree against *C*. *B* files a suit againt *A* for a declaration that the decree is invalid. The suit is decreed in the first Court but dismissed on appeal. The period of *B's* suit cannot be excluded under this section for an application to execute the decree.[1]

2. Certain worshippers of a temple filed a suit against the *archakas* of the temple for a declaration that a lease of *hundial* collections to them by the devasthanam committee was invalid. It was held that the period of pendency of such suit cannot be excluded for the purpose of computing the period of limitation

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Note 10

1. ('29) 16 AIR 1929 Pat 36 (37) : 119 Ind Cas 890 : 7 Pat 829 (DB), *Ganga Singh* v. *Sheo Prasad*.

[*See also* ('26) 13 AIR 1926 All 473 (474) : 94 Ind Cas 482 (DB), *Mt. Sahodra* v. *Bhagwandas*. (There was a stay order as well as an order granting time.)]

2. ('18) 5 AIR 1918 All 216 (218) : 40 All 198 : 44 Ind Cas 24 (DB), *Jurawan* v. *Mahabir Dube*.

('84) 1884 Pun Re No. 77, *Kurta Ram* v. *Kaithli Mal*.

3. ('27) 14 AIR 1927 Lah 106 (106, 107) : 100 I. C. 475, *Amin Chand* v. *Khiali*.

Note 11

1. ('33) 20 AIR 1933 Mad 418 (419) : 143 Ind Cas 1 : 56 Mad 490 (FB), *Bala Tripura Sundaramma* v. *Abdul Khader*. (Dissenting from AIR 1927 Mad 997.)

('19) 6 AIR 1919 Oudh 85 (87) : 54 Ind Cas 426, *Kalka Singh* v. *Gur Saran Lal*.

for a suit by the trustee against the same *archakas* for recovery of the collections taken by them.[2]

3. *A* obtained a preliminary mortgage decree against *B*. Subsequently *C* sued *A* and *B* for a declaration that the hypotheca did not belong to *B* but to *C*; but the suit was ultimately dismissed. It was held that the period of the pendency of the suit could not be excluded in computing the period of limitation prescribed for an application by *A* against *B* for passing a final decree.[3] (*Note.*—The decision assumes that S. 15 might apply to an application for a final decree. This is not correct. See Note 5.)

4. *A* obtains a decree against *B*. *B* subsequently files a suit against *A* to set aside the decree on the ground of fraud. *A* cannot exclude the period of pendency of the suit in computing the period of limitation for an application for execution of the decree.[4]

See also the undermentioned cases.[5]

12. Attachment, if amounts to an injunction or a stay order. — An attachment of a book-debt or of a bond does not prevent a *suit* from being filed for the recovery thereof and does not operate as an injunction or a stay.[1] An attachment of a *decree* under O. 21,

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[2] ('25) 12 AIR 1925 Mad 1188 (1189, 1190) : 89 Ind Cas 938 (DB), *Sethu Rao* v. *Seethalakshmi Ammal.*

[3] ('25) 12 AIR 1925 Mad 334 (335) : 85 Ind Cas 272 (DB), *Ammathayi Ammal* v. *Sivarama Pillai.*

[4] ('16) 3 AIR 1916 Pat 367 (367, 368) : 35 Ind Cas 579 (DB), *Mahadeo Prasad Sahu* v. *Ram Chandra Narain Singh.*

('24) 11 AIR 1924 Bom 39 (40) : 76 Ind Cas 557 (DB), *Somshikharswami* v. *Shivappa Mallappa.*

[5] ('39) 26 AIR 1939 All 82 (84, 86) : ILR (1939) All 207 : 180 Ind Cas 927 (DB), *Lakhmi Chand* v. *Bibi Kalsumannisa.* (The section does not contemplate the case of one decree being rendered impossible of execution by a subsequent decree inconsistent therewith passed in another suit — Decree for possession in favour of *A*—Subsequent decree in favour of *B* declaring him to be owner and restraining *A* from taking possession—Latter decree set aside in appeal—Period during which such decree was in force cannot be excluded in computing limitation for execution of the decree in *A's* favour.)

('39) 26 AIR 1939 Bom 1 (10, 21) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji* v. *Gurnathgouda.* (*A* obtaining decree against *B* declaring *A* to be in possession of lands as sole owner and ordering *B* not to deprive *A* of his possession or to obstruct *A* in taking crops and ordering him not to receive rents from tenants — Decree set aside in Privy Council appeal — The period during which the decree was in force cannot be deducted in computing limitation for suit for possession by *B* against *A*.)

('38) 25 AIR 1938 Nag 534 (537) : ILR (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji* v. *Paiku.* (Attachment in execution raised on objection by third party — Period of claim suit by decree-holder cannot be deducted as it will not operate as bar to execution.)

('24) 11 AIR 1924 Cal 1059 (1061) : 84 Ind Cas 425 (DB), *Bijoy Chand Mohatab* v. *Khoka Sinha.* (Pendency of another suit does not operate as a stay order or injunction.)

Note 12

[1] ('95) 17 All 198 (210, 211) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.* (Attachment before judgment—14 All 162 affirmed.)

('90) 13 All 76 (78) : 1890 All W N 194 (DB), *Shib Singh* v. *Sita Ram.* (Order of attachment under O. 21 R. 46.)

R. 53 of the Civil Procedure Code does not prohibit the *execution* of the decree by the decree-holder[2] and therefore does not operate as an injunction or a stay order.[3] Where A obtained a decree against B in Court X and B obtained a decree against A in Court Y and in execution thereof got A's decree against himself attached under O. 21 R. 53 of the Code, it was, however, held in the undermentioned case[4] that such attachment operated as a stay of execution of A's decree against B. It is submitted that this view is not correct. The attachment, which is under O. 21 R. 53, sub-r. (1) (b), would be to merely request the Court X to stay execution of A's decree unless and until *the holder of the decree sought to be executed or his judgment-debtor* (in this case A) *applies* to Court X to execute its own decree. In other words, A can apply for execution at any time, and consequently there cannot be any stay of execution within the meaning of this section.

('19) 6 AIR 1919 Mad 317 (318) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasami Chetty* v. *Thangavelu Chetty*. (8 Mad 229 dissented from.)

('18) 5 AIR 1918 Cal 631 (632) : 40 Ind Cas 816 (DB), *Munsur Ali* v. *Abhoya Charan Das*. (Attachment before judgment.)

[But see (1862) 1 Mad H C R 150 (151) (DB), *Kadarbacha Sahib* v. *Rangasami Nayak*. (While the bond was attached and placed under power and control of a Court, no one could deal with it except by the direction and orders of the Court. Such attachment was held to be good and sufficient cause under Madras Regn. II of 1802, Section 18 clause 4 as to save the bond from limitation.)

('85) 8 Mad 229 (234) (DB), *Shunmugam* v. *Moidin*. (This is not good law after the Privy Council decision in 17 All 198 (PC).)]

2. See Forms 22 and 23 of Appendix E to the Code of Civil Procedure.

[*See also* ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy* v. *Bhavani Sankaran*.

('24) 11 AIR 1924 Bom 383 (384) : 48 Bom 485 : 80 Ind Cas 239 (DB), *Chanbasappa Nagappa* v. *Holibasappa*. (It can be executed by attaching decree-holder or by decree-holder in attached decree.)

('34) 21 AIR 1934 Lah 142 (143) : 150 Ind Cas 174, *Mahesh Dass Chanan Das* v. *Mehnga Ram*. (Do.)

('12) 13 Ind Cas 179 (179) (DB) (Mad), *Gopala Menon* v. *Manavikraman*. (Under C. P. C., 1882.)

('34) 21 AIR 1934 Cal 140 (141) : 149 Ind Cas 1130 (DB), *Saroj Ranjan Sinha* v. *Joy Durga Dassi*. (Attachment of decree by judgment-debtor.)]

[See however ('11) 9 Ind Cas 786 (787) : 35 Mad 622 (DB), *Thuchakovil Unni Koya* v. *Arapayil Pathutti*. (Attachment under the old Code under which the attached decree-holder was prevented from executing his decree.)

('69) 3 Beng L R App 52 (53) (DB), *Chandi Prasad* v. *Raghunath Dhar*. (Attachment under the Code of 1859 under which the decree-holder was prohibited from executing his decree.)]

3. ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy* v. *Bhavani Sankaran*.

('24) 11 AIR 1924 Bom 383 (384) : 48 Bom 485 : 80 Ind Cas 239 (DB), *Chanbasappa Nagappa* v. *Holibasappa*.

('74) 11 Bom H C R 206 (212, 213) (DB), *Mir Ajmuddin* v. *Mathuradas Govardhandas*. (In computing limitation for execution of a decree the period during which it was under attachment cannot be excluded.)

4. ('16) 3 AIR 1916 Cal 620 (621) : 30 Ind Cas 587 (DB), *Kiranshashi Debi* v. *Chandrika Prosad Singh*.

Where an order of attachment actually prohibits execution by *anybody*[5] or is accompanied by a stay order,[6] then S. 15 will apply.

13. Order allowing execution only on condition.—Where the Court made an order that the decree would be allowed to be executed only if the decree-holder furnished security for half a lakh of rupees and it was found that it was impossible for the decree-holder to furnish such security, it was held that the order effectually operated as a stay of execution within the meaning of this section.[1] In the undermentioned case[2] the decree-holder applied for execution by transfer to another Court, but the Court ordered him to produce the judgment in a certain suit before a certain date before the decree could be transferred. The judgment in that suit was passed at a much later date and so the copy was not produced on the date fixed and the petition was dismissed. In calculating the limitation for a subsequent application for execution it was held that the time during which the suit, the judgment in which was required to be produced, continued, should be excluded. Where a final decree in a mortgage suit was set aside in appeal against some of the defendants and the case was ordered to be re-tried, and the Court struck off the execution application against the other defendants until the case remanded finally settled the liability of former defendants, it was held that the order operated as a stay of execution.[3]

14. Adjournment of case is not stay. — The adjournment of an application for execution for hearing cannot operate as a stay of execution or as an injunction.[1]

15. Appeal does not operate as a stay. — The preferring of an appeal cannot be said to be an order of a Court granting an injunction or stay. Order 41 Rule 5 of the Civil Procedure Code in fact provides that an appeal shall not operate as a stay of proceedings under the decree or order appealed from except so far as the appellate Court may order.

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[5] ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy* v. *Bhavani Sankaran.* (Such order amounts to an injunction.)

[6] ('23) 10 AIR 1923 Cal 310 (311) : 68 Ind Cas 897 (DB), *Charu Chandra Mazumdar* v. *Fanindra Narain Choudhury.*

Note 13

[1] ('20) 7 AIR 1920 Pat 354 (356) : 53 Ind Cas 9 (DB), *Satdeo Narain* v. *Radhey Kuar.* (19 Suth W R 186 followed.)

[*See also* ('73) 19 Suth W R 186 (187) (DB), *Gunesh Dutt* v. *Mungree Ram.* (High Court ordering suspension of execution pending appeal to Privy Council until the decree-holder furnished security — *Held* that time was suspended until the decision of the Privy Council — Case under the Act of 1871.)]

[2] ('21) 8 AIR 1921 All 174 (175) : 64 I. C. 598 (DB), *Baldeo Singh* v. *Ram Sarup.*

[3] ('18) 5 AIR 1918 Cal 143 (143) : 47 Ind Cas 907 (DB), *Satish Mohini Debya* v. *Pabna Bank Ltd.*

Note 14

[1] ('17) 4 AIR 1917 Cal 444 (445) : 36 Ind Cas 939 (DB), *Thakamoyi Dasi* v. *Nadir Chand.*

('21) 8 AIR 1921 Bom 33 (33) : 60 Ind Cas 916, *Viswanath Parsharam* v. *Narsu Tulsidas.*

16. **" The day on which it was issued or made, and the day on which it was withdrawn."** — Where stay was ordered on condition of security being furnished by the party seeking the stay and the security was tendered, accepted and given finally only on a later date, the stay must be deemed to commence on the date of the order itself. The fact that the condition (about security) was fulfilled only subsequently cannot alter the position.[1]

17. **Duration of stay in case of an appeal.** — When a stay or an injunction in respect of execution has been granted by a Court in a suit or proceeding and the suit or proceeding is dismissed, does the stay or injunction terminate on such dismissal or does it continue during the pendency of the appeal preferred in such suit ? The answer is that the stay or injunction terminates with the dismissal of the suit or proceeding as the trial Court has no power to grant an interim injunction or stay so as to last after the dismissal of the suit or proceeding by the same Court.[1] Where the injunction or stay is granted "until the decision of the suit," the 'decision' contemplated is not the final decision in the litigation by a final Court of appeal

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Note 16

[1] ('27) 14 AIR 1927 Mad 391 (393) : 99 I. C. 632, *Thayyamuthu* v. *Odayappan.*

Note 17

[1] ('21) 8 AIR 1921 All 99 (101) : 43 All 383 : 61 Ind Cas 417 (DB), *Madho Prasad* v. *Draupadi Bibi.* (Per Piggot J.)

('24) 11 AIR 1924 Mad 178 (179) : 76 Ind Cas 126 (DB), *Ayissaumma* v. *P. K. Abdulla.* (31 Mad 71 relied on.)

('16) 3 AIR 1916 Pat 89 (90) : 42 Ind Cas 811 (DB), *Mahesh Ram Tewari* v. *Mt. Lachhan Kuer.* (Stay of execution of decree pending disposal of an application to set aside an *ex parte* decree—The application being dismissed, applicant applying for review—Stay does not continue during review.)

('20) 7 AIR 1920 All 174 (175) : 42 All 564 : 56 Ind Cas 1006, *Balwant Singh* v. *Budh Singh.*

('70) 14 Suth W R 384 (384) (DB), *Shaikh Moheeoodeen* v. *Shaikh Ahmad Hussein.* (It cannot be maintained pending appeal.)

[*See* ('03) 26 All 140 (144) : 1903 All W N 211 (DB), *Beni Prasad* v. *Sarju Prasad.* (Injunction pending decision in suit is not effectual up to final decree.)

('26) 13 AIR 1926 Pat 62 (63) : 89 Ind Cas 992 (DB), *Hajo Bibi* v. *Har Sahay Lal.* (Injunction granted pending appeal—It does not continue till dismissal of Letters Patent Appeal.)

('87) 1887 All W N 297 (297) (DB), *Chunni Kuar* v. *Dwarka Prasad.* (Injunction granted in cross suit.)]

[*See also* ('98) 21 Mad 257 (260, 261) : 8 Mad L Jour 25 (DB), *Suryanarayana Pandarathar* v. *Gurunada Pillai.* (But there can be no revival of a petition which had been properly dismissed—In first execution petition decree-holder was relegated to a regular suit to establish his right and the execution petition was dismissed. But the decree-holder, without filing the suit again, put in an execution petition which was rightly dismissed. A further execution petition was held not to be a revival of the prior one.)]

or revision.[2] It was so held even in a case where injunction was granted "pending *final* decision of the suit."[3] In a case coming under O. 21 R. 29 of the Code of Civil Procedure under which execution may be stayed pending a cross suit by the judgment-debtor against the decree-holder, the Calcutta High Court[3a] held that the words "until the pending suit has been decided" mean until the claim in the suit has *finally* been decided. This view, in the circumstances of the case, is not in conflict with the foregoing principle.

The first Court granted an injunction, but the suit itself was dismissed in the first appeal for misjoinder. On the second appeal the decision of the first appellate Court was reversed and the case was remanded for disposal on merits. It was held that the order of remand by the High Court was not tantamount to the issue of an injunction.[4] But where in consequence of a remand the decree of the first Court itself is restored, it is not unreasonable to hold that the stay or injunction revives, if the form of the first Court's decree operates as a stay of execution.[5]

18. "Revival" of execution application and Section 15. — This section deals only with the computation of the period of limitation for an application for *execution*. It does not affect the law with regard to an application to *revive* an application for execution already made but suspended by an interruption and deemed to be pending final disposal by the Court. The section has not the effect of making such a revival application a fresh application for execution. It has not got the effect of destroying the equitable theory of revival of pending application uniformly recognized by Courts.[1] A decree-holder applied for execution of his decree on 4th January 1916 and while the execution was pending, a suit was brought to declare that the property proceeded against in execution was not liable to be sold and the execution was stayed by injunction. The suit was finally disposed of on the 6th of July 1920 and the injunction was dissolved. The execution application was then "struck off" without notice to parties. On the 10th January 1923, the decree-holder again applied for execution and contended that his application was only to revive the prior execution application which was not finally decided in being so "struck off." It was contended that S. 15 of the Limitation Act had the effect of making every application in execution an application *for* execution and that the period of stay by injunction should alone be excluded and that the last application should be held to be time-barred. The Allahabad High Court in a Full Bench[2] decided that it was a case of a revival of a pending application and that S. 15, Limitation Act, did not affect the right to apply for revival. It is a well-recognized principle of law that where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended.[3] But where a break in the continuity arose

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[2] ('03) 26 All 140 (144) : 1903 All W N 211 (DB), *Beni Prasad* v. *Sarju Prasad*.
('26) 13 AIR 1926 All 409 (410) : 94 Ind Cas 1005 (DB), *Sat Narain Lal* v. *Ganga Jal*. (Reversing decision of Walsh J. in AIR 1925 All 572.)
[See however ('86) 1886 Bom P J 156 (DB), *Gopal* v. *Sita Ram*.]

[3] ('21) 8 AIR 1921 All 99 (101) : 61 Ind Cas 417 : 43 All 383 (DB), *Madho Prasad* v. *Draupadi Bibi*. (Walsh, J. doubting.)

[3a] ('28) 15 AIR 1928 Cal 222 (224) : 107 Ind Cas 79 : 55 Cal 512 (DB), *Mahesh Chandra* v. *Jogendra Lal Sarkar*. (The pending suit was decided in favour of the plaintiff-judgment-debtor in trial Court and also in appeal.)

[4] ('15) 2 AIR 1915 Mad 756 (758) : 26 Ind Cas 267 (DB), *Doraisami Reddi* v. *Venkatachallam Pillai*. (14 Ind Cas 343 distinguished.)

[5] ('03) 26 All 140 (143) : 1903 All W N 211 (DB), *Beni Prasad* v. *Sarju Prasad*.
[*See* ('03) 26 All 156 (160) : 1903 All W N 221 (DB), *Ruddar Singh* v. *Dhanpal Singh*. (Suit to set aside decree on ground of fraud — *Interim* stay of execution till disposal of suit granted — Suit itself decreed — During pendency of appeal from the decree, the decree itself held to operate as stay though interim stay as such came to an end with the passing of the decree.)]

Note 18

[1] ('27) 14 AIR 1927 All 16 (19, 20, 22) : 100 Ind Cas 692 : 49 All 276 (FB), *Chhattar Singh* v. *Kamal Singh*. (Right of revival is different and distinct from permitting exclusion of time.)
('36) 23 AIR 1936 Cal 239 (242) : 63 Cal 57 : 162 Ind Cas 654 (DB), *Kristo Kamini Debi* v. *Girish Chandra Mondal*. (Such application is not a fresh application for execution.)

[See however ('25) 12 AIR 1925 Pat 298 (299) : 78 Ind Cas 478 (DB), *Lal Pasi* **v.** ***Ramsaran Lal.*** **(Such application is governed by Art. 181.)]**

[2] **('27) 14 AIR 1927 All 16 (20, 22) : 49 All 276 : 100 Ind Cas 692 (FB),** *Chhattar Singh* **v.** *Kamal Singh.*

[3] **('05) 27 All 334 (338) : 32 Ind App 102 : 1 Cal L Jour 381 : 2 All L Jour 397 : 7 Bom L R 433 : 9 Cal W N 601 : 15 Mad L Jour 258 : 8 Sar 810 (PC),** *Qamar-ud-din Ahmad* **v.** *Jawahir Lal.*

('21) 8 AIR 1921 All 99 (100) : 43 All 383 : 61 Ind Cas 417 (DB), *Madho Prasad* **v.** *Draupadi Bibi.* **(A revival application is governed by Article 181.)**

('23) 10 AIR 1923 All 600 (601) : 77 Ind Cas 871 (DB), *Mahamad Hadi* **v.** *Debi Prasad.* **(Execution proceedings suspended at the instance of stranger.)**

('26) 13 AIR 1926 Mad 698 (699) : 95 Ind Cas 718, *Lalumia* **v.** *Mazur Hannisa.* **(There was no order of suspension.)**

('21) 8 AIR 1921 Cal 472 (473) : 68 Ind Cas 207 (DB), *Ajodhya Nath Pahary* **v.** *Srinath Chandra Pahary.* **(Execution suspended by pendency of proceedings under O. 21 R. 2, C. P. C., for recording satisfaction.)**

('21) 8 AIR 1921 Cal 594 (595) : 64 Ind Cas 849 (DB), *Jira Bibi* **v.** *Majiruddin.* **(Sale held in execution of decree set aside—Second application is one for revival.)**

('14) 1 AIR 1914 Cal 269 (270) : 20 Ind Cas 244 (DB), *Tilakdhari Lal* **v.** *Bikram Singh.* **(An intermediate application in execution for another relief does not matter.)**

('35) 22 AIR 1935 Lah 911 (912) : 157 Ind Cas 679 (DB), *Hira Lall* **v.** *Punjab National Bank.* **(As successful claim proceedings were pending, it was held that subsequent execution petition was a continuation though prior execution petition had been dismissed for default—2 Ind Cas 76 followed.)**

('37) 24 AIR 1937 Oudh 158 (159) : 165 Ind Cas 798 : 12 Luck 743 (DB), *Narain Bakhsh Singh* **v.** *Shiva Bhikh.* **(Execution suspended by order of Insolvency Court.)**

('80) 5 Bom 29 (34, 35) : 1880 Bom P J 232, *Kalyanbhai Dipchandbhai* **v.** *Ghanshamlal Jadunathji.* **(Injunction against execution—Act of 1877.)**

('78) 4 Cal 415 (416, 417) : 3 Cal L R 46 (DB), *Issurree Dassee* **v.** *Abdool Khalak.* **(23 Suth W R 183 followed.)**

('08) 31 Mad 71 (76) : 18 Mad L Jour 46 : 3 Mad L Tim 329 (DB), *Chalavadi Kotiah* **v.** *Paloori Alamelammal.* **(Provided no new relief is claimed.)**

by reason of the decree-holder's omission or default, the subsequent application cannot be regarded as a continuation of the previous one.[4] On the question whether the application for revival should be within three years of the removal of stay, there is a difference of opinion among the High Courts, some holding that there is no limitation at all for such an application and others holding that it is governed by Art. 181 of the Act. See Article 182 Note 143.

19. Notice of "suit" — Sub-section (2). — The provision in sub-s. (2) will apply only where the enactment requires that notice should be given of the suit before such a suit is commenced.[1] It has

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('26) 13 AIR 1926 Pat 129 (130) : 89 Ind Cas 886 (DB), *Ibrahim Hussain Khan* v. *Shoeo Pratap Narain.* (The scope of both the applications must be the same — 2 P L T 22 followed.)

('13) 20 Ind Cas 439 (441) (DB) (Cal), *Lal Gobind Nath* v. *Bhikar Sahu.*

('01) 1901 All W N 117 (117), *Farzand Ali* v. *Bhup Indar Bahadur Singh.* (Decree was under attachment for more than three years.)

[*See* ('98) 1898 All W N 137 (138) (DB), *Anwarali Khan* v. *Phul Chand.*

('18) 5 AIR 1918 Mad 1010 (1011) : 38 Ind Cas 300 (DB), *Satyanarayana* v. *Narayanaswamy Naidu.*]

[*See also* ('11) 11 Ind Cas 972 (973, 974) (DB) (Cal), *Sheikh Mahomed* v. *William Alfred Thomas.*

(1865) 3 Suth W R Act X Rul 5 (6) (DB), *Md. Kalee Shikdar* v. *Sheikh Ali Hossein.* (Revival of suit wrongly struck off owing to pendency of connected suit.)

('79) 4 Cal 877 (880) : 3 Cal L R 161 : 4 Ind Jur 236 (DB), *Hurronath Bhunjo* v. *Chunni Lal Ghose.* (Whether the previous application was finally disposed of or not is a question of fact depending on circumstances.)]

See also Article 182 Note 143.

4. (1900) 5 Cal W N 347 (348, 349) (DB), *Dhukiram Srimani* v. *Jogendra Chunder Sen.*

See also Article 182 Note 143.

Note 19

1. ('39) 26 AIR 1939 All 277 (278) : I L R (1939) All 392 : 181 Ind Cas 948, *Shri Bhagwan* v. *Secretary of State.* (Notice to Secretary of State as required by S. 80 of the Civil Procodure Code.)

('32) 19 AIR 1932 Bom 259 (261) : 137 Ind Cas 545 : 56 Bom 135 (DB), *Chhagan Lal Sakerlal* v. *Municipality of Thana.* (Notice under Bombay District Municipalities Act.)

('14) 1 AIR 1914 Cal 396 (436): 40 Cal 898: 23 I. C. 25 (SB), *Weston* v. *Peary Mohan.*

('17) 4 AIR 1917 Lah 212 (212, 213) : 1917 Pun Re No. 52 : 38 Ind Cas 600 (DB), *North Western Rly.* v. *Ram Dhan Mal Shib Lal.* (Notice under S. 80, C. P. C.)

('19) 6 AIR 1919 Oudh 26 (27) : 22 Oudh Cas 342 : 54 Ind Cas 535, *Ladly Prasad* v. *Nizam-ud-din Khan.* (The Secretary of State not a necessary party to the suit at all—Period of notice cannot be excluded.)

('22) 9 AIR 1922 Pat 549 (550) : 70 Ind Cas 109, *B. & N. W. Ry. Company* v. *Ram Sarup Lal Chowdhury.* (Notice under S. 77, Railways Act to Secretary of State.)

('33) 20 AIR 1933 Sind 240 (244) : 148 Ind Cas 178, *Asandas Hashmatrai* v. *Khan Chand.* (Suit against a police head constable for alleged illegal search.)

('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613 (613), *Oudh Behari Lal* v. *Collector of Etah.* (Notice to Court of Wards.)

('25) 12 AIR 1925 Mad 1134 (1139) : 48 Mad 586 : 91 Ind Cas 82 (DB), *E. C. Kelu Nair* v. *Secretary of State.* (A I R 1916 Mad 1093 followed.)

[*See* ('23) 10 AIR 1923 Mad 665 (665) : 74 Ind Cas 281 (DB), *Secretary of State* v. *Nagaraja Iyer.* (Notice under S. 80, C. P. C.)

no application where such notice is not notice of suit but is only intended as an information of the claim to the defendant[2] or a notice determining a tenancy.[3]

The plaintiff is entitled to a deduction of the period of notice if *at the time* of giving it, it was required to be given by law though subsequently such notice may have become unnecessary.[4]

20. Notice required in case of only one or some only of the defendants. — Suppose in a suit against several defendants, notice is required to be given by law only in respect of one or some of them; is the period of notice to be excluded as against the others also? The Allahabad High Court[1] has held that if it is *necessary* or *even permissible* for a plaintiff to bring a suit claiming relief against all the defendants *jointly*, the period of notice should be excluded for the whole suit and not merely so far as the defendant to whom notice was given is concerned. Any other view will make the provisions of S. 15 nugatory in cases in which it is necessary to implead in one suit private individuals and a public officer against whom there is but one cause of action. All that the section requires is that a notice should have been given under law and if this condition exists, it declares without any qualification or reservation that the period of notice shall be excluded. The Bombay High Court is also of the same opinion.[2]

('30) 17 AIR 1930 Nag 179 (179, 180) : 26 Nag L R 81 : 123 Ind Cas 903 (DB), *K. L. Niyogi & Co.* v. *District Council, Buldana.* (Suit against District Council.)]

[*See also* ('14) 1 AIR 1914 Sind 125 (128) : 8 Sind L R 294 : 29 Ind Cas 597, *Municipality of Tata* v. *Asanmal Chandoomal.* (Notice under Bombay District Municipalities Act.)]

[2] ('38) 25 AIR 1938 Mad 612 (613) : 178 Ind Cas 880 (DB), *Sevugan Chettiar* v. *Raghunatha Doraisingam.* (Section 49 of the Madras Court of Wards Act (I of 1902) does not require notice of suit with regard to property of an institution of which a ward is only a trustee.)

('31) 18 AIR 1931 All 752 (754) : 133 Ind Cas 537 (DB), *Baroda Kant Sen* v. *Court of Wards in charge of Baraon Estate, Allahabad.* (Notice to the Collector under S. 17 of the United Provinces Court of Wards Act is not a notice covered by this section.)

[3] ('37) 24 AIR 1937 Cal 656 (657) : I L R (1937) 1 Cal 499 : 174 Ind Cas 31, *Krishna Kanta Ghosh* v. *Rajeshwar Ghosh.* (Ejectment suit under S. 48 (c), Bengal Tenancy Act.)

[4] ('24) 11 AIR 1924 Bom 364 (365) : 81 Ind Cas 750 (DB), *Khanderao* v. *Chanmallappa.* (Notice under Bombay Court of Wards Act—Ward ceasing to be such before suit came on for hearing.)

Note 20

[1] ('30) 17 AIR 1930 All 742 (745) : 53 All 44 : 132 Ind Cas 17 (DB), *Mahomed Sharif* v. *Nasir Ali.* (Suit against a Police Inspector and other private individuals for damages for malicious prosecution on the ground that all the defendants conspired to bring a false charge against the plaintiff.)

[2] ('24) 11 AIR 1924 Bom 364 (365) : 81 I. C. 750, *Khanderao* v. *Chanmallappa.* (Notice under Bombay Courts of Wards Act being required only in respect of some of the defendants.)

Section 15
Notes 20–22

The Calcutta High Court has however held to the contrary.[3] But it was a case where the Court came to the conclusion that even as against the Secretary of State for India the period of notice could not be deducted on the basis of S. 29 of the Limitation Act as it stood before the amendment which made it applicable to local and special laws. The High Courts of Lahore[4] and Patna[5] and the Judicial Commissioner's Court of Sind[6] are also of the same view as that of the High Courts of Allahabad and Bombay.

But, in any case, the plaintiff is not entitled to claim deduction of time as against private individuals by impleading the Secretary of State or a public officer *unnecessarily* and giving him notice, though he might have done so under a mistake of law or fact.[7]

21. Adverse possession (Section 28) and extension of limitation under sub-section (2). — Where a suit for possession is instituted after twelve years of the cause of action but is within time by reason of the exclusion of the period of notice required to be given before suit, the defendant cannot claim that his title by adverse possession is perfected by the suit not having been instituted within twelve years of the cause of action. The reason is that the defendant can get a title only on the expiration of the *period limited by the Act* for instituting such suit, and such period will be twelve years *excluding* the period of notice.[1]

22. Sub-section (2) : "Enactment for the time being in force."—These words require that the enactment referred to must be in force in the *place* in which the suit is brought. Section 54 of the

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3. ('19) 6 AIR 1919 Cal 949 (950) : 47 Ind Cas 524 (DB), *Gangadhar Nanda* v. *Janakimoni Dasi*. (*Held* this section does not apply to suit under S. 104H, Bengal Tenancy Act.)

4. ('28) 15 AIR 1928 Lah 349 (350) : 9 Lah 519 : 111 Ind Cas 749 (DB), *E. I. Ry. Co.* v. *Rahimullah Ilahi Bakhsh*. (Provided all the defendants are properly impleaded in the plaint, it does not affect the application of this section that any or some of the defendants are found on trial not to be liable.)

5. ('22) 9 AIR 1922 Pat 549 (550) : 70 Ind Cas 109 (DB), *B. & N. W. Ry. Co.* v. *Ramsuruplal Chowdhury*. (Suit against several Railways—Notice to Secretary of State necessary only with respect to one of the Railways.)

6. ('37) 24 AIR 1937 Sind 281 (284) : 32 Sind L R 106 : 172 Ind Cas 622 (DB), *Udharam Vassanmal* v. *Grahams Trading Co. Ltd.* (Joint tort-feasors — One requiring notice under S. 80, C. P. C.)

7. ('19) 6 AIR 1919 Oudh 26 (27) : 55 Ind Cas 535 : 22 Oudh Cas 342, *Ladli Prasad* v. *Naizamuddin Khan*.
[*See* ('38) 25 AIR 1938 Mad 612 (613) : 178 Ind Cas 880 (DB), *Sevugan Chettiar* v. *Raghunatha Doraisingam*. (Suit concerning title, between plaint charity and temple represented by a ward who was trustee of the temple — Though ward is represented by the Estate Collector S. 80, C. P. C. does not apply as the subject-matter of the suit does not relate to any act done by the Collector or the Public Officer in his official capacity — Period of notice cannot be deducted.)]

Note 21

1. ('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613, *Oudh Behari Lal* v. *Collector of Etah*.

United Provinces Court of Wards Act requires two months' notice to be given before a suit is instituted against a ward represented by the Collector. In a suit instituted against the ward outside the United Provinces, viz., at Delhi, it was held by the Lahore High Court[1] that the fact that the defendant was a ward under the United Provinces Court of Wards Act would not make S. 15, sub-s. (2) of the Limitation Act applicable to the suit, as the United Provinces Court of Wards Act which required two months' notice to be given would not apply to suits instituted outside the Province to which alone the enactment applied though the suit was against that ward.

23. **Section 15 sub-section (2) and Sections 6 and 8.** — See Note 41 to Section 6.

24. **Section 15 and res judicata.** — A decision between the same parties in a prior execution application as to the applicability of this section is binding on them and the same question of limitation cannot be agitated in a subsequent application.[1]

16.* In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Exclusion of time during which proceedings to set aside execution-sale are pending.

Synopsis

1. Scope of the section.
2. "Suit."
3. "Proceeding."

Other Topics (miscellaneous)

Symbolical possession obtained — Suit for actual possession — Section not applicable. See Note 1.

Prosecuting claim based on sale—Time not to be excluded. See Note 3.

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* **Act of 1877 : S. 16; Act of 1871 : S. 17.**

Same as above, except for the following changes, viz., for the words "a proceeding to set aside the sale has been prosecuted" there was "the judgment-debtor has been prosecuting a suit to set aside the sale" in the Act of 1871 and "the judgment-debtor . . . . *proceeding* to set aside the sale" in the Act of 1877.

Act of 1859.
No corresponding provision.

Note 22

[1] ('37) 24 AIR 1937 Lah 41 (48,49) : 164 Ind Cas 1090 : ILR (1937) Lah 11 (DB), *Hargulal Mal* v. *Muhammad Ata Elahi Khan.* (Per Coldstream and Monroe, JJ.; Jai Lal J., *contra.*)

Note 24

[1] ('32) 19 AIR 1932 Oudh 246 (246, 247) : 137 I. C. 603 (DB), *Mahomed Amir Mirza Beg* v. *Gauri Nath.*

Section 16
Notes 1–3

1. Scope of the section. — Articles 137 and 138 prescribe the period of limitation for suits for possession by purchasers at sales in execution of decrees. This section enacts that in computing the period of limitation so prescribed, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

In order that this section may apply, the suit must be for possession by a *purchaser at a sale in execution of a decree.* In other words, the cause of action for the suit must be the *purchase.* A person who has purchased at a sale in execution of a decree and has obtained symbolical possession, and sues for *actual* possession, cannot be said to be suing as a *purchaser at a sale in execution of a decree* within the meaning of this section. The cause of action for the suit in such a case is not the *purchase* but the *adverse possession* of the defendant from the date of the delivery of symbolical possession; Article 144 and not Article 137 or Article 138 governs such cases.[1]

2. "Suit." — This section applies, in terms, only to *suits* for possession by a purchaser at a sale in execution of a decree. The word "suit" in this Act does not include an "application." (See section 2, clause 10.)

An *application* for possession under Order 21 Rules 95 and 96 of the Civil Procedure Code will, therefore, not fall within the purview of this section. (See Art. 180 Note 4.)

3. "Proceeding." — Under the Limitation Act of 1871, the period during which the judgment-debtor had been prosecuting a *suit* to set aside a sale was excluded. The word "proceeding" was substituted for the word "suit" in the Act of 1877. The intention of the Legislature is evidently to allow exclusion of time during which the validity of the sale is in controversy, whether the sale is impeached by a *suit* or by an *application* to set aside the sale.[1] Thus, where the judgment-debtor filed an application to set aside the sale and, on the application being dismissed, filed a suit to set aside the decree and the sale, and the suit was finally dismissed by the Privy Council, the entire time taken in respect of such proceedings, i. e., the period during which the legality of the sale was in question, was excluded under this section in a suit for possession by the auction purchaser.[2]

The word "proceeding" refers only to a proceeding to *set aside the sale* and the period during which the auction purchaser has been

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Section 16 — Note 1

[1] ('21) 8 AIR 1921 Cal 385 (387) : 70 Ind Cas 420 (DB), *Brojendra Kumar Roy Choudhri* v. *Ashutosh Roy.*

Note 3

[1] ('17) 4 AIR 1917 Cal 802 (803, 805) : 38 Ind Cas 547 (DB), *Promotha Nath Roy* v. *Kishore Lal.* (Word 'proceeding' is comprehensive to include suit as well as application.)

[2] ('17) 4 AIR 1917 Cal 802 (803,804) : 38 Ind Cas 547 (DB), *Promotha Nath Roy* v. *Kishore Lal.*

unsuccessfully prosecuting *a claim* based on the sale cannot be excluded in a suit by him for possession.[3]

Effect of death before right to sue accrues.

17.* *(1)* Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections *(1)* and *(2)* applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Relative scope of sections 6 and 17. See Note 3 to S. 6.
4. Where a person, who would, if he were living, have a right to sue, dies before the right accrues.
5. Death of creditor on day when debt becomes due.
6. The starting point of limitation under the section.
7. "Legal representative," meaning of. See Note 43 to S. 6.
8. "Capable of instituting . . . . such suit."
9. Claims against estate of deceased person — Applicability of section — Sub-section (2). See Note 4.

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* Act of 1877 : S. 17.
Same as above.

Act of 1871 : S. 18.

Effect of death before right to sue accrues.

When a person who would, if he were living, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative in interest of the deceased capable of suing.

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[3] (1864) 1864 Suth W R Gap 130 (130) (DB), *Wooma Churn v. Ranee Mohamoya.*

Other Topics (miscellaneous)

Suit by or against administrator. See Note 8.
Suit by or against executor. See Note 8.
Disability of legal representative. See S. 6 Note 44.
Section not applicable to appeals. See Note 2.
Suit for partnership accounts after death of a partner. See Note 4.

1. Legislative changes.

(1) There was no corresponding section in the Act of 1859.

(2) The corresponding section in the Act of 1871 did not apply to applications, but applied only to suits. The sections in the later Acts apply to applications as well as to suits.

(3) The section in the Act of 1871 applied also to suits for pre-emption. But the sections in the later Acts do not apply to such suits.

(4) The corresponding section in the Act of 1871 spoke of a "representative in interest" and a "representative." The subsequent Acts refer to a "legal representative."

2. Scope of the section. — It is a general principle that unless there is a completed cause of action, limitation cannot run and that unless, *inter alia*, there is a person who can sue and a person who can be sued, there cannot be a complete cause of action.[1] It follows

When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative whom the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.

Act of 1859.
No corresponding provision.

Section 17 — Note 2

1. ('38) 25 AIR 1938 Mad 353 (356) : I L R (1938) Mad 586 : 174 Ind Cas 459 (FB), *Subbiah Thevar* v. *Samiappa Mudaliar.*

(1913) 2 K B 549 (552) : 82 L J K B 949 : 109 L T 77 : 29 T L R 486, *Gelmini* v. *Moriggia.* (Day of payment—Cause of action matures next day.)

(1821) 5 B & Ald 204 (214) : 106 E R 1167 : 24 R R 325, *Murray* v. *East India Company.* (Referred in A I R 1919 Mad 798.)

(1897) 1 Q B 702 (707, 708) : 66 L J Q B 462 : 76 L T 608 : 45 W R 488, *Coburn* v. *Colledge.* (Solicitors' costs—Cause of action accrues when work is completed.)

('24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520 (DB), *Dwijendra Narain* v. *Joges Chandra.*

('16) 3 AIR 1916 P C 202 (205) : 43 Ind App 113 ; 35 Ind Cas 323 (P C), *Meyappa Chetty* v. *Supramanian Chetty.*

('19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti* v. *Kunhi Pathumma.* (Per Srinivasa Aiyangar, J.)

('19) 6 AIR 1919 Mad 798 (808) : 41 Mad 749 : 47 Ind Cas 733 (DB), *Midnapore Zamindari Co. Ltd.* v. *Malayandi Appayasami Naicker.* (A I R 1916 P C 202, followed.)

('23) 10 AIR 1923 Cal 1 (7) : 50 Cal 49 : 74 Ind Cas 630 (DB), *Charu Chandra Pramanik* v. *Nahush Chandra Kundu.*

that limitation will not run where there is no person who can sue or who can be sued.[2] This section is based on this principle. It provides that (except in certain cases enumerated in sub-s. (3)), where a cause of action accrues in favour of, or against, the estate of a deceased person, limitation must be postponed till there is some one who can sue or be sued on behalf of the estate.

The section is one of the provisions of the Act which enable the institution of proceedings *after* the period prescribed therefor by the first schedule. It has been seen in Note 2 to S. 6 that such provisions proceed in different ways to achieve this end; for instance, in some of them the starting point of limitation is postponed, while in some others the starting point of limitation is not postponed but the litigant is allowed an additional period. This section belongs to the former category which *postpones* the starting point of limitation.

The ground on which limitation is postponed under this section is the absence of any person who can sue or be sued on the cause of action. The cause of action contemplated is one which arises in favour of, or against, the *estate* of a deceased person. Sub-section (1) relates to cases in which such cause of action accrues *in favour of* the estate; sub-s. (2) relates to cases in which the cause of action is *against* the estate. In either case, the starting point of limitation is postponed till there is some person who is capable of suing or being sued on behalf of the estate.

The section applies only to *suits* and *applications*; it does not apply to *appeals*. Suits for pre-emption, suits for the possession of immovable property, and suits for the possession of an hereditary office are expressly exempted from the operation of this section. (Sub-s. (3).)

3. Relative scope of Sections 6 and 17. — See Note 3 to Section 6.

4. Where a person who would, if he were living, have a right to sue, dies before the right accrues.—Sub-section (1) provides for cases where a person who would, if he were living, have a right to institute a suit dies before the right accrues. Sub-section (2) refers to cases in which a person *against* whom, if he were living, a right to institute a suit would have accrued, dies before the right accrues. Thus, both sub-ss. (1) and (2) refer to cases in which a right to sue accrues after the death of a person in circumstances in which

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('18) 5 AIR 1918 Cal 933 (939) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya Sakhi Debi* v. *Bireshwar Samanta.* (Simple mortgage —Mortgagor dispossessed—Time runs against mortgagee from date when he is entitled to possession.)

('17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (DB), *Manikkam Pillai* v. *Thanikkachalam Pillai.*

('66) 6 Suth W R P C 3 (9) : 2 Moo Ind App 390 (PC), *Jewun Doss Sahoo* v. *Kubeer-ood-deen.* (Time runs against mutwalli from date of his appointment.)

[2] ('13) 18 Ind Cas 373 (375) (DB) (Mad), *Palaniandi Malavarayan* v. *Vadamalai Oodayan.*

('68) 10 Suth W R 15 (19) (DB), *Womesh Chunder Goopto* v. *Raj Narain Roy.*

such right would have accrued to or against such person if he were living. In other words, the section refers to cases where a right to sue accrues in favour of or against the *estate* of a deceased person. Thus, suppose A contracts with B to pay B a certain sum of money on the 15th January 1930. B dies on 10th January 1930. If B had been living on the 15th January 1930, a right to sue would have accrued in his favour on A's failure to pay the money on that date. Suppose, in the above illustration, A dies on 10th January 1930. In such a case, if A had been living on the 15th January 1930, a right to sue would have accrued *against* him on his failure to pay the money on that date. As it is, on A's failure to pay the money on the 15th January, a cause of action accrues *in favour of the estate* of B in the first instance: and in the second instance, a cause of action accrues *against the estate* of A. Sub-section (1) applies to the first case and sub-s. (2) applies to the second case.

It will be seen that in both the illustrations given above, the right to sue accrues *after* the death of the person to whose estate the right relates. If such cause of action accrues *before* the death of such person, the section does not apply although the right may be enforceable on behalf of or against the *estate* of the deceased person. The reason is that the section only applies where the person to whose estate the cause of action relates dies *before* the accrual of the cause of action.[1]

Suppose, a cause of action which exists in favour of or against the estate of a deceased person has been the result of the death of such person in the sense that but for such death, the cause of action would not have arisen at all. Thus, suppose there is a partnership amongst A, B and C. A dies. A's death causes a dissolution of the partnership and gives rise to a cause of action in favour of his representatives to sue B and C for an account of the partnership business and for A's share of the profits of the business. In such a case, the cause of action owes its existence to the death of A. The question arises as to whether this section applies to such cases. It has been assumed in the undermentioned cases[2] that this section will apply even to such cases. It is

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Note 4

[1] ('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *Burn* v. *Paul.* (Application.)
('18) 5 AIR 1918 Mad 526 (528) : 41 Ind Cas 605 (DB), *Lakshimi Narayana* v. *Venkata.* (Cause of action before death—S. 17 does not apply.)
(1874) L R 17 Eq 71 (74) : 43 L J Ch 12, *Boatwright* v. *Boatwright.* (Do.)

[2] ('81) 7 Cal 627 (631, 632), *Lawless* v. *Calcutta Landing and Shipping Co. Ltd.* (Agency.)
('96) 20 Bom 15 (44) (DB), *Rivett-Carnac* v. *Gokuldas Sobhanmull.* (Partnership.)
('05) 9 Cal W N 537 (541), *Mohit Lall Dutt* v. *Raj Narain Dutt.* (Do.— 20 Bom 15 followed.)
[*See also* ('16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.* (Suit for accounts after death of partner—It was assumed by Privy Council without deciding that the suit should be deemed to be suit which the deceased partner would, if he were living, have a right to institute—Case under S. 17, Straits Settlements Limitation Ordinance.)]

submitted that the said view is not correct. The cause of action being itself the death of such person, it cannot be said that the deceased person, if he were alive, would have had a right to institute a suit on such cause of action.[3] In support of the view that the said decisions are not correct, it has also been said that in such cases the cause of action arises *at* death and not afterwards and that, therefore, it cannot be said that the deceased person has died *before* the accrual of the right to sue within the meaning of this section.[4] But this latter reasoning also does not seem to be correct. The right to sue arises *on* the death of the deceased person and not at the same time as the death takes place. In other words, in such cases, the cause of action arises the next moment *after* the death and not at any time before.

5. Death of creditor on day when debt becomes due. *[Omitted.]*

6. The starting point of limitation under the section.— Limitation under the section runs from the time when there is a legal representative of the deceased by or against whom the suit may be instituted. Thus, three conditions are necessary for limitation to begin to run under the section :

(1) There must be a legal representative of the deceased.

(2) The legal representative must be *capable* of suing, or being sued, on behalf of the estate.

(3) The legal representative must be capable of suing, or being sued, on the *particular* cause of action in question.

The provision that limitation begins to run from the time when there is a legal representative capable of suing or being sued on the cause of action, does not mean that limitation begins to run the moment there is such a person irrespective of the question whether the cause of action is *mature* at such time. Where the cause of action arises *after* the coming into existence of a person who is capable of suing or being sued on behalf of the estate, limitation under this section does not begin to run from the time of the coming into existence of such person but only from the time when the cause of action arises. Thus, suppose that at the time of the death of X there is a person capable of suing on behalf of the estate. If a cause of action arises *subsequently* in favour of the estate, limitation runs not from the death of X but from the time when the cause of action accrues. The section has not the effect of accelerating the cause of action so as to enable it to be treated as arising at the death of X.[1]

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[3] ('41) 28 AIR 1941 Mad 449 (466) (FB), *Venkateswara Sarma* v. *Venkatesa Ayyar*. (See the observations of Abdur Rahman, J., in this case at page 466, where he points out that this section applies only where the accrual of the cause of action is *independent* of the death of the person. Accordingly his Lordship has held that S. 17 does not apply to a suit by the manager of a religious endowment for the recovery of endowment property transferred for valuable consideration by his predecessor in office as the cause of action for such a suit arises only on the death of the transferor.)

[4] See U. N. Mitra's "Limitation Act," (Edn. 6), Vol. II, p. 882.

7. "**Legal representative," meaning of.** — See Note 43 to Section 6.

8. "**Capable of instituting . . . such suit.**"—In order that limitation may begin to run under the section, the mere existence of a legal representative of the deceased is not enough. It is necessary that such legal representative should be *capable* of instituting a suit on the cause of action.[1]

The section does not lay down as to when a legal representative may be held to be capable of instituting a suit on behalf of the estate of the deceased person. Where, for example, the incapacity is due to the fact that the legal representative is an alien enemy residing in a foreign country, he may become capable of instituting a suit if either he becomes a resident in British India with the permission of the Central Government or after the state of war ends. (See S. 83, Civil Procedure Code.)

Again, in the case of a person other than a Hindu, Muhammadan, Buddhist, Jain, Sikh or Indian Christian dying intestate, only an administrator can sue or be sued on behalf of the estate.[2] An administrator derives his right solely from the grant of the letters of administration and hence, in cases where he alone can sue or be sued on behalf of the estate, such suit cannot be brought before the grant of the letters of administration. In such cases, therefore, limitation does not begin to run under this section before the grant of the letters of administration.[3]

Where letters of administration have been granted only with reference to a portion of the estate, and the remaining portion of the estate continues to be unrepresented, suits in respect of such portion cannot be brought until letters of administration have been obtained with regard to such portion.[4] Hence, it is conceived that if the cause

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Note 6

[1] ('36) 23 AIR 1936 P C 309 (311, 312) : 164 Ind Cas 337 : I L R (1937) Mad 94 : 63 Ind App 429 (PC), *Murugesam Pillai* v. *Minakshisundara Ammal.*

Note 8

[1] ('16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 I. C. 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.* (Capability of administrator and executor.)

[2] See Ss. 211, 212, Indian Succession Act, 1925.

('25) 12 AIR 1925 Rang 186 (187) : 3 Rang 46 : 85 Ind Cas 325, *Barnett Bros. Ltd.* v. *E. Fowle.*

('94) 18 Bom 337 (341, 342) (DB), *Framji Dorabji Ghaswala* v. *Adarji Dorabji Ghaswala.*

('82) 4 All 192 (195) : 1882 All W N 3 (DB), *Sukh Nandan* v. *Rennick.*

[3] (1902) L R 1902 A C 257 (260) : 71 L J P C 49 : 86 L T 245 : 51 W R (Eng.) 18 : 18 T L R 420, *Chan Kit San* v. *Ho Fung Hang.*

('16) 3 AIR 1916 P C 202 (205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.*

[4] ('94) 18 Bom 337 (340, 341) (DB), *Framji Dorabji* v. *Adarji Dorabji.*

of action relates to such unrepresented portion of the estate, limitation will be postponed under this section till the grant of letters of administration in respect of it.

The rule is different where there is an *executor*. An executor derives his title from the will and he can sue or be sued on behalf of the estate even before obtaining probate of the will.[5] The rule requiring probate in his case will only prevent a *decree* being passed before such probate is obtained and will not prevent the *institution* of the suit. Hence, in such cases, there will be no postponement of limitation under this section.[6]

The rule that an administrator or executor alone can sue or be sued on behalf of the estate of a deceased person does not apply to Hindus, Muhammadans, Buddhists, Jains, Sikhs and Indian Christians.[7] Hence, in such cases, a suit can be brought on behalf of or against the estate of a deceased person even before the grant of letters of administration[7a] even though there may be no executor. Hence, there will be no postponement of limitation under this section in such cases. Where there is an executor in such cases, he can institute suits on behalf of the estate even before the grant of probate and consequently, there will be no postponement of limitation under this section.[8]

The fact that in the above cases a *decree* cannot be passed in a suit for the recovery of a debt due to the estate, before the grant of a succession certificate,[9] does not bar the *institution* of the suit.[10]

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5. ('16) 3 AIR 1916 P C 202 (204, 205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty*.
('13) 19 Ind Cas 406 (409): 37 Bom 158 (DB), *Jamsetji Nassarwanji* v. *Hirjibhai*.
(1872) 42 L J Ch 234 (240) : 5 H L 656, *Knox* v. *Gye*.
(1804) 10 Ves 93 (94) : 7 R R 351, *Webster* v. *Webster*.

6. ('16) 3 AIR 1916 P C 202 (204, 205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty*. (Straits Settlements Limitation Ordinance, 1896.)

7. See Section 212, Indian Succession Act, 1925.

7a. ('38) 25 AIR 1938 Mad 157 (160) : ILR (1938) Mad 533 : 174 I. C. 638 (DB), *Sivasankara Mudaliar* v. *Amaravathi Ammal*. (Executors appointed under will declining to accept office — Heir-at-law of testator can maintain action to recover possession of estate left by testator.)
('37) 24 AIR 1937 Sind 84 (84, 85) : 31 Sind L R 11 : 168 I. C. 55 (DB), *Shrimati Pevibai* v. *Motumal Kalachand*. (Will by Hindu made at Hyderabad, Sind, of property at Hyderabad — Probate is not necessary before suing as legatee.)
('37) 24 AIR 1937 Sind 318 (320) : 172 I. C. 805, *Jamnabai* v. *Jethamal*. (Residuary legatee under will is legal representative capable of instituting suit.)

8. ('14) 1 AIR 1914 Mad 51 (54) : 37 Mad 175 : 24 I. C. 852, *Balakrishnadu* v. *Narayanaswamy Chetty*.
('90) 17 Cal 272 (275, 276) (DB), *Krishna Kinkur Roy* v. *Panchuram Mondul*.
('26) 13 AIR 1926 Mad 434 (447) : 49 Mad 261 : 94 Ind Cas 83 (FB), *Ramiah* v. *Venkatasubbamma*. (Hindu will in moffussil.)

9. See Succession Act, 1925, Section 214.

10. ('14) 1 AIR 1914 Mad 51 (54) : 37 Mad 175 : 24 I. C. 852, *Balakrishnadu* v. *Narayanaswamy Chetty*.

Section 17
Notes 8–9

At the same time, it must be noted that the expression "capable of instituting a suit" in the section means "capable of instituting a suit in which a decree might be obtained." Hence, although a suit may be instituted before the grant of probate of a will or succession certificate and the passing of the decree alone may be deferred till the grant of such probate or succession certificate, yet, if the case is one in which such probate or certificate cannot be obtained at all, the plaintiff cannot be said to be capable of instituting a suit in which a decree might be obtained and hence, it must be held that in such cases there is no one capable of instituting the suit on behalf of the estate.[11]

As to whether the fact that the legal representative of the deceased is under a disability referred to in S. 6 will be a ground for the postponement of limitation under this section, see Note 3 to S. 6.

The section says that limitation must be computed from the time when there is a legal representative who is "capable of instituting *such* suit." That means that the mere existence of a person who can sue on causes of action accruing to the estate is not enough. Such legal representative must be competent to sue on the *particular* cause of action which is in question. Thus, suppose a certain sum of money would have fallen due to a deceased person, if he were alive in 1935. If he dies in 1930, the mere fact that there is at the time a legal representative who can sue on behalf of the estate will not start limitation under this section in 1930. Limitation can only run from 1935. The reason is that in 1930 the legal representative is not capable of suing on the cause of action for the simple reason that the cause of action has not arisen. The section has not the effect of accelerating the cause of action in such cases.[12]

9. Claims against estate of deceased person — Applicability of Section. — Sub-section (2). — See Note 4.

('37) 24 AIR 1937 Sind 318 (320) : 172 I. C. 805, *Jamnabai* v. *Jethamal.* ("Capable of instituting a suit" not to be interpreted as "capable of instituting a suit and obtaining a decree.")

('16) 3 AIR 1916 P C 202 (204, 205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.*

[11] ('16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.*

[12] ('36) 23 AIR 1936 P C 309 (311, 312): 164 I. C. 337 : 63 I. A. 429 : ILR (1937) Mad 94 (PC), *Murugesam Pillai* v. *Minakshisundara Ammal.*

18.* Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

Effect of fraud.

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application —

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Suit or application."
4. There must have been fraud.
5. Person defrauded must have been kept from knowledge of his right to sue or to apply.
6. Plea of fraud.
7. Burden of proof.
8. Fraud, if can be antecedent to the cause of action.
9. Pre-emption cases.
10. Proceedings to set aside execution sales.
11. "Document necessary to establish such right."
12. "Has been fraudulently concealed from him."
13. Starting point.
14. Against whom time can be extended.
15. Applicability of the section to period fixed by Section 48, Civil Procedure Code.

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* Act of 1877 : S. 18.
Same as above.

Act of 1871 : S. 19; Act of 1859 : S. 9.
(Section 19 of the Act of 1871 and S. 9 of the Act of 1859 were the same except for the change noted in the "Legislative changes," Note 1.)

Other Topics (miscellaneous)

Actual and active fraud necessary. See Note 4.
Application against decree-holder and auction-purchaser. See Note 14.
Article 95 and this section. See Note 2.
Concealment of document. See Note 13.
Concealment of title. See Note 4.
Criminal complaint — Section not applicable. See Note 3.
Fraud after limitation has begun to run — Section not applicable. See Note 2.
Fraud in Section 48, C. P. C. — Not same as fraud in this section. See Note 15.
Mere concealment of facts. See Note 4.
Mere suspicion is not knowledge. See Note 13.

1. Legislative changes. — Section 9 of the Act of 1859 and S. 19 of the Act of 1871, corresponding to this section, dealt with the effect of fraud on a person's right to institute a *suit*. The Act of 1877 extended the section to *applications* also. There is no change effected in the present Act.

2. Scope of the section. — This is an enabling section[1] which postpones the starting point of limitation for suits and applications where the plaintiff's or the applicant's *right to seek relief* is, by means of fraud, *kept from his knowledge*. The mere fact that the *cause of action is founded on fraud* is not enough to bring the case within this section.[2] Article 95 will apply to such cases.

Whether this section or Art. 95 applies, time, however, runs from the date when the fraud first *becomes known* to the person injuriously affected by the fraud. The principle on which both the provisions are based is the same, namely, that where a remedy is given on the ground of fraud, the right of the party defrauded is not affected by the lapse of time so long as he remains in ignorance of the fraud.[3] In *Rolfe* v. *Gregory*,[4] where the relief claimed was founded on fraud, the Lord Chancellor observed as follows :

> "As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains, without fault of his own, in ignorance of the fraud that has been committed."

Section 18 — Note 2

[1] ('23) 10 AIR 1923 All 282 (283) : 45 All 316 : 71 Ind Cas 631 (DB), *Sheo Ram Koeri* v. *Ikramunnissa Bibi*.
[*See also* ('32) 19 AIR 1932 Cal 381 (381, 382) : 137 Ind Cas 378 (DB), *Surja Kanta* v. *Jogendra Nath*.]

[2] ('29) 16 AIR 1929 Rang 62 (63) : 117 Ind Cas 63 : 7 Rang 104 (DB), *Bowramah* v. *A. N. A. N. Chettiar*. (It must be proved that a person's title or right has been kept from his knowledge by other party's fraud.)

[3] ('22) 9 AIR 1922 Cal 157 (158) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose*.
('25) 12 AIR 1925 Mad 1255 (1257) : 48 Mad 925 : 91 Ind Cas 151 (DB), *Ramiah & Co.* v. *Sadasiva Mudliar & Bros.*

[4] (1865) 146 R R 463 (466) : 13 W R (Eng) 355 (356) : 4 D J & S 576 : 34 L J Ch 274 : 11 Jur (N S) 98 : 12 L T (N S) 162.

A person desiring to invoke the aid of this section must establish two things —

(1) that *there has been fraud*, and

(2) that by means of such fraud *he was kept from the knowledge* of his right to sue or apply or of the title on which such right is founded.[5]

Both these things must be established. It is not enough for the plaintiff or applicant to show that the act done by the defendant was fraudulent. He must, as observed by Petheram, C. J., in *Kailash Chandra* v. *Bissonath*,[6] "carry the fraud further" and show that his right to sue or to apply has been kept from his knowledge by means of such fraud. See also the undermentioned cases to the same effect.[7]

This section must be read consistently with the provisions of S. 9 and, so reading it, it is clear that the fraud must have existed *at the inception of the cause of action*. A fraud committed *after* the limitation has begun to run cannot, in view of section 9, stop limitation running and this section will not apply to such cases.[8] But the Calcutta High Court seems to have taken a contrary view in the undermentioned case.[9] In that case A obtained a decree against B and then died leaving a minor son C. Limitation for application for execution had begun to run even in the lifetime of A. After the death of A, B without disclosing the fact that he was the debtor to the estate of A appointed himself as the guardian of C and allowed the prescribed time for execution to elapse. It was held that the period of B's guardianship *should be excluded* in computing the period of limitation for an application for execution. Their Lordships did not refer to any provision of law under which such *exclusion* could be made. It is submitted that this view is not correct.[10]

As to whether the fraud can be *antecedent* to the accrual of the cause of action, see Note 8.

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[5] See Notes 4, 5 and 7.
See also Article 166 Note 18.

[6] ('96) 1 Cal W N 67 (70) (DB).

[7] ('26) 13 AIR 1926 Cal 229 (231) : 87 Ind Cas 555 (DB), *Nabin Chandra Haldar* v. *Bipin Chandra Haldar*.
('81) 1881 Pun Re No. 32, *Arsala* v. *Yar Muhammad*.
('19) 6 AIR 1919 Lah 422 (422, 423) : 50 Ind Cas 610, *Asanand* v. *Ghanji Ram*.
('20) 7 AIR 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi* v. *Amar Nath*.
('26) 13 AIR 1926 Lah 128 (129) : 92 Ind Cas 597, *Nand Ram* v. *Ishar*.

[8] ('21) 8 AIR 1921 Mad 283 (283) : 69 Ind Cas 274 (DB), *Ramalagu Servai* v. *Solai Servai*. (Case covered by Article 62, Limitation Act—This section cannot apply where there was no fraud at the date when the cause of action arose — In this case a subsequent act of fraud was relied on to save limitation.)

[9] ('25) 12 AIR 1925 Cal 584 (585) : 52 Cal 63 : 88 Ind Cas 61 (DB), *Gobinda Lal Ghose* v. *Nalini Kanta Ghose*.

[10] ('25) 48 Mad L Jour (N I C) 31 (31, 32). (Critical note on A I R 1925 Cal 584, *Gobinda Lal Ghose* v. *Nalini Kanta Ghose*.)

As to the applicability of this section to special or local laws, see S. 29 Notes 3 and 5.

3. **"Suit or application."**—A complaint of a criminal offence is not a suit or application and this section has no application to such cases.[1]

4. **There must have been fraud.** — The expression "by means of fraud kept," etc., shows that the fraud contemplated is an *actual* and *active* fraud in the means adopted to keep the person injured out of knowledge of his right.[1] There must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts : a designed fraud by which a party, knowing to whom a right belongs, conceals the facts and circumstances giving that right.[2] A necessary element in fraud is *deception* or *deceit* and getting

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Note 3

[1] ('96) 20 Bom 543 (544) (DB), *Queen-Empress* v. *Nageshappa Pai.* (This section does not apply to criminal cases and the peremptory terms of S. 11 of the Indian Salt Act (XII of 1882) are not affected by it.)

Note 4

[1] ('31) 18 AIR 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6 Luck 374, *Lalta Singh* v. *Mathur Upadhia.* (Omission by mortgagor to inform of his want of title to mortgagee is not active fraud so as to attract the application of this section.)

('29) 16 AIR 1929 Bom 119 (126) : 53 Bom 271 : 117 I. C. 417 (DB), *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co. Ltd.* (Not furnishing information in breach of contract is not fraud.)

('29) 16 AIR 1929 All 213 (213, 214) : 115 Ind Cas 798 (DB). *Sheo Shankar* v. *Pratab Narain Singh.* (Active concealment with intention to deceive is fraud.)

('03) 1903 Pun L R No. 4, p. 8 (9) : 1902 Pun Re No. 86 (DB), *Ghulam Raza* v. *Sardar Khan.* (Mere non-disclosure of transaction cannot be held to amount to fraud.)

('23) 10 AIR 1923 Mad 353 (354) : 72 Ind Cas 46 (DB), *Muhammad Rowther* v. *Subba Naicker.* (Where a decree-holder not merely failed to serve the judgment-debtor with notice of the intended sale but even after the sale actively concealed from him the knowledge of his right to object to the sale— *Held* that Section 18 applied.)

[2] Halsbury's "Laws of England," Vol. 19, page 172.

('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi* v. *Probodh Chandra.*

('29) 16 AIR 1929 Pat 228 (230) : 117 I. C. 46 (DB), *Babu Lal* v. *Parem Kumari.*

('26) 13 AIR 1926 Pat 397 (398) : 97 I. C. 798 (DB), *Bihari Lal Mitter* v. *Tanuk Lal Mander.* (Mere carelessness or negligence does not substantiate a finding of fraud.)

('11) 11 Ind Cas 313 (313) (DB) (Lah), *Kaka Ram* v. *Mohammad Ali.* (Section 18 does not apply where there is an absence of indication of any active or intentional concealment.)

('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu* v. *Damodar Das.* (Fraudulent concealment necessary to constitute fraud.)

('12) 16 Ind Cas 547 (548, 549) (DB) (Cal), *Lokenath Ruth* v. *Chintamoni Tripathi.* (Ignorance of plaintiff of right to sue, not sufficient—Ignorance must be brought about by fraud of opponent.)

[*See also* ('38) 25 AIR 1938 Cal 263 (266, 270) : I L R (1938) 1 Cal 512 : 182 Ind Cas 244 (DB), *Chaitanya Das* v. *Ranjit Pal.* (Decree-holder fraudulently selling somebody to believe something that is really not correct.[3] It is not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his right.[4] There must be something said or done which is directly intended to keep the plaintiff or applicant from knowledge of his right to sue or to apply.[5] An *open* act of a party cannot be said to be a fraudulent act of concealment.[6] Thus, an open extortion of documents from a party cannot be regarded as a fraudulent concealment of the documents.[7] A failure to give information which a party is bound to give under a *contract* is not fraud but only a breach

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property not belonging to judgment-debtor—Suit by auction-purchaser for refund of purchase-money — Decree-holder held guilty of fraud.)

('26) 13 AIR 1926 Nag 388 (389) : 94 Ind Cas 56, *M. B. Kinkhede* v. *Mohanya*. (Article 164 is not confined only to a case of fraud in service of notice but it covers any fraud and Section 18 can be applied.)]

[3] ('29) 16 AIR 1929 Bom 119 (127) : 53 Bom 271 : 117 I. C. 417 (DB), *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co., Ltd.*

('03) 1903 Pun L R No. 4, p. 8 (9): 1902 Pun Re No. 86 (DB), *Ghulam Raza* v. *Sardar Khan.* (Fraud as used in this section means, and can only mean, active deceit in defrauding or endeavouring to defraud a person of his rights by artful device.)

[4] Halsbury's "Laws of England," Vol. 19, page 172.

('27) 14 AIR 1927 All 437 (438) : 101 Ind Cas 322, *Gulab Rai* v. *Tulsi Ram.*

[5] ('29) 16 AIR 1929 All 213 (214) : 115 Ind Cas 798 (DB), *Sheo Shanker* v. *Pratab Narain Singh.*

('27) 14 AIR 1927 All 437 (438, 439) : 101 Ind Cas 322, *Gulab Rai* v. *Tulsi Ram.*

(1864) 1864 Suth W R (Gap) 364 (364) (DB), *Sheikh Muksood Ali* v. *Sheikh Gowhur Ali.*

('68) 9 Suth W R 255 (255) (DB), *Byjnath Suhaye* v. *Brohmo Deo Narain.*

('74) 21 Suth W R 109 (111) (DB), *Dwarkanath Bhooya* v. *Ajoodhya Ram Khan.* (Where a plaint sufficiently alleged that the plaintiffs being entitled to property were ousted from its enjoyment under colour of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud having been so contrived as to make the plaintiffs believe that they had no right of action at all, it was held that the allegation, if true, showed that the plaintiffs had been kept by fraud from a knowledge of their right of action.)

('82) 1882 Pun Re No. 3, *Nihal Chand* v. *Foujdar Singh.*

('85) 1885 Pun Re No. 73, *Gauhri Mal* v. *Jainti Mal.*

('02) 1902 Pun L R No. 15, pp. 68, 70 : 1902 Pun Re No. 16 (DB), *Panna Lal* v. *Bhagwan Das.*

[6] (1900) 24 Bom 104 (111) : 1 Bom L R 466 (DB), *Dhondo* v. *Vasudev.*

('09) 4 Ind Cas 313 (314) (Lah), *Khubi* v. *Nihala.* (Open gift of property followed by mutation of names.)

('81) 3 Mad 384 (397, 398) : 8 Ind App 149 : 5 Ind Jur 542 : 4 Sar 259 (PC), *Venkateswara Iyan* v. *Shekari Varma.* (Fact of registration displaces the theory of concealment.)

('20) 7 AIR 1920 Mad 295 (302) : 58 Ind Cas 689 (DB), *Secretary of State* v. *Bommadevara Venkatanarasimha.* (Open enjoyment of land.)

('15) 2 AIR 1915 Cal 738 (738) : 28 Ind Cas 708 (DB), *Panchkari Chattapadhya* v. *Maharaja Bahadur Singh.* (Open act of possession by defendant.)

[7] ('74) 7 Mad H C R 22 (23) (D B), *Ananta Lakshiminarasu* v. *Ankinid Bahadur.*

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of contract.[8] Nor is the mere fact that a person was *ignorant* of his right sufficient to establish active fraud.[8a]

A *mere concealment* of facts may or may not amount to fraud. If the party is under no *duty* to disclose such facts to the other party, a mere concealment will not amount to fraud.[9] Where there *is*, however, such a duty, a concealment may amount to active fraud *(suppressio veri)*.[9a] Thus, a concealment by a person in a fiduciary

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[8] ('29) 16 AIR 1929 Bom 119 (126) : 117 Ind Cas 417 : 53 Bom 271 (DB), *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co., Ltd.*

('16) 3 AIR 1916 Low Bur 40 (41) : 36 Ind Cas 418 (DB), *Ardikappa Chetty* v. *Kadappa.* (Neglecting to settle accounts by agent with object of concealing misconduct from principal.)

('31) 18 AIR 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6 Luck 374, *Lalta Singh* v. *Mathur Upadhia.* (Mere omission by mortgagor to disclose want of title.)

('12) 16 Ind Cas 804 (805) : 1913 Pun Re No. 32 (DB), *Hardhian Singh* v. *Delhi Cloth and General Mills Co.* (Mere omission to give plaintiff notice of a breach of contract.)

[8a] ('67) 8 Suth W R 23 (23) (DB), *Azroal Singh* v. *Lalla Gopeenath.* (Except in cases in which such ignorance has been brought about by opposite party's fraud.)

('69) 1869 Pun Re No. 29, *Mt. Maeea Davee* v. *Sukh Dyal.* (Do.)

('25) 12 AIR 1925 Cal 515 (516) : 78 Ind Cas 149, *Giribala Dasi* v. *Tarak Nath.* (Do.)

('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi* v. *Probodh Chandra.* (Do.)

('12) 16 Ind Cas 547 (548) (DB) (Cal), *Lokenath* v. *Chintamoni Tripathi.* (Do.)

[9] Snell's "Principles of Equity," 11th Edition, page 471.

(40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram* v. *Munshi Ram.* (Suit by reversioner challenging mortgage on the ground of want of consideration and necessity — Reversioner is not bound to disclose that mortgage property was gifted to him — Even attempt on his part to conceal factum of gift cannot bring case under Section 18.)

('04) 28 Mad 168 (171) (DB), *Abdul Karim Sahib* v. *Official Assignee of Madras.* (There is no duty cast upon the insolvent to disclose to the Official Assignee that he has become possessed of property since the making of the order of personal discharge and consequently the non-disclosure of the fact cannot be regarded as fraud within the meaning of Section 18.)

(1865) 3 Suth W R S C C Ref. 9 (10) (DB), *Indorobhoosun Deb Roy* v. *Thomas J. Kenny.* (Where a lessee cut trees contrary to the provisions of his first lease, and the lease was renewed (the lessor then not looking to the infringement of the terms of the lease in this respect), limitation was held to run from breach of contract, and not from lessor's knowledge of it, because he might have known of it before.)

('29) 16 AIR 1929 All 213 (214) : 115 Ind Cas 798 (DB), *Sheo Shanker Upadhia* v. *Pratab Narain Singh.* (Mere omission to inform the pre-emptor of the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor, there would undoubtedly be a fraud within the meaning of Section 18.)

[9a] Snell's "Principles of Equity," 11th Edition, page 471.

[*See also* ('39) 26 AIR 1939 All 113 (113, 114) : 180 Ind Cas 525, *Jagdish Rai* v. *Suraj Kumar.* (*Held*, under circumstances of the case, vendees were guilty of fraudulent concealment of the fact of sale from pre-emptor.)

('39) 26 AIR 1939 Oudh 227 (229) : 14 Luck 694 : 183 Ind Cas 382 (DB), *Kasim Husain* v. *Mt. Mubarak Jahan Begam.* (Omission of existing debt from written statement of debtor under S. 8 U. P. Encumbered Estates Act, not explained

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position may amount to active fraud.[10]

5. Person defrauded must have been kept from knowledge of his right to sue or to apply. — As has been seen already, there must not only have been fraud but the person injured by it must have been kept from knowledge of his right to institute a suit or make an application by means of such fraud.[1] It follows that if the person injured is *aware* of his right to seek relief, he cannot claim the benefit of this section.[2] The mere fact that though he knew of his right to seek the necessary relief he was prevented by fraud from *exercising* his right, is not sufficient.[3] A lost certain Government promissory notes,

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satisfactorily—Presumption is that such omission is deliberate with intention to reap advantage of S. 13 of the Act — Creditor is entitled to benefit of S. 18, Limitation Act.)

('82) 6 Bom 628 (636), *Merwanji Hormusji* v. *Rustomji Burjorji.* (Silence under particular circumstances may amount to active fraud satisfying the section.)]

10. ('74) 21 Suth W R 245 (245) (DB), *Hossein Buksh* v. *Tussuduck Hossein.* (Suit for money received by agent and concealed from principal.)

('25) 12 AIR 1925 Cal 584 (585) : 52 Cal 63 : 88 Ind Cas 61 (DB), *Gobinda Lal Ghose* v. *Nalini Kanta Ghose.* (Decree obtained by minor—Judgment-debtor appointed guardian—Failure to execute decree—There is fraud.)

('09) 4 Ind Cas 313 (314) (Lah), *Khubi* v. *Nihala.* (Where a *lambardar* gets a common land mutated in his own name on the basis of a fraudulent deed of transfer, limitation begins to run only when the claimants become aware of the fraud.)

('29) 16 AIR 1929 Bom 119 (127) : 53 Bom 271 : 117 I. C. 417 (DB), *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co. Ltd.*

Note 5

1. ('14) 1 AIR 1914 Cal 728 (729, 730) : 24 Ind Cas 249 (DB), *Jotindra Mohan Roy* v. *Brojendra Kumar.*

('19) 6 AIR 1919 Cal 836 (837) : 53 Ind Cas 562 (DB), *Ram Chandra* v. *Abeda Khatun.*

('82) 1882 Pun Re No. 3, *Nihal Chand* v. *Foujdar Singh.*

('23) 10 AIR 1923 Pat 435 (436): 72 Ind Cas 625, *Mahabir Ram* v. *Ram Bahadur.*

('33) 20 AIR 1933 Rang 110 (111) : 144 Ind Cas 980, *Ramanathan Chettiar* v. *Baldeo Singh.*

('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori Dasi* v. *Mukund Lal.*

('30) 17 AIR 1930 Pat 153 (154) : 119 Ind Cas 891, *Mohinuddin Meerza* v. *Mohamed Amin.*

('17) 4 AIR 1917 All 8 (8, 9) : 40 Ind Cas 37 (DB), *Lakhpat Pandey* v. *Jang Bahadur Pandey.*

2. ('14) 1 AIR 1914 Cal 728 (729) : 24 Ind Cas 249 (DB), *Jotindra Mohun Roy* v. *Brojendra Kumar Datta.*

('70) 2 N W P H C R 180 (181) (DB), *Sheo Sahae Panday* v. *Ratta Beebee.*

('89) 12 Mad 168 (175) (FB), *Venkata* v. *Chengadu.*

3. ('12) 13 Ind Cas 63 (66) (DB) (Cal), *Biroo Gorain* v. *Jainurat Koer.*

('15) 2 AIR 1915 Cal 73 (73) : 25 Ind Cas 884 (DB), *Golam Mujahar Chowdhury* v. *Goloke Charan Das.*

('19) 6 AIR 1919 Upp Bur 26 (27) : 52 Ind Cas 958 : 3 Upp Bur Rul 169, *Maung On Myit* v. *Maung Shwe Pi.*

('23) 10 AIR 1923 Rang 103 (106) : 11 Low Bur Rul 363 : 68 Ind Cas 924 (DB), *P. R. P. L. Chetty Firm* v. *G. Lon Pow.* (13 Ind Cas 63 followed — AIR 1922 Low Bur 81 reversed on appeal.)

and some years thereafter the Government notified to him that the promissory notes had been presented by a stranger at the treasury, and that inspection would be given to him on his furnishing an indemnity bond. A did not furnish the indemnity and being unable to know the name of the stranger, could not file a suit against him. More than six years after the notification he sued for the recovery of the notes. It was held that after the notification he could not be said to have been kept from the *knowledge* of his right to institute a suit.[4]

A collected the debts due to a deceased person and actually concealed the said fact from B the heir. B was kept from knowledge of his right by such concealment. It was held that this section would apply.[5] B was entitled to a share of the debt collected by a coparcener before partition but it was kept back from him at the time of partition on the representation that the debt was outstanding. It was held that B was kept from knowledge of his right by the fraud of the coparcener.[6]

6. Plea of fraud. — Order 6 Rule 4 of the Code of Civil Procedure provides, *inter alia*, that in all cases in which a party pleading relies on any fraud, particulars with dates and items, if necessary, shall be stated in the pleading. A person seeking to avoid the statute of limitation on the ground of fraud must therefore specifically state the particulars thereof.[1] *General* allegations, however

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('25) 12 AIR 1925 Nag 374 (375) : 88 Ind Cas 48, *Maroti* v. *Narayan.* (Mere omission by the decree-holder to certify adjustment of the decree was held not sufficient to extend the period of limitation allowed to a judgment-debtor under Article 174.)

('18) 5 AIR 1918 All 336 (337) : 43 Ind Cas 671 (DB), *Harish Chander* v. *Ganga Bishun.* (Where a judgment-debtor was by fraud induced to omit to make an application under O. 21, R. 89, C. P. C., it was held that the fraud was not of the kind which would operate to extend the limitation provided for an application to set aside a sale on the ground of irregularity inasmuch as it did not keep the judgment-debtor from the knowledge of his right but merely prevented him from making an application.)

[4] ('67) 1 Agra 213 (214, 215) (DB), *Syud Ali Nuquee* v. *Bhugwan Dass.*

[5] ('21) 8 AIR 1921 All 155 (157) : 43 All 440 : 60 Ind Cas 774 (DB), *Saheb Ram* v. *Mt. Govindi.*

See also Article 62 Note 32.

[6] ('13) 21 Ind Cas 394 (396) (DB) (Mad), *Avancha Lakshminarasimma* v. *Lakshamma.*

[But see ('27) 14 AIR 1927 All 437 (438, 439) : 101 Ind Cas 322, *Gulab Rai* v. *Tulsi Ram.* (*A* collecting money to which *B* was also entitled and not informing *B—Held* no active concealment.)]

Note 6

[1] ('27) 14 AIR 1927 All 437 (439) : 101 Ind Cas 322, *Gulab Rai* v. *Tulsi Ram.*

('19) 6 AIR 1919 Lah 152 (154) : 51 I. C. 447, *Bashi Ram* v. *Hassan Muhammad.*

('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra Mandal* v. *Anukul Biswas.*

('21) 8 AIR 1921 Pat 145 (147) : 61 Ind Cas 823 : 6 Pat L Jour 319 (DB), *Das Narayan Singh* v. *Mir Muhammad Yusuf.* (Application to set aside execution sale on the ground of fraud.)

strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.[2] See also Note 2 to O. 6 R. 4 of the Authors' Commentary on the Civil Procedure Code, 3rd Edition and Note 16 to Article 95.

7. Burden of proof. — Where a plaint is *prima facie* barred by limitation, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect.[1] If he relies upon fraud as being such a circumstance,

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('34) 21 AIR 1934 P C 208 (210) : 151 Ind Cas 45 (PC) *Kalyan Mal* v. *Ahmad Uddin Khan.*

('16) 3 AIR 1916 Cal 120 (122, 123) : 35 Ind Cas 284 (DB), *Bansiram* v. *Secretary of State.*

[*See also* ('22) 9 AIR 1922 P C 336 (338, 339) : 1 Pat 733 : 67 Ind Cas 914 : 49 Ind App 312 (PC), *Radha Krishna* v. *Bisheshwar Sahay.*]

2. ('15) 2 AIR 1915 P C 7 (13, 14) : 39 Bom 441 : 42 Ind App 135 : 29 Ind Cas 639 (PC), *Bal Gangadhar Tilak* v. *Shrinivas Pandit.*

('94) 18 Bom 144 (146) (DB), *Krishnaji* v. *Wamanji.* (A plaint seeking relief on the ground of fraud but omitting to give particulars does not disclose a cause of action and should be rejected or returned for amendment.)

('88) 15 Cal 533 (537) : 15 Ind App 119 : 5 Sar 168 : 12 Ind Jur 254 (PC), *Ganga Narain Gupta* v. *Tiluckram Chowdhury.* ((1880) 5 App Cas 685 followed.)

('16) 3 AIR 1916 Cal 120 (123) : 35 I. C. 284 (DB), *Bansiram* v. *Secretary of State.*

('82) 1882 Pun Re No. 3, *Nihal Chand* v. *Foujdar Singh.*

('02) 1902 Pun Re No. 86 : 1903 Pun L R No. 4, *Ghulam Raza* v. *Sardar Khan.*

('09) 1 Ind Cas 784 (785) : 36 Cal 134, *Jyotiprokas Nandi* v. *Jhowmull Johury.*

('09) 4 Ind Cas 495 (499) (DB) (Cal), *Promoda Nath Roy* v. *Kinoo Mollah.*

('98) 1 Oudh Cas 262 (267), *Munna Lal* v. *Auseri Lal.*

('21) 8 AIR 1921 Pat 145 (147) : 6 Pat L Jour 319 : 61 Ind Cas 823 (DB), *Das Narayan Singh* v. *Mir Muhammad Yusuf.*

('31) 18 AIR 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6 Luck 374, *Lalta Singh* v. *Mathur Upadhia.* (Mere omission by mortgagor to inform of his want of title to mortgagee is not active fraud.)

[*See also* ('92) 19 Cal 683 (688) : 19 Ind App 166 : 6 Sar 209 (PC), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal.*

('30) 17 AIR 1930 Mad 12 (16) : 123 Ind Cas 24, *Changalvaraya Reddi* v. *Kollapuri Reddi.* (Section 18 applied under special circumstances though no specific allegations were made.)]

Note 7

1. ('22) 9 AIR 1922 Cal 157 (158) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose.*

('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra* v. *Anukul Biswas.*

('13) 18 Ind Cas 391 (392) (DB) (Cal), *Panchu Mandal* v. *Sheikh Isaf.*

('22) 9 AIR 1922 Pat 507 (510) : 2 Pat 65 : 77 Ind Cas 957 (DB), *Ramdhuri Chowdhury* v. *Deonandhan Prasad Singh.*

('17) 4 AIR 1917 Pat 443 (445) : 41 Ind Cas 385 (DB), *Ram Pertap Lal* v. *Kesho Prasad Singh.*

('12) 16 Ind Cas 844 (845) (DB) (Lah), *Phula Singh* v. *Prem Singh.*

[*See* ('13) 20 Ind Cas 664 (664) (DB) (Cal), *Probhabati Dasi* v. *Taibaturinessa Chowdhurani.*]

[*See also* ('93) 6 C P L R 19 (21), *Vithoba* v. *Laxamangir.* (It is for the party who pleads fraud to prove it or to make out a very strong *prima facie* case before the onus can be shifted.)]

See also Note 38 to Section 3 and Note 19 to Art. 91.

the initial burden is upon him to establish the fraud and that by means of such fraud he was kept from knowledge of his right to seek relief.[2] Allegations of fraud must be *substantially* proved by the party making the same though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party must be unravelled.[3] Fraud, therefore, cannot be presumed until the person relying upon it establishes his case[3a] and the Courts must not be too ready to presume fraud from suspicious circumstances,[4] though a number of such circumstances may, when combined, lead to the inference of fraud.[5] When one kind of fraud is alleged, another kind of fraud cannot, upon failure of the proof of the fraud alleged, be substituted for it.[6]

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[2] ('39) 26 AIR 1939 Cal 663 (664, 665) : ILR (1939) 2 Cal 163 : 186 Ind Cas 335, *Abul Jamil* v. *Ambia Khatun.*

('38) 25 AIR 1938 Lah 577 (579) : 178 I. C. 504 (DB), *Nanak Chand* v. *Sardar Singh.*

('22) 9 AIR 1922 Cal 157 (158) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose.*

('24) 11 AIR 1924 Nag 94 (94) : 20 Nag L R 23 : 80 Ind Cas 590, *Ramchandra* v. *Hardeo.*

('29) 16 AIR 1929 Rang 62 (63) : 7 Rang 104 : 117 Ind Cas 63 (DB), *Bowrammah* v. *A. N. A. N. Chettiar.* (In certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected.)

('20) 7 AIR 1920 Pat 725 (725, 726) : 57 Ind Cas 404, *Jagdhar Missir* v. *Dhoroi Khatwa.*

('34) 21 AIR 1934 Lah 878 (879) : 155 I. C. 654 : 16 Lah 408 (DB), *Bhagwana* v. *Shadi.*

('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hassan Ali* v. *Gurudas Kapali.*

('27) 99 Ind Cas 946 (947) (Cal), *Kedar Hura* v. *Asutosh Roy.*

('14) 1 AIR 1914 Cal 728 (730) : 24 Ind Cas 249 (DB), *Jotindra Mohan* v. *Brojendra Kumar.*

('13) 20 Ind Cas 538 (539) (Oudh), *Kashiram* v. *Mt. Pragi.*

('19) 6 AIR 1919 Lah 152 (154) : 51 I. C. 447, *Bashi Ram* v. *Hassan Muhammad,*

('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra* v. *Anukul Biswas.*

('74) 22 Suth W R 479 (479, 480), *Nutun Singh* v. *Mogdhun Singh.*

('66) 6 Suth W R 165 (165) (DB), *Brindabun Doss* v. *Jugodessuree Chowdhrain.*

[*See* ('20) 7 AIR 1920 Cal 202 (203) : 56 Ind Cas 811, *Manulla Kolu* v. *Prasanna Kumar Sarkar.*]

[See however ('29) 16 AIR 1929 All 721 (723) : 122 I. C. 598 (DB), *Sri Kishen Pandey* v. *Ghana Nand Joshi.* (But if notwithstanding the fact that the plaintiff did in most specific terms allege in his suit the date and circumstances in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the date of the plaintiff's acquisition of knowledge, the burden of proving the date is not on the plaintiff.)]

See also Note 12 to Article 10.

[3] ('23) 10 AIR 1923 P C 73 (76) : 73 I. C. 391 (PC), *Satish Chandra Chatterjee* v. *Kumar Satish Kantha Roy.* (Fraud must be proved by facts or inferences from facts as a whole — Suspicions or surmises or conjuncture are no substitute for those facts—But fraud need not be exactly traced.)

[3a] ('82) 1882 All W N 7 (8) (DB), *Girdhar Lal* v. *Jaunatunnissa.*

('94) 21 Cal 612 (621) (DB), *Mohamed Golab* v. *Mohamed Suliman.* (A person who charges another with fraud must himself prove it — He is not relieved of this obligation because the defendant has told an untrue story.)

[4] ('03) 1903 Pun L R No. 27, p. 132 (133), *Bhagwan Das* v. *Ida.*

[5] ('98) 1898 Pun Re No. 12, *Abdul Rahim Khan* v. *Muhammad Yar.*

Once fraud is established, however, the burden will be shifted to the person who has committed the fraud to show that the person affected thereby had knowledge of the transaction beyond the period of limitation.[7] The leading case on the point is *Rahimbhoy* v.

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[6] ('87) 11 Bom 620 (643) : 14 Ind App 111 : 5 Sar 25 : 11 Ind Jur 352 (PC), *Abdul Hossein Zenail Abadi* v. *Charles Agnew Turner*.

('16) 3 AIR 1916 Cal 120 (123) : 35 I. C. 284 (DB), *Bansiram* v. *Secretary of State*.

('29) 16 AIR 1929 Bom 1 (5) : 53 Bom 75 : 113 Ind Cas 229 (DB), *Kondi Ravji Fadtare* v. *Chunilal Rupchand*.

('20) 7 AIR 1920 Cal 26 (32) : 55 Ind Cas 689 (DB), *Satish Kantha Roy* v. *Satish Chandra Chatterjee*.

('10) 6 Ind Cas 472 (472) : 37 Cal 856 (DB), *Rajendra Kumar* v. *Ganga Ram*. (But if relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some equity, a plaintiff may fail on the first but succeed on the latter alternative.)

[7] ('37) ILR (1937) 2 Cal 496 (499, 500): 41 Cal W N 993, *Charles De Sa Fragoso* v. *Meher Ali*.

('33) 20 AIR 1933 Nag 244 (246) : 144 Ind Cas 724, *Ramji Rao* v. *Maruti*.

('93) 17 Bom 341 (347) : 20 I. A. 1 : 6 Sar 256 : 17 Ind Jur 40 (PC), *Rahimbhoy Habibbhoy* v. *C. A. Turner*. (But that some clues and hints which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, do not amount to such knowledge as is required by this section.)

('14) 1 AIR 1914 Cal 728 (729): 24 Ind Cas 249 (DB), *Jotindra Mohan Roy Chowdhury* v. *Brojendra Kumar Datta Munshi*.

('05) 27 All 540 (543): 2 All L Jour 350 : 1905 All W N 88, *Sukh Lal* v. *Madhuri Prasad*.

('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu* v. *Mohanth Damodar Das*.

('15) 2 AIR 1915 Cal 268 (271): 27 I. C. 294 (DB), *Arjun Dass* v. *Gunendra Nath*.

('22) 9 AIR 1922 Cal 157 (158, 159) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta* v. *Promotha Nath Ghose*.

('34) 21 AIR 1934 Lah 878 (879) : 155 I.C. 654 : 16 Lah 408 (DB), *Bhagwana* v. *Shadi*.

('24) 11 AIR 1924 Nag 94 (94) : 80 I. C. 590 : 20 Nag L R 23, *Ramchandra* v. *Hardeo*.

('16) 3 AIR 1916 Cal 120 (123) : 35 I. C. 284 (DB), *Bansiram* v. *Secretary of State*.

('18) 5 AIR 1918 Cal 171 (173) : 46 Ind Cas 221 (DB), *Ram Kinkar Tewari* v. *Sthiti Ram Panja*.

('21) 8 AIR 1921 Cal 251 (252) : 60 Ind Cas 801 : 48 Cal 119 (DB), *Bhusan Mani Dasi* v. *Profulla Kristo Deb*.

('26) 13 AIR 1926 Cal 229 (230, 231) : 87 Ind Cas 555 (DB), *Nabin Chandra Haldar* v. *Bipin Chandra Haldar*.

('28) 15 AIR 1928 Cal 349 (350) : 108 Ind Cas 33 (DB), *Ramesh Chandra Patranabis* v. *Birajasundari Gupta*.

('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee* v. *Probodh Chandra*.

('33) 20 AIR 1933 Cal 339 (340) : 153 Ind Cas 284, *Ramizaddin Basar* v. *Naimaddi Basar*.

('35) 22 AIR 1935 Cal 779 (783) : 160 Ind Cas 250, *Jadu Nath Guha Roy* v. *Kasiswar Guha Roy*.

('04) 1904 Pun Re No. 34, *Gordhan Das* v. *Ahmad*.

('17) 4 AIR 1917 Pat 443 (445) : 41 Ind Cas 385 (DB), *Ram Pratap Lal* v. *Kesho Prasad Singh*.

('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mahabir Ram* v. *Rambahadur*.

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Turner,[8] decided by the Privy Council in the year 1892. In delivering the judgment of the Board, Lord Hobhouse observed as follows :

> "Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit."

In *Narayan Sahu* v. *Damodar Das*,[9] Jenkins, C. J., after citing *Rahimbhoy's case*,[8] observed that "fraud is a *continuing influence* and until that influence ends, it retains its power of mischief." It has accordingly been held in the undermentioned cases[10] that it is for the party guilty of fraud to show that the continuing effect of the fraud had been removed at a time too remote to allow a suit to be brought.

See also Note 17 to Article 95.

8. Fraud, if can be antecedent to the cause of action. — The fraud contemplated by this section is not confined to fraud committed at the inception of the cause of action, but may include fraud committed even before that date.[1] Thus, where fraud is committed by the decree-holder in execution proceedings taken for bringing the property of the judgment-debtor to sale, this section would apply to an application by the judgment-debtor to set aside the sale on the ground of fraud, though the right to apply only arises on the date of the sale and though no fresh act of fraud is proved at

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('29) 16 AIR 1929 Pat 228 (229) : 117 Ind Cas 46 (DB), *Babu Lal* v. *Parem Kumari*.

('10) 6 Ind Cas 154 (156) (DB) (Cal), *Basirruddin Mondal* v. *Sonaullah*.

('28) 112 Ind Cas 847 (848) (Lah), *Mt. Jamnat* v. *Abdul Rahman Khan*.

('13) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa Patil* v. *Basagowda Devappa Patil*.

('18) 5 AIR 1918 Mad 76 (78) : 44 Ind Cas 551 (DB), *Venkateswara Iyer* v. *A. P. Ri*.

See also Note 17 to Art. 95 and Note 18 to Art. 166.

[8] **('92) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (PC).**

[9] **('12) 16 Ind Cas 464 (465) (DB) (Cal).**

[*See also* ('29) 16 AIR 1929 Pat 228 (229) : 117 Ind Cas 46 (DB), *Babu Lal* v. *Parem Kumari*.

('25) 12 AIR 1925 Pat 521 (522) : 85 Ind Cas 622, *Bajrang Prasad Singh* v. *Mt. Sonejhari Kuer*.]

[10] **('24) 11 AIR 1924 Pat 496 (497) : 80 Ind Cas 761, *Thakur Mahton* v. *Jhaman Mahton*.**

('30) 17 AIR 1930 Pat 58 (60) : 123 Ind Cas 637, *Beas Singh* v. *Khedu Mian*.

('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mahabir Ram* v. *Rambahadur Dubey*.

('98) 1898 Pun Re No. 12, *Abdul Rahim Khan* v. *Muhammad Yar*.

Note 8

[1] **('25) 12 AIR 1925 Pat 521 (522) : 85 Ind Cas 622, *Bajrang Prasad Singh* v. *Mt. Sonejhari Kuer*.**

('12) 17 Ind Cas 972 (973) (DB) (Cal), *Tookoomoni Dasi* v. *Dwarakanath Dinda*. (The question of fraud should be considered as a whole.)

the date of the sale. The reason is that the fraud committed in the execution proceedings would have a *continuing* influence and would retain its power of mischief until that influence ends. If at the date of the cause of action the effect of the antecedent fraud continued so as to keep the person injured from knowledge of his right to seek relief, this section would clearly apply.[2] In *Narayan Sahu* v. *Damodar Das*,[3] Jenkins, C. J., held that the view that the fraud contemplated by the section was fraud committed at the inception of the cause of action and not an antecedent fraud, was not in consonance with the view expressed by their Lordships of the Privy Council in *Rahimbhoy* v. *Turner*.[4] The undermentioned cases,[5] which have taken the view that the fraud referred to in this section is confined to fraud at the inception of the cause of action, are, in view of the discussion above, not correct.

9. Pre-emption cases. — Where immediately after the sale, possession of the property sold was *openly* taken by the vendee and there was nothing to show that the sale was kept from the knowledge of the pre-emptor, it was held that it could not be said that there was any fraud within the meaning of the section,[1] even though the pre-emptor may not have known or may not have the means of knowing of the sale or of the change of possession under the sale.[2] Mere silence on the part of the vendor and vendee is not fraud.[3] Nor is the mere failure or omission to give the pre-emptor notice of the sale enough to bring the case within the section[4] as it does not amount

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[2] See cases cited in Note 10.

[3] ('12) 16 Ind Cas 464 (465) (DB) (Cal).
[*See also* ('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori Dasi* v. *Mukund*. (It is doubtful whether this section applies to a case in which the fraud is antecedent to the accrual of the right. According to 2 Ind Cas 844 it does not so apply, but 17 Bom 341 is against this view.)]

[4] ('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (PC).

[5] ('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra Mandal* v. *Anukul Biswas*. (Fraud in *bringing about* the sale is not enough—Question of limitation depends on what took place *after* the sale.)
('20) 7 AIR 1920 Pat 725 (725) : 57 Ind Cas 404, *Jagdhar Missir* v. *Dhorai Khatwa*. (Do.)

Note 9

[1] ('66) 1866 Pun Re No. 67, *Khazana* v. *Maigha Singh*.
('78) 1878 Pun Re No. 29, *Ram Dayal* v. *Beli Ram*.
[*See also* ('79) 1879 Pun Re No. 46, *Murad* v. *Bhag Singh*.]

[2] ('78) 1878 Pun Re No. 29, *Ram Dayal* v. *Beli Ram*.

[3] ('85) 1885 Pun Re No. 73, *Gauhri Mal* v. *Jainti Mal*.

[4] ('11) 11 Ind Cas 313 (313) (DB) (Lah), *Kaka Ram* v. *Muhammad Ali*.
('98) 1 Oudh Cas 262 (266), *Munna Lal* v. *Auseri Lal*.
('02) 1902 Pun Re No. 86 : 1903 Pun L R No. 4, *Ghulam Raza* v. *Sardar Khan*. (Where a person transferred his immovable property to his wife in lieu of dower by a registered deed and both were so conducting themselves in relation to the property that the pre-emptor was kept away from the knowledge of such transfer but it was proved that they had no intention to conceal the transfer from him

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to keeping the pre-emptor from a knowledge of his rights by means of fraud,[5] though an omission to issue a notice with the deliberate intention of keeping the pre-emptor from a knowledge of his right may amount to fraud.[6] Where there is an active concealment of the sale, as where the sale is ostensibly effected in favour of B but really in favour of M who actively conceals such fact, and the pre-emptor is thereby kept from knowledge of his right, this section would apply.[7] These conclusions clearly follow from the principles discussed in Notes 4 and 5 above.

10. Proceedings to set aside execution sales. — The principles discussed in Notes 4 to 8 will apply also to proceedings to set aside sales in execution of a decree. Where owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale is withheld from the judgment-debtor, the latter can invoke the aid of this section and apply within the period prescribed, reckoned from the date when he becomes aware

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and were able to explain their conduct, it was held that mere non-disclosure of the transaction could not be held to amount to fraud.)

('93) 1893 Pun Re No. 91, *Atma Ram* v. *Mehardil Khan.* (Even if the omission to give due notice is intentional.)

('83) 1883 Pun Re No. 120, *Ghiba* v. *Hayat.*

('81) 1881 Pun Re No. 32, *Arsala* v. *Yar Muhammad.* (Mere absence of a public notification of the sale.)

[5] ('83) 1883 Pun Re No. 120, *Ghiba* v. *Hayat.*

[6] ('11) 11 Ind Cas 313 (313) (DB) (Lah), *Kaka Ram* v. *Muhammad Ali.*

('98) 1 Oudh Cas 262 (266, 267), *Munna Lal* v. *Auseri Lal.* (In this connection the Judge remarked that in cases of contract when it is the duty of a person to speak, silence is accepted as sufficient proof of fraud.)

[7] ('11) 10 Ind Cas 114 (114) : 1911 Pun Re No. 89, *Ismail* v. *Boji.* (It is immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the plaintiff.)

[*See* ('39) 26 AIR 1939 All 113 (113, 114) : 180 Ind Cas 525, *Jagdish Rai* v. *Suraj Kumar.* (Small portion of land in another Tahsil included in sale deed along with property over which pre-emptor had right of pre-emption—Sale deed registered in such other Tahsil—To conceal fact of sale from pre-emptor, vendee not applying for mutation and neither getting possession nor recovering rent till after one year from registration—Vendee held guilty of fraud under S. 18.)

('37) 24 AIR 1937 Lah 97 (98) : I L R (1937) Lah 202 : 172 Ind Cas 104 (DB), *Ganesha* v. *Sadiq.* (Transaction of sale fraudulently described otherwise—Limitation begins to run from date on which fraud becomes known to pre-emptor.)

('29) 16 AIR 1929 All 213 (213, 214) : 115 Ind Cas 798 (DB), *Sheo Shanker* v. *Partab Narain.* (Pre-emption — Sale deed registered not in Tahsil in which property situate but in another tahsil—Stamp paper also purchased in another district several months before execution of document—No notice served on pre-emptor—Possession not taken for over a year after execution of sale deed — No mutation effected within one year from registration—Vendee held guilty of fraud —Pre-emptor held entitled to exclusion of such period.)

('98) 1898 Pun Re No. 12, *Abdul Rahim Khan* v. *Muhammad Yar.* (Sale deed registered at a place away from the village where land was situate — Attesting witnesses residents of other villages—Sale deed also described as mortgage deed —*Held* from these facts fraudulent concealment of sale could be inferred within meaning of this section.)]

of the sale.[1] The fact that the sale has been *confirmed* in ignorance of the fraud is no bar to the maintainability of the application.[2]

A mere failure to serve the judgment-debtor with the notice of sale[3] or a mere under-valuation of the property to be sold in the sale proclamation[4] is not by itself sufficient to justify the inference of fraud. But a supression of notices by a deliberate contrivance,[5] or a

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Note 10

[1] ('25) 12 AIR 1925 All 778 (779) : 88 Ind Cas 500 : 47 All 850 (DB), *Mt. Servai Begam* v. *Ram Chander Sarup.*

('14) 1 AIR 1914 Cal 728 (729, 730) : 24 Ind Cas 249 (DB), *Jotindra Mohun Roy Chowdhury* v. *Brojendra Kumar Datta Munshi.* (Fraudulent execution sale — It is not necessary to prove that there has been fraud subsequent to the execution sale.)

See also Note 18 to Art. 166.

[2] ('90) 17 Cal 769 (776) (FB), *Mohendra Narain Chaturaj* v. *Gopal Mondul.* (Dissenting from 14 Cal 679.)

('12) 16 Ind Cas 436 (436) (DB) (Cal), *Nilmoni Singh* v. *Brinda Dasya.*

('22) 9 AIR 1922 Pat 422 (423) : 70 Ind Cas 675, *Ram Pershad Lal* v. *Chamari Singh.*

('03) 30 Cal 142 (153) : 7 Cal W N 305 (DB), *Golam Ahad Chowdhry* v. *Judhister Chundra Shaha.*

('23) 10 AIR 1923 All 282 (283, 284) : 45 All 316 : 71 Ind Cas 631 (DB), *Sheo Ram Koeri* v. *Ikramunnissa Bibi.*

('28) 112 Ind Cas 847 (847) (Lah), *Mt. Jannat* v. *Abdul Rahman Khan.* (A I R 1923 All 282 followed.)

See also Note 18 to Art. 166.

[3] ('25) 12 AIR 1925 Pat 521 (521) : 85 Ind Cas 622, *Bajrang Prasad Singh* v. *Mt. Sonejhari Kuer.* (Fraud is essentially different from irregularity in the conduct of sale.)

('26) 13 AIR 1926 Pat 397 (398) : 97 Ind Cas 798 (DB), *Bihare Lal Mitter* v. *Tanuk Lal Mander.*

[4] ('39) 26 AIR 1939 Cal 663 (665) : I L R (1939) 2 Cal 163 : 186 Ind Cas 335, *Abul Jamil* v. *Ambia Khatun.*

('37) I L R (1937) 2 Cal 496 (500) : 41 Cal W N 993, *Charles De Sa Fragoso* v. *Meher Ali.* (Mis-statement of price of property in sale proclamation does not constitute fraudulent concealment.)

('11) 11 Ind Cas 295 (297) (DB) (Cal), *Rai Kishori Dasi* v. *Mukund Lall Dutt.*

('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu* v. *Damodar Das.* (Fraud is not to be lightly charged or lightly found — The mis-statement in an execution petition of the value of the property may be an irregularity; but assuming that it is a fraud, it does not constitute such frudulent concealment as is required by this section.)

('26) 13 AIR 1926 Cal 577 (578) : 91 Ind Cas 407 (DB), *Nripati Nath Bhattacharjee* v. *Jatindra Kumar Das.*

('22) 9 AIR 1922 Pat 507 (511) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri* v. *Deonandhan Prasad Singh.* (But a wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud.)

('02) 26 Bom 543 (549) : 4 Bom L R 249 (DB), *Chitambar* v. *Kristnappa.*

[5] ('24) 11 AIR 1924 Mad 859 (859) : 84 Ind Cas 970, *Pallayya* v. *Bhimaraju.*

('30) 17 AIR 1930 Mad 12 (15, 16) : 123 Ind Cas 24, *Chengalraya Reddi* v. *Kollapuri Reddi.*

wilful mis-statement of the value of the property to be sold, in the sale proclamation,[6] or a dishonest combination to obtain by artifice the property at a low value,[7] may amount to fraud. Where after the decree amount has been paid, the decree-holder brings the properties to sale and takes steps so that no notice of the sale may reach the judgment-debtor, this section will apply.[8]

As to whether it is necessary for the applicability of this section that the *auction purchaser* should have also been guilty of fraud, see Note 14.

11. "Document necessary to establish such right." — Where the right to a sum of money could be established on certain admitted facts, and a particular document is only evidence of the obligation, it cannot be said that the document is "necessary" to establish the right. Consequently, the fraudulent concealment thereof would not extend the time under this section.[1]

12. "Has been fraudulently concealed from him." — The words "has been fraudulently concealed from him" refer to a fraudulent concealment from the knowledge of the plaintiff or the applicant. In other words, the plaintiff or the applicant must, through the fraudulent concealment, be unaware of the existence of the document.[1]

13. Starting point. — The time limited for a suit or application will, in the cases contemplated in the section, be computed from the time *when the fraud becomes known* to the person injuriously affected

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('23) 10 AIR 1923 Mad 353 (354) : 72 Ind Cas 46 (DB), *Sheikh Muhammad Rowther* v. *Subba Naicker*. (Decree-holder not merely failing to serve the judgment-debtor with notice of sale but even after sale actively concealing from him the knowledge of his right to object to the sale.)

('24) 11 AIR 1924 Pat 496 (497, 498) : 80 Ind Cas 761, *Thakur Mahton* v. *Jhaman Mahton*.

[*See* ('26) 13 AIR 1926 Pat 397 (398) : 97 Ind Cas 798 (DB), *Bihare Lal Mitter* v. *Tanuk Lal Mander*.]

6. ('11) 11 Ind Cas 295 (297) (DB) (Cal), *Raikishori Dasi* v. *Mukund Lal Dutt*.

('22) 9 AIR 1922 Pat 507 (510, 511) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri* v. *Deonandhan Prasad Singh*.

('25) 12 AIR 1925 Pat 521 (521) : 85 Ind Cas 622, *Bajrang Prasad Singh* v. *Mt. Sonejhari Kuer*.

7. ('07) 6 Cal L Jour 111 (115, 116) (DB), *Ambika Prasad Singh* v. *R. H. Whitwell*.

8. ('28) 15 AIR 1928 All 354 (354) : 108 Ind Cas 899, *Jagdeo* v. *Ujiyari Kunwar*.

Note 11

1. ('74) 7 Mad H C R 22 (23, 24) (DB), *Lakshminarasu Pantulu* v. *Ankinid Bahadur*.

Note 12

1. ('74) 7 Mad H C R 22 (23, 24) (DB), *Lakshminarasu Pantulu* v. *Ankinid Bahadur*.

by the fraud.[1] The knowledge referred to is clear and *definite* knowledge of the facts constituting the particular fraud,[1a] and not a mere *suspicion*. It must be such knowledge as will enable the person defrauded to seek his remedy in Court.[2] Where this section is held to apply to a case *prima facie* barred by limitation, the Court must find exactly when the plaintiff got knowledge of the fraud : without a finding to that effect it cannot say that the suit is in time.[3]

The terms of this section are materially different from those of S. 26 of the English Real Property Limitation Act, 1833, (3 & 4 Will. IV, c. 27). Under the terms of the latter section, the right of the person defrauded to sue for relief would be deemed to have first accrued at and not before the time such fraud was, or *with reasonable diligence might have been*, discovered. But under this section, it is, however, clear that time will begin to run only when the fraud becomes *known*. Negligence in pursuing the means available for discovering the fraud will not, therefore, in this country start limitation running before the

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Note 13

[1] ('31) 18 AIR 1931 P C 12 (15) : 57 Ind App 251 : 128 Ind Cas 257 : 5 Luck 492 (P C), *Abdul Rahman* v. *Parsotam Das.*
('21) 8 AIR 1921 Cal 786 (789) : 70 Ind Cas 525 (DB), *Sarat Chandra Gupta* v. *Kanai Lal Chuckerbutty.*
('14) 1 AIR 1914 Lah 209 (209) : 23 Ind Cas 397, *Afzal Ali* v. *Aman Ali.*
('37) 24 AIR 1937 Lah 97 (98) : 172 Ind Cas 104 : ILR (1937) Lah 202 (DB), *Ganesha* v. *Sadiq.*
('93) 3 Mad L Jour 255 (257) (DB), *Iswara Pattar* v. *Karuppan.*
('15) 2 AIR 1915 Mad 150 (156) : 26 Ind Cas 369 (DB), *Grace Rosamund Rhodes* v. *Padmanabha Chettiar.*
('22) 9 AIR 1922 Pat 507 (509, 510) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri* v. *Deonandhan Prasad Singh.*
('83) 7 Bom 542 (545) (DB), *Collector of Broach* v. *Rajaram Laldas.*
('99) 3 Cal W N 333 (335) (DB), *Luchmipat* v. *Mt. Mandil Koer.*
('15) 2 AIR 1915 Cal 496 (498) : 26 I.C. 860, *Rajendra Kumar Ghosh* v. *Adinadi.*
('18) 5 AIR 1918 Cal 223 (225) : 42 Ind Cas 548 (DB), *Sarat Chandra Bose* v. *The Khararea Mezejula Zamindari Syndicate Ltd.*

[1a] ('22) 9 AIR 1922 Cal 157 (159) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose.*
('34) 21 AIR 1934 Lah 878 (879, 880) : 155 Ind Cas 654 : 16 Lah 408 (DB), *Bhagwana* v. *Shadi.*
('24) 11 AIR 1924 Nag 94 (94,95) : 20 Nag L R 23 : 80 Ind Cas 590, *Ramchandra* v. *Hardeo.*
('68) 9 Suth W R 329 (329) : 2 Beng L R A C 270 (DB), *Dhanpat Singh Dogar* v. *Rahman Mandal.*

[2] ('21) 8 AIR 1921 Cal 251 (252) : 48 Cal 119 : 60 Ind Cas 801 (DB), *Bhusan Mani Dasi* v. *Profulla Kristo Deb.* (Hearsay information is not knowledge.)
('90) 14 Bom 408 (414) (DB), *Rahimbhoy Habibbhoy* v. *C. A. Turner.*

[3] ('18) 5 AIR 1918 Cal 77 (78) : 48 Ind Cas 970 (DB), *Abha Munshi* v. *Komu Molla.*
('12) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa* v. *Basagowda Devappa.* (Court ought to have evidence of definite character to arrive at such finding.)
('68) 9 Suth W R 329 (329) : 2 Beng L R A C 270 (DB), *Dhanpat Sing Dogar* v. *Rahman Mandal.*

date of actual knowledge.[4] In *Rahimbhoy* v. *Turner*,[5] their Lordships of the Privy Council, in answer to the contention that the plaintiff had the means of discovering the fraud, but did not do so, observed as follows :

> " But their Lordships consider, — and in this they agree with both the Courts below — that all that the appellant Rahimbhoy has done is to show that some clues and hints reached the assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the assignee that the insolvent's estate had been defrauded by Rahimbhoy of these assets in the year 1867. "

In the case of a document necessary for establishing a right to sue or to apply, which is fraudulently concealed from the person having such right, time will run from the date when the plaintiff has the means of producing it or compelling its production.[6]

14. Against whom time can be extended. — Time will be extended under the section only as against *the person guilty of fraud,* or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.[1] It seems to be clear, therefore, that where an execution sale is brought about by the fraud of the decree-holder and the property is purchased by a third person in good faith and for valuable consideration, the period prescribed for an application to set aside the sale on the ground of fraud cannot be extended as against the auction purchaser,[2] though,

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4. ('38) 25 AIR 1938 Cal 263 (266, 267) : ILR (1938) 1 Cal 512 : 182 Ind Cas 244 (DB), *Chaitanya* v. *Ranjit.* (Mere fact that some hints and clues reach plaintiff which if followed up might lead to complete knowledge of fraud is not enough.)
('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (P C), *Rahimbhoy Habibbhoy* v. *C. A. Turner.*
('22) 9 AIR 1922 Cal 157 (159) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta* v. *Promotho Nath Ghose.*
('35) 22 AIR 1935 Cal 779 (783): 160 Ind Cas 250, *Jadu Nath Guha* v. *Kasiswar.*
('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi* v. *Probodh Chandra.*
('90) 1890 Bom P J 268 (DB), *Jetha* v. *Rupchand.* (Question under this section is not whether plaintiff had the means of ascertaining the truth, but whether he had, by means of fraud on the part of the defendant, been kept from the knowledge of his right.)
('34) 21 AIR 1934 Lah 878 (879) : 155 Ind Cas 654 : 16 Lah 408 (DB), *Bhagwana* v. *Shadi.*
('12) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa* v. *Basagowda Devappa.*
5. ('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (P C).
6. ('74) 7 Mad H C R 22 (23) (DB), *Lakhshminarasu* v. *Ankinid Bahadur.*

Note 14

1. ('40) 27 AIR 1940 Cal 207 (208) : 188 Ind Cas 169 (DB), *Dhirendra Nath* v. *Charu Chandra.* (Bengal Public Demands Recovery Act of 1913, S. 36—Suit by certificate-debtor to set aside sale in execution of certificate—Fraud of auction-purchaser cannot extend limitation against certificate-holder.)
('36) 23 AIR 1936 Cal 706 (707) : 166 Ind Cas 127, *Majaharali* v. *Mafijaddi Sardar.* (44 C L J 565 relied on.)
('76) 2 Cal 1 (18): 25 Suth W R 425 (DB), *Ramdoyal Khan* v. *Ajoodhia Ram Khan.*
2. (36) 23 AIR 1936 Cal 706 (707) : 166 Ind Cas 127, *Majaharali* v. *Mafijaddi Sardar.* (Fraud of decree-holder—Purchase *bona fide*—Section 18 does not apply to an application to set aside the sale.)
('16) 3 AIR 1916 Mad 33 (38) : 38 Mad 1076 : 29 Ind Cas 314 (DB), *Pasumarti Payidanna* v. *Lakshminarasamma.*
('09) 2 Ind Cas 844 (845): 36 Cal 654 (DB), *Purna Chandra Mandal* v. *Anukul.*

if an application is filed within the prescribed period, it is not necessary in order to set aside the sale under the provisions of O. 21 R. 90 of the Code of Civil Procedure that the purchaser should also be guilty of fraud. A contrary view has been expressed in the undermentioned cases[3] that it is not necessary for the applicability of *this section* that the purchaser should also be guilty of fraud. It is submitted that such a view is against the plain provisions of this section and is not correct.

Where the decree-holder is not guilty of fraud but the auction purchaser is, does the section apply so as to extend the time for an application against either to set aside the sale? There is a difference of opinion on the point. It was held in the undermentioned case[4] that it will not apply, while a contrary view has been held in the cases noted below.[5] It is submitted that the latter view is correct. The application so far as it is against the auction purchaser guilty of fraud will be clearly governed by this section and will not be barred. The fact that the application so far as it was against the decree-holder would be barred, cannot take away the right of the applicant to set aside the sale on the ground of the fraud of the auction purchaser.

See also Note 18 to Article 166.

15. Applicability of the section to period fixed by S. 48, Civil Procedure Code. — There is a divergence of judicial views as to the applicability of the general provisions of the Limitation Act to the calculation of the twelve years period prescribed by S. 48 of the Civil Procedure Code. (See S. 29 Note 6a.)

But S. 48 of the Civil Procedure Code itself provides that the Court can order the execution of a decree upon an application presented after the expiration of the term of twelve years referred to in it, where the judgment-debtor has, by *fraud* or force, *prevented* the execution of the decree at some time within twelve years immediately before the date of the application. The "fraud" referred to therein is not the fraud referred to in this section, namely an active fraud intended to keep the applicant from *knowledge of his right to apply*, but is a fraud which prevents *exercise* of the right to apply. For a full discussion, see Note 15 to S. 48 of the Authors' Commentary on the Code of Civil Procedure, 3rd Edn.

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[3] ('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mahabir Ram* v. *Rambahadur Dubey*. (Fraud in publishing and conducting sale—Not necessary that purchaser should be guilty of fraud in order to apply Section 18.)
('28) 15 AIR 1928 All 354 (354) : 108 Ind Cas 899, *Jagdeo* v. *Ujiyari Kunwar*.
('27) 99 Ind Cas 946 (947) (Cal), *Kedar Hura* v. *Asutosh Roy*.

[4] ('25) 12 AIR 1925 Cal 1227 (1228) : 86 Ind Cas 745 (DB), *Azizannessa* v. *Dwarka Prosad*.

[5] ('33) 20 AIR 1933 Mad 626 (627) : 56 Mad 734 : 145 Ind Cas 388 (DB), *Pulla Reddi* v. *Pattabhirama Reddi*. (AIR 1925 Cal 1227 not followed.)
('35) 22 AIR 1935 Cal 89 (90) : 154 Ind Cas 347 (DB), *Parthasarathi Ray* v. *Ahindra Nath Ray*. (Where auction-purchaser along with some of the judgment-debtors, is guilty of fraud, the applicants can avail themselves of the provisions of this section.)

19.* *(1)* Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Effect of acknowledgment in writing.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, I of 1872, oral evidence of its contents shall not be received.

*** Act of 1877 : S. 19.**

19. If, before the expiration of the period prescribed for a suit or application, in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

Effect of acknowledgment in writing.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1. — For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2. — In this section 'signed' means signed either personally or by an agent duly authorized in this behalf.

Act of 1871 : S. 20 and Art. 148.

20. *(a)* No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

Effect of acknowledgment in writing.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt

Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II.—For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III. — For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

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or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee ;

but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor *A*. *Z* affixes his seal, but does not sign the letter :

Z pays part of the debt and promises orally to pay the rest :

Z publishes an advertisement, requesting his creditors to bring in their claims for examination :

In none of these cases is the debt taken out of the operation of this Act.

148. Against a mortgagee to recover possession of immoveable property mortgaged.	Sixty years.	The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment.

Act of 1859 : S. 4 and S. 1 cl. 15.

Revival of right to sue by admission in writing.

4. If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission :

Proviso.

Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Synopsis

1. Legislative changes.
2. Acknowledgment of liability made under prior enactment — Test of sufficiency.
3. English law.
4. Principle of the section.
5. Distinction between Sections 19 and 20.
6. Distinction between this section and Article 183. See Section 20 Note 37.
7. Acknowledgment does not confer title.
8. Acknowledgment, if operates as fresh contract.

8a. Acknowledgment, if operates as fresh cause of action. See Note 8.

9. Distinction between this section and Section 25, clause 3, Contract Act.
10. Acknowledgment and accounts stated — Distinction between. See Note 3 under Art. 64.
11. Section to be liberally construed.
12. "Before the expiration of the period prescribed for a suit or application."
13. Acknowledgment made under prior Act — Meaning of expression "period prescribed," with respect to such acknowledgment.
14. Applicability of section to period prescribed by special or local law.
15. Applicability of section to period of twelve years under Section 48 of the Civil Procedure Code.
16. "Suit or application in respect of any property or right."
17. "Application."
18. "Acknowledgment of liability" — Essentials.
19. Conditional acknowledgment of liability.
20. Acknowledgment of past liability.
21. Admission of execution of document, whether implies admission of liability under it.
22. Admission of execution of document before Sub-Registrar.
23. Submission to arbitration, if can be acknowledgment. See Note 19.
24. Admission of existence of open and unsettled accounts, whether acknowledgment. See Note 19.
25. Acknowledgment, if may be made by a person who is not liable at the time of the acknowledgment.
26. Acknowledgment must be in respect of the particular property or right claimed in the suit or application.
27. Acknowledgment of anything includes acknowledgment of its legal consequences.
28. Acknowledgment of liability with reference to portion of claim made by plaintiff — Effect.
29. Acknowledgment of liability in respect of promissory note, whether available in respect of original cause of action.
30. "In writing."
31. "Signed."
32. Admissibility of external evidence for construction of documents alleged to contain acknowledgments of liability.
33. "Party against whom such property or right is claimed."
34. "Person through whom he derives title or liability."
35. Acknowledgment of mortgage by mortgagor, whether binds transferees of the equity of redemption claiming under transfers made prior to acknowledgment.

Section 1, clause 15 * * * *
or if in the meantime an acknowledgment of the title of the depositor, pawnor, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

    36. Renewal of first mortgage after second mortgage — Effect.
37. "Fresh period of limitation shall be computed from the time when the acknowledgment was so signed."
38. Admissibility of oral evidence as to date of acknowledgment — Sub-section (2).
39. Oral evidence of contents of acknowledgment — Sub-s. (2).
40. Oral evidence of the factum of acknowledgment.
41. Admissibility of evidence for contradicting or varying, etc., matters stated in document containing acknowledgment of liability.
42. Acknowledgment need not specify exact nature of property or right. See Note 26.
43. Acknowledgment of liability coupled with averment that time for payment, etc., has not yet come.
44. Acknowledgment of liability may be accompanied by refusal to pay, etc.
45. Acknowledgment of liability coupled with a claim of set-off.
46. Acknowledgment not addressed to person entitled, sufficiency of—Explanation I.
    47. Admission contained in document addressed to Court.
    48. Admission contained in deposition of witness.
    49. Entry in Settlement Record, etc.
50. Explanation II : Acknowledgment by agent.
    51. Acknowledgment of liability by pleader on behalf of client.
    52. Acknowledgment by receiver.
    53. Acknowledgment of liability by Official Assignee — Effect.
    54. Acknowledgment by one of several co-judgment-debtors.
    55. Acknowledgment of liability by administrator.
    56. Acknowledgment by executor.
    57. Acknowledgment, if may be made by Court.
    58. Acknowledgment by Court of Wards.
    59. Acknowledgment by one of several co-heirs, if binds others. See Note 8 to S. 21.
    60. Acknowledgment on behalf of Hindu joint family. See Notes to S. 21.
    61. Acknowledgment by manager of Malabar tarwad. See Note 21 to S. 21.
    62. Husband and wife—Authority to acknowledge on each other's behalf.
63. Applicability of section to applications for execution.
64. Promissory note for pre-existing debt, if can be used as acknowledgment of liability in suit on original cause of action.
65. Admission of liability by person in adverse possession.
66. Acknowledgment contained in letter marked "without prejudice."
67. Material alteration of document containing acknowledgment.
68. Acknowledgment contained in document thirty years old.
69. Acknowledgment under circumstances that would vitiate contract.
70. Acknowledgment made in official confidence.
71. Mortgage invalid under tenancy laws, if can operate as acknowledgment of liability.
72. Offer of Collector under Section 16 of Bombay Court of Wards Act, if acknowledgment.
73. Agreement to extend time for performance of contract.
73a. Suit based on default clause in mortgage deed, etc.
74. Stamp.
75. Registration.
76. Onus of proof.
77. Pleading.
78. Acknowledgment, whether question of law or fact.

Other Topics (miscellaneous)

Acknowledgment and promise to pay. See Notes 8 and 9.
Acknowledgment by minor. See Note 69.
Acknowledgment by telegram. See Note 31.
Acknowledgment in agreement of reference to arbitration. See Note 46.
Acknowledgment in letter to attorney of creditor. See Note 46.
Acknowledgment in plaint and written statement. See Note 47.
Acknowledgment in schedule of creditors in insolvency proceedings. See Note 47.
Acknowledgment in unregistered document compulsorily registrable. See Note 75.
Acknowledgment in will. See Note 46.
Acknowledgments pertaining to execution proceedings. See Notes 47 and 51.
Admission of correctness of account and requesting for time for payment. See Note 18.
Application for extension of time for payment of decretal amount. See Note 47.
Assertion of claim coupled with admission of right to set off—No acknowledgment. See Note 45.
Authority to borrow or to settle and pay claims includes authority to acknowledge. See Note 50.
Date given scored out—Admissibility of oral evidence. See Note 38.
Extra time under S. 4 — Not part of period prescribed. See Note 12.
Payment and acknowledgment. See Notes 5 and 30.
Unstamped or insufficiently stamped acknowledgments. See Notes 29, 64 and 74.

1. Legislative changes.

The law prior to Act of 1859:

The doctrine of an acknowledgment of liability, as an exception to the bar of limitation, was recognised in various portions of British Indian law even prior to the coming into force of the Act of 1859. For instance, under the exception to Cl. (14) of the Bengal Regulation III of 1793, clear and positive proof that the plaintiff asserted his claim within the period of limitation and that the defendant had admitted this claim to be as of right, was sufficient to save limitation under that section.[1] Analogous provisions were also contained in the Madras Regulation II of 1802[2] and the Punjab Code.[3]

Differences between Acts of 1859 and 1871:

(1) Under S. 4 of the Act of 1859, an acknowledgment by the *agent* of the debtor was not sufficient,[4] whereas such acknowledgment was sufficient under S. 20 of the Act of 1871.

Section 19 — Note 1

[1] ('69) 13 Moo Ind App 37 (53) : 12 Suth W R P C 36 : 3 Beng L R P C 37 : 2 Suther 261 : 2 Sar 479 (PC), *Gopeekishen Goshamee* v. *Bindabunchunder Sircar.*
(1859-61) 8 Moo Ind App 225 (235) : 3 Suth W R P C 31 : 1 Suther 405 : 1 Sar 749 (PC), *Government of Bengal* v. *Mt. Shurruffutoonnissa.*

[2] (1855) 6 Moo Ind App 232 (249) : 1 Sar 536 (PC), *Rajah Bommarauze Bahadoor* v. *Rangasamy Mudaly.*

[3] ('66) 5 Suth W R P C 18 (20, 21) : 10 Moo Ind App 362 : 1 Suther 612 : 2 Sar 160 (PC), *Shah Mukkun Lal* v. *Imtiazooddowlah.*
('70) 1870 Pun Re No. 25, *Shahzadha Gholam Mahomad* v. *Bheem Sein.*

[4] (1864) 2 Mad H C R 84 (87), *Raja Isvara Das* v. *Richardson.*
('67) 8 Suth W R 1 (1) (DB), *Budoobhoosun Bose* v. *Enaet Moonshee.*
('68) 10 Suth W R 175 (176) (DB), *Shaikh Reazoodeen* v. *Collector of Cuttack.*
('69) 6 Bom H C R O C 67 (70), *Purshotam Mancharam* v. *Mirza Abdul Latif.*
('81) 6 Cal 340 (347, 348) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree.*

(2) Section 20 of the Act of 1871 required that the acknowledgment should be made *before the expiry of the prescribed period* of limitation, while such a provision did not exist in S. 4 of the Act of 1859.[5]

(3) Section 20 of the Act of 1871 referred to a "*promise* or acknowledgment," while section 4 of the Act of 1859 only referred to an "acknowledgment."

(4) Clause (c) of section 20 of the Act of 1871 which dealt with the admissibility of oral evidence as to the date and contents of an acknowledgment was new; there was no such provision in S. 4 of the Act of 1859.

(5) Explanation I to S. 20 of the Act of 1871 (corresponding to explanation I to S. 19 of the Acts of 1877 and 1908) was newly added in the Act of 1871. Nevertheless, the principles embodied in the above explanation were given effect to in the decisions on S. 4 of the Act of 1859. Thus, it was held under that section that an acknowledgment addressed to a third party was sufficient.[6] Similarly, it was held that a *promise* to pay, express or implied, was not necessary to constitute an acknowledgment under that section.[7] So also, it was held that an admission of liability for a debt would be sufficient under that section although it was accompanied by a statement that the time for payment had not yet come.[7a]

(6) Section 20 of the Act of 1871 required "an express undertaking to pay or deliver the debt or legacy or an unqualified admission of the liability as subsisting." Section 4 of the Act of 1859 required

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[5] ('75-77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghoji Bhikaji* v. *Abdul Karim.*

('75) 24 Suth W R 282 (284) (DB), *Heera Lall Mookerjee* v. *Roy Dhunput Singh.*

('67) 3 Mad H C R 308 (310) (DB), *John Young* v. *Mangalapilly Ramaiya.* (It is probably the better opinion that an admission made after an action brought will suffice.)

[*See also* ('74) 6 N W P H C R 306 (306, 307) (DB), *Uncovenanted Service Bank* v. *Marshall.*]

[6] ('69) 4 Mad H C R 385 (391) (DB), *Nijamudin* v. *Mahammadali.*

(1865) 3 Suth W R S C C Ref 6 (7) (DB), *Huro Chunder Roy* v. *Monee Mohinee Dossee.*

('68) 5 Bom H C R A C 176 (178, 179) (DB), *Ahiloji Khandoji* v. *Dongar Harichand Gujar.*

('70) 6 Beng L R 299 (301, 302), *Madhusudan Chowdhry* v. *Brajanath Chandra.*

[7] ('72) 6 Mad H C R 197 (200) (DB), *Hirada Karibasappa* v. *Gadigi Muddappa.*

('69) 4 Mad H C R 385 (390, 391, 392) (DB), *Nijamudin* v. *Mahamadali.*

('67) 3 Mad H C R 308 (309, 311) (DB), *John Young* v. *Mangalapilly Ramaiya.*

(1865) 2 Mad H C R 307 (309, 310) (DB), *Kristna Row* v. *Hachhappa Sugapa.* (It is left to the Court to decide in each case whether the written acknowledgment, reasonably construed, contains a sufficient admission that the debt or part of it is due.)

[7a] ('69) 4 Mad H C R 385 (391) (DB), *Nijamudin* v. *Mahamadali.*

('67) 3 Mad H C R 308 (311) (DB), *John Young* v. *Mangalapilly Ramaiya.*

an acknowledgment admitting that "the debt or legacy or any part thereof is due."[8]

(7) The proviso to section 4 of the Act of 1859 (corresponding to S. 21, sub-s. (2) of the present Act) was differently worded from the corresponding portion (explanation II) of S. 20 of the Act of 1871. (See Notes under S. 21.)

(8) The illustrations to S. 20 of the Act of 1871 were new.

(9) Both S. 4 of the Act of 1859 and S. 20 of the Act of 1871 applied only to "*debts and legacies.*" But S. 1, cl. (15) of the Act of 1859 and Arts. 147 and 148 of the Act of 1871 which prescribed the period of limitation for suits against a depositary, pawnee or mortgagee for the recovery of property moveable or immovable, contained provisions for allowing a longer period where there was an acknowledgment of liability. These two sets of provisions differed from each other in the following respect:

> While S. 1, cl. (15) of the Act of 1859 provided a period of sixty years or thirty years according as the property was immovable or moveable unless there was an acknowledgment of liability "*in the meantime,*"[9] Arts. 147 and 148 of the Act of 1871 required that the acknowledgment should be made "*before the expiration of the prescribed period.*"[10]

Differences between Acts of 1871 and 1877:

(1) Section 19 of the Act of 1877 applied to acknowledgments in respect of "*any property or right,*" while S. 20 of the Act of 1871 (and S. 4 of the Act of 1859) only applied to acknowledgments in regard to "*debts or legacies.*"[11]

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[8] ('74) 6 N W P H C R 306 (307) (DB), *Uncovenanted Service Bank* v. *Marshall.*
('70) 2 N W P H C R 403 (404) (DB), *Gash* v. *Mclean.*
('67) 3 Mad H C R 308 (310) (DB), *John Young* v. *Mangalapilly Ramaiya.*

[9] ('82) 5 Mad 182 (183) (DB), *Mukkanni* v. *Manan Bhatta.* (The expression "in the meantime" referred to the period of sixty years from the date of the mortgage.)
('84) 1884 Pun Re No. 109, *Sheodan* v. *Surjit.* (Do.)
('03) 1903 Pun L R No. 82, p. 321 (324), *Bhag Mal* v. *Dhouna.* (Do.)
('18) 5 AIR 1918 Mad 86 (87, 88) : 43 Ind Cas 50 (DB), *Raman Kurup* v. *Chappan Nair.* (Do.)
('71) 3 N W P H C R 119 (120) (DB), *Mahomed Abdool Ruzzah* v. *Asif Ali Shah.* (Do.)
('85) 1885 All W N 194 (194) (DB), *Munirruddin* v. *Muhammad Kaim.* (Do.)
[But see ('71) 6 Mad H C R 267 (270) (DB), *Narain* v. *Ukkoma.* (The Act does not require that the acknowledgment should be made at any *particular time.*)]

[10] ('75-77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Daia Chand* v. *Sarfraz Ali.* (Decision under Act of 1871 — Acknowledgment made before coming into force of Act of 1859—As there was no period of limitation for a suit for redemption before the above Act, the acknowledgment must be deemed to have been made before the expiration of the "prescribed period" within the meaning of Article 148 of Act of 1871 notwithstanding that the date of the mortgage may not be known.)

[11] ('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amarchand Rajaram* v. *Narayan Vishnu.* (Section 20 of Act of 1871 did not apply to an acknowledgment of a mortgage by a mortgagee.)

(2) Section 19 of the Act of 1877 referred to an *acknowledgment* of liability in respect of a right or property, while S. 20 of the Act of 1871 referred to a *promise*[12] or *acknowledgment.*

(3) Section 19 of the Act of 1877 applied also to acknowledgments made by a person from whom the defendant derived his title or liability, while S. 20 of the Act of 1871 did not apply to such acknowledgments.[13]

(4) Section 20 of the Act of 1871 provided that oral evidence of the contents of a document containing an acknowledgment could not be given *where the document was alleged to have been destroyed or lost.* The words as to the document being alleged to be destroyed or lost were omitted in S. 19 of the Act of 1877.[14]

(5) Section 20 of the Act of 1871 provided that a promise or acknowledgment might be sufficient though it omitted to specify the exact *amount* of the debt or legacy. Section 19 of the Act of 1877 provided that the acknowledgment might be sufficient though it omitted to specify the exact *nature* of the property or right.

(6) Section 19 of the Act of 1877 required in the case of an acknowledgment by an agent that the agent must be "*duly*" authorised in this behalf. Section 20 of the Act of 1871 required that the agent must be *generally or specially* authorised in this behalf.

(7) Section 20 of the Act of 1871 provided that the promise or acknowledgment under it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.[15] This provision was omitted in section 19 of the Act of 1877.[16]

[*See* ('68) 5 Bom H C R A C 50 (54) (DB), *Amritrav* v. *Anyaba.* (Acknowledgment of right to share in vatan not within S. 4 of Act of 1859.)

('72) 17 Suth W R 271 (272) (DB), *Lalla Doorga Pershad* v. *Lalla Luchman Sahoy.* (Acknowledgment of title to land is not acknowledgment of debt or legacy.)]

[12] ('75-77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghoji Bhikaji* v. *Abdul Karim.* (The "promise" referred to is not a *new contract* but one introduced by way of an exception to the statute with reference to the *original cause of action.*)

('78-80) 2 Bom 230 (231) : 1877 Bom P J 237 (DB), *Chatur Jagsi* v. *Tulsi.* (Do.)

('75) 23 Suth W R 462 (462) (DB), *Tara Soonduree Kuloonee* v. *Bhoobun Chunder Ghose.*

[13] ('35) 22 AIR 1935 Mad 899 (901) : 161 Ind Cas 924 (DB), *Modhugari Narayana* v. *Venkataramanna Patnaik.*

[14] ('88) 12 Bom 268 (269, 270) (DB), *Ziulnissa Ladlim Begam* v. *Motidev Ratandev.* (Oral evidence is not admissible even where the writing containing the acknowledgment has been returned to the debtor.)

[15] ('78) 1 All 683 (685) (DB), *Mathura Das* v. *Babu Lal.* (Letter admitting the existence of a debt due to the plaintiff but not admitting that the amount claimed by the plaintiff is correct is unqualified admission of existence of debt.)

[16] ('87) 10 Mad 259 (264, 265) (DB), *Sitayya* v. *Rangareddi.* (Hence, an admission of liability qualified by a condition would be within S. 19 of the Act of 1877

(8) The provision in S. 20 of the Act of 1871 as to one partner or executor not being bound by an acknowledgment by another partner or executor, was omitted in S. 19 of the Act of 1877 and was removed to S. 21 of that Act. (See Notes under S. 21.)

(9) The illustrations to S. 20 of the Act of 1871 were omitted in S. 19 of the Act of 1877.

(10) The separate provisions as to acknowledgments in Arts. 147 and 148 of the Act of 1871 were omitted in the Act of 1877. At the same time, as already said in para. 1 above, the scope of S. 19 of the Act of 1877 was made wider than that of S. 20 of the Act of 1871, so as to make it applicable to all suits in respect of any property or right and not merely to suits for debts and legacies as was the case under the previous Act. The chief points of distinction between the relevant portions of the above articles and the corresponding provision in the Act of 1859, viz., S. 1 cl. (15) on the one hand, and S. 19 of the Act of 1877 on the other, which superseded them, were as follows :

(a) The former provisions required an acknowledgment of the title of the mortgagor, depositor or pawnor *or* of his right of redemption.[17] But S. 19 of the Act of 1877 required an acknowledgment of *liability* in respect of such property or right.[18]

(b) The former provisions did not recognise acknowledgments by the agent of the mortgagee, depositary or pawnee,[19] but S. 19 of the Act of 1877 recognised such acknowledgments.

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while it would not be within the Act of 1871 or that of 1859 under which an acknowledgment that a debt is due was necessary.)

[17] ('70-71) 6 Mad H C R 267 (269, 270) (DB), *Narraina Tantri* v. *Ukkoma*. (Relationship of mortgagor and mortgagee was admitted but the right to redeem was denied—*Held*, that this was sufficient.)

[18] ('85) 1885 All W N 211 (212, 213) (DB), *Bisheshar* v. *Bhagirattu Ram*.

[19] ('73) 20 Suth W R 375 (376, 377) : 13 Beng L R 177 (PC), *Luchmee Buksh Roy* v. *Runjeet Ram Pandey*.

('11) 12 Ind Cas 604 (604, 605) : 34 All 109 (DB), *Zaib-un-nissa Bibi* v. *Prabhu Narain Singh*.

('85) 1885 All W N 194 (194) (DB), *Muniruddin* v. *Muhammad Kaim*.

('83) 1883 All W N 202 (202) (DB), *Kidar Nath* v. *Ulfat Rai*.

('97) 1 Cal W N 513 (516) (DB), *Sundar Das* v. *Fatimatunissa Begam*.

('69) 12 Suth W R 443 (444) (DB), *Lutchmee Buksh Roy* v. *Pandey Ranjeet Ram*.

('28) 15 AIR 1928 Bom 28 (29, 30) : 107 Ind Cas 60 (DB), *Naragan Balaji* v. *Govind Sakharam*.

('77) 1 All 642 (643) (DB), *Rahmani Bibi* v. *Hulasa Kuar*.

('88) 1888 Pun Re No. 157, *Hakikat Rai* v. *Ganga Das*.

('04) 1 All L Jour 355 (357) (DB), *Hanuman Prasad* v. *Raghunandan Singh*.

[*See* ('25) 12 AIR 1925 All 176 (177, 178) : 85 Ind Cas 633, *Ganga Ram* v. *Lachman Singh*.]

(c) The former provisions required that the acknowledgment should be made by the mortgagee, depositary or pawnee or by some person claiming under him.[20] But S. 19 of the Act of 1877 required that the acknowledgment should be made by the party against whom the property or right (in respect of which the acknowledgment was made) was claimed or by some person through whom he derived his title or liability.

(d) The former provisions did not contain any provision analogous to the second paragraph of S. 19 of the Act of 1877 which dealt with the question of the admissibility of oral evidence as to the date or contents of the writing containing the acknowledgment.

(e) The former provisions did not also contain any provision similar to any of those contained in explanation I to S. 19 of the Act of 1877. Nevertheless, some of the principles embodied in explanation I were followed in the decisions on the above provisions. For instance, although there was no provision in S. 1, cl. (15) of the Act of 1859 that an acknowledgment addressed to a third person was sufficient, it was held in cases decided under that clause that such acknowledgment was sufficient.[21]

Differences between Acts of 1877 and 1908:

(1) The words "according to the nature of the original liability" which occurred after the words "a new period of limitation" and before the words "shall be computed"[22] have been omitted.

[*See also* ('68) 3 Agra 255 (257) (DB), *Esree Singh* v. *Bishesher Singh*. (By virtue of cl. 1 of S. 12, Regn. 27 of 1814, it was held that the act of the vakil in acknowledging was the act of the mortgagee himself.)]

20. ('15) 2 AIR 1915 Mad 951 (951) : 26 Ind Cas 127 (DB), *Muhammade* v. *Mayi Kunhi Haji*. (Anandravan cannot be said to be claiming under karnavan to extend limitation by acknowledgment of mortgage.)

('09) 3 Ind Cas 725 (727) : 32 All 33 (DB), *Shib Shankar Lal* v. *Soni Ram*.

('1900) 1900 Pun Re No. 62, *Bhawani Das* v. *Muhammad Yusaf*. (Acknowledgment by father—Mortgage—Joint Hindu family.)

('80) 1880 Pun Re No. 32, *Lala Mal* v. *Ghulam Mahomed*. (A sub-mortgagee could not be said to be "claiming under" the mortgagee.)

('80) 1880 Pun Re No. 85, *Hakim Devi Dyal* v. *Prab Dyal*.

21. ('68) 3 Agra 255 (257) (DB), *Esree Singh* v. *Bishesher Singh*.

('71) 3 N W P H C R 78 (79) (DB), *Ali Hossein* v. *Ram Dyal*.

('1865) 3 Suth W R 3 (4) (DB), *Dur Gopal Singh* v. *Kasheeram Pandey*.

('68-69) 4 Mad H C R 359 (364, 365) (DB), *Kunhi Kutti Nair* v. *Kunhammad Kutty Maraccar*.

('70) 6 Mad H C R 267 (270) (DB), *Narraina Tantri* v. *Ukkoma*.

[*See also* (1900) 27 Cal 1004 (1011, 1012) : 4 Cal W N 565 : 27 Ind App 103 : 7 Sar 718 (PC), *Fatimatulnissa* v. *Sunder Das*.]

22. ('66) 5 Suth W R S C C Ref 3 (4) (DB), *Nobin Chunder Moozoomdar* v. *T. J. Kenney*. (Case under 1859 Act which resembled Act of 1877 in this respect.)

(2) The provision in cl. (2) excluding oral evidence of the contents of a writing which embodies an acknowledgment of liability has been qualified by the introduction of the words "subject to the provisions of the Indian Evidence Act, 1872" which did not occur in the Act of 1877.

(3) Explanation III is new.

2. Acknowledgment of liability made under prior enactment — Test of sufficiency. — It is a settled principle that the law of limitation applicable to a suit is the law in force at the time of the institution of the suit, although the acknowledgment relied on may have been made while a previous enactment was in force. The validity and sufficiency of such acknowledgment must, therefore, be determined in accordance with the provisions of the law in force at the time of the *institution* of the suit.[1] But, there is one exception to this rule, viz., that where the acknowledgment was not sufficient according to the provisions of the prior enactment, with the consequence that the right to sue had become barred at the time of the coming into force of the Act under which the suit was instituted, such later Act cannot revive the right of suit.[2] (See Preamble Note 15.)

See also Note 13.

Note 2

1. ('13) 19 Ind Cas 291 (294, 295) : 35 All 227 : 40 Ind App 74 (PC), ***Sonilal* v. *Kanhaiya Lal.***

('25) 12 AIR 1925 All 176 (177, 178) : 85 Ind Cas 633, ***Ganga Ram* v. *Lachman Singh.***

('11) 12 Ind Cas 604 (605): 34 All 109 (DB), ***Zaib-un-nissa Bibi* v. *Prabhu Narain Singh.*** **(Acknowledgment made by agent when Act of 1859 was in force, though invalid, is valid under the Act of 1908.)**

('32) 19 AIR 1932 Bom 531 (533) : 139 Ind Cas 218, ***Amarchand* v. *Narayan.***

('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), ***Shib ShankarLal* v. *Soni Ram.***

('33) 20 AIR 1933 Lah 47 (47, 48) : 141 Ind Cas 425, ***Punjab Ram* v. *Jowaya.***

('77) 1 All 425 (427) : 2 Ind Jur 115 (DB), ***Daia Chand* v. *Sarfraz Ali.***

2. ('41) 28 AIR 1941 Bom 178 (183) (DB), ***Haji Yoonus* v. *Shekh Hasan.*** **(27 Cal 1004 (P C) followed.)**

('30) 17 AIR 1930 Bom 55 (57) : 122 Ind Cas 862 (DB), ***Dhondi Shivaji* v. *Lakshman.*** **(Redemption of mortgage of 1799 — Mortgagor relying upon acknowledgment of 1865 in suit brought in 1924—Remedy barred under previous enactment in 1862 — Right having extinguished subsequent enactment is not of any use.)**

('28) 15 AIR 1928 Bom 28 (31) : 107 Ind Cas 60 (DB), ***Narayan* v. *Govind.***

('25) 12 AIR 1925 Bom 339 (340) : 87 Ind Cas 699 (DB), ***Indurai* v. *Shivlal.*** **(Mortgage executed in 1761 — Acknowledgment alleged in 1858 — Suit to redeem filed in 1916.)**

('83) 8 Bom 99 (103, 104) : 8 Ind Jur 261 (DB), ***Dharma Vithal* v. *Govind Sadvalkar.***

('18) 5 AIR 1918 Mad 86 (87, 88) : 43 I. C. 50 (DB), ***Raman Kurup* v. *Chappan Nair.***

('83) 1883 All W N 202 (202, 203) (DB), ***Kidar Nath* v. *Ulfat Rai.***

('94) 1894 Pun Re No. 53, ***Ghulam Hassan* v. *Haji Muhammad.***

('82) 5 Mad 182 (184) (DB), ***Mukkanni* v. *Manan Bhatta.***

('84) 1884 Pun Re No. 109, ***Sheodan* v. *Surjit.***

Section 19
Notes 3-4

3. English law. — The doctrine of an acknowledgment of liability as an answer to the bar of limitation is also recognised under the English law. But, the doctrine is not contained in a single enactment as under the Indian law. Various sections in various statutes are based on a recognition of the doctrine.[1] The language of these provisions is not always similar to the language of this section. Further, the English theory underlying the doctrine of acknowledgment in the case of contract debts is quite different from the theory on which this section is based. (See Note 8.) In the former case, an acknowledgment will be no acknowledgment unless it amounts to a *promise* to pay the debt. But under this section an acknowledgment may be good although the debtor *refuses* to pay the debt. Hence, English decisions cannot be applied *in toto* to the determination of the law under this section. But such decisions may be consulted where the language of the statutory provisions concerned is identical in material particulars with the language of this section or where they lay down general principles which are not inconsistent with the principles on which this section is based.[2]

4. Principle of the section.—The following views have been expressed as to what is the true theory on which the provision as to acknowledgment of liability contained in this section is based :

(1) In *Dharma Vithal* v. *Govind Sadvalkar*,[1] West, J., observed as follows : "The intention of the law is manifestly to make an admission in writing of an existing jural relation of the kind specified, equivalent for the purposes of limitation to a new contract . . . . ." This view was followed by Wilkinson, J., in *Venkata* v. *Parthasaradhi*.[2]

(2) In *Anantram* v. *Inayat Ali*,[3] the Lahore High Court observed as follows : "One object of the law of limitation is to prevent

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('80) 1880 Pun Re No. 85, *Hakim Devi Dyal* v. *Prab Dyal*.

[But see ('80) 6 Cal 340 (348, 349) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree*. (Acknowledgment made while 1859 Act was in force — Acknowledgment insufficient under 1859 Act—Suit filed under 1871 Act—Acknowledgment sufficient as per later Act—*Later* Act applies notwithstanding that the suit was time-barred at the time of coming into force of 1871 Act — Reason is that only remedy is barred but right is not put an end to.)]

Note 3

[1] See Halsbury's "Laws of England," (1911) Vol. 19, pp. 58, 79, 92 and 131.

[2] (11) 9 Ind Cas 944 (945) : 35 Bom 383, *Shri Gopal Chiranji Lal* v. *Dhana Lal Ghasiram*.

('32) 19 AIR 1932 Oudh 1 (4) : 138 Ind Cas 800 : 7 Luck 270 (DB), *Amir Mirza Beg* v. *Lachmi Narain*.

('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram*.

Note 4

[1] ('83) 8 Bom 99 (102) : 8 Ind Jur 261 (DB).

[2] ('92) 16 Mad 220 (227) : 3 Mad L Jour 85 (DB).

[3] ('20) 7 AIR 1920 Lah 447 (448) (DB).

claims being preferred after such a time that the real character of the transaction can no longer be cleared up, but S. 19 provides that an acknowledgment of the existence of a liability will give a fresh term, and it may be presumed that in such a case it is considered that the object of the law of limitation has been attained."

(3) In a critical note in 3 Madras Law Journal[4] the view has been expressed that the section is based on the theory that the defendant *waives* the benefit of the period of time that has run in his favour.

It is submitted that each of the above views is open to objection. As regards the first view, in the face of the express provision in the section that an acknowledgment may be accompanied by a *refusal to pay*, it cannot be said that the acknowledgment contemplated by the section is one which implies a *promise* by the defendant to fulfil his obligation.[5] As regards the second view, it is not clear how the giving of an acknowledgment of liability will help to clear up the real character of the transaction at the time of the suit, when it is remembered that under this section it is expressly provided that an acknowledgment need not specify the exact nature of the property or right in regard to which the acknowledgment is made. As regards the third view, the law of limitation does not permit any *waiver* of its provisions. (See Notes 17 and 23 to section 3.)

It has been seen in Note 4 to the Preamble, that one of the considerations on which the law of limitation is based is that there is a presumption that a right not exercised for a long time is non-existent. But, where the person against whom the right is claimed admits the existence of the right, there is no room for the above presumption.

It was held in England at one time, with reference to contract debts, that the Statute of Limitations rested on the presumption of payment and that where such presumption was repelled by means of an acknowledgment of liability, the plaintiff was entitled to succeed.[6] But this view has not been accepted in the later decisions and according to them, the true theory with regard to an acknowledgment in such cases is that it imports a *promise* to pay, giving rise to a new cause of action to the plaintiff. According to these later English decisions, therefore, an acknowledgment of a debt will not entitle the plaintiff to a fresh period of limitation unless it amounts to a *promise* to pay.[7]

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[4] ('93) 3 Mad L Jour 96 (101) (Jour). (Critical Note on 16 Mad 220, *Venkata* v. *Parthasaradhi*.)

[5] *See* ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Kar P C 134 : ILR (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Ram Shah* v. *Lal Chand.* (This section is not to be read as based upon the theory of implied promise.)

[6] See cases cited in (1827) 30 R R 461 (462) : 6 B & C 603 : 9 Dowl & Ry. 549 : 5 L J K B 218, *Tanner* v. *Smart.*

[7] (1827) 30 R R 461 (463) : 6 B & C 603 : 9 Dowl & Ry. 549 : 5 L J K B 218, *Tanner* v. *Smart.*

But, as already seen, this view has not been accepted by the framers of this section under which an acknowledgment may be quite good although it is accompanied by a refusal to perform the obligation. Hence, the true theory on which this section is based seems to be that on which the earlier English decisions were based, namely that an admission of liability rebuts the presumption which the law raises, to wit, that a right which has not been exercised or asserted for a long time does not exist.

5. Distinction between Sections 19 and 20. — As in the case of an acknowledgment under this section, a payment under S. 20 is also required to be recorded in *writing*. But, under S. 19, the writing must contain *within itself* an admission of an existing liability, while under S. 20, it is sufficient if the writing merely records the *fact of payment*. The fact that the money is paid as interest or as part of principal, need not appear in writing but may be proved by evidence *aliunde*.

But, a writing which records a payment may amount to an acknowledgment of liability within this section, if from the words used in the writing, it is clear that an existing liability is admitted.[1]

[*See also* (1864) 33 Beav 452 (456) : 140 R R 216 : 12 W R (Eng.) 328 : 55 E R 443 : 10 Jur (NS) 117 : 9 L T (NS) 746, *Hammond* v. *Smith*.]

Note 5

[1] ('41) 28 AIR 1941 Lah 23 (25) : 192 Ind Cas 118 (DB), *Saraj Din* v. *Umar Din*. (Endorsement on bond thumb-marked by debtor ran : "today. . . . . . Rs. 360-10-0 . . . . . were paid towards this bond"—*Held* it amounted to acknowledgment.)

('40) 27 AIR 1940 Lah 106 (107) : 189 Ind Cas 264 (DB), *Bur Singh* v. *Sikri Brothers*. (Where an executant of a promissory note pays a certain sum and makes an endorsement on the back of the note in his own hand that it will be adjusted in the promissory note account, the endorsement is clearly an acknowledgment of subsisting liability under the promissory note.)

('40) 27 AIR 1940 Oudh 305 (307) : 15 Luck 537 : 187 Ind Cas 624 (DB), *Deputy Commissioner, Kheri* v. *Brijendra Bahadur Singh*. (Entry in debtor's account books that payment is made "alal hisab" is acknowledgment.)

('38) 25 AIR 1938 Rang 84 (86) : 1937 Rang L R 421 : 175 Ind Cas 550, *Kasiviswanathan Chettyar* v. *Lakshmanan Chettyar*. (The endorsement in this case was ". . . paid towards this Rs. 410 . . . only, through the account of *K*"— *Held* there was an acknowledgment.)

('38) 25 AIR 1938 Rang 401 (404) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung* v. *L. Ah Choy*. (Endorsement on back of promissory note "paid on a/c Rs. 10" held to be acknowledgment of liability.)

('16) 3 AIR 1916 Mad 638 (638) : 27 Ind Cas 744 (DB), *Visvanatha Santhasingaro* v. *Sri Ramachandra Mardraja Deo*. (Lessee paying instalment and writing that amount be credited to lease account—*Held* this was an acknowledgment.)

('34) 21 AIR 1934 Lah 971 (972), *Harbans Lal* v. *Arjan*. (Mortgage bond —Sum payable as profits—Endorsement of payment—Effect of.)

('36) 23 AIR 1936 Mad 616 (617) : 163 Ind Cas 803, *Chandukutti Nambiyar* v. *Kunhi Kalandan*. (Endorsement on promissory note that 'out of the amount due under the promissory note Rs. 1000 was paid this day' held to be an acknowledgment of liability.)

('82) 5 All 201 (205) : 1882 All W N 221 (DB), *Janki Prasad* v. *Ghulam Ali*.

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Thus, if the writing itself states that money is paid for interest or for part of principal, it would clearly imply an admission of liability for the debt.[2]

But, an endorsement of payment *need not* imply an acknowledgment of liability.[3] Whether it does so depends on the language used

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('36) 23 AIR 1936 Lah 276 (277, 278) : 162 Ind Cas 306, *Shanti Lal* v. *Lyallpur Bank, Ltd.* (Sale of immovable property by debtor to creditor — Latter asked to credit price towards prior promissory note—Document amounts to acknowledgment.)

('09) 2 Ind Cas 522 (522) (Mad), *Ranganayakalu Aiya* v. *Subbayan.* (Where a debtor acknowledged on 10th September 1899 a liability as existing on 20th July 1898 without suggesting that it had been paid after that date and before the date of acknowledgment, it was held equivalent to acknowledgment on 10th September 1898.)

('37) 24 AIR 1937 Oudh 391 (393) : 13 Luck 334 : 168 Ind Cas 799 (DB), *Satgur Nath* v. *Brahma Dat.* (Letter accompanying payment asking for time to pay balance is acknowledgment.)

[*See* ('39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 I. C. 535 (DB), *Ishri Prasad* v. *Chandrabhan Prasad.* (Endorsement to the effect that Rs. 25 are being paid in respect to the promissory note held not to amount to acknowledgment.)]

[2] ('35) 22 AIR 1935 All 946 (955, 956) : 159 Ind Cas 387 : 58 All 261 (FB), *Udeypal Singh* v. *Lakshmi Chand.*

('17) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrishniah* v. *Subbarayudu.* (Endorsement of part payment.)

('37) 24 AIR 1937 Nag 304 (304) : 170 Ind Cas 213 : I L R (1937) Nag 374, *Sunderlal Sharma* v. *Bisahoo Bodhrai Teli.* (Endorsement of payment on back of pronote implies acknowledgment of liability for the balance due on the note.)

('21) 8 AIR 1921 Cal 331 (332) : 64 Ind Cas 988 : 48 Cal 1046 (DB), *Prasanna Kumar Ray* v. *Niranjan Ray.*

('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devchand Chatraji* v. *Jamsedji Shapurji.*

('26) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba* v. *Gopi.* (Payments not satisfying either bond—Thumb-impression of debtor is admission of debts under both bonds.)

('18) 5 AIR 1918 Nag 203 (204) : 48 Ind Cas 724, *Mohan Lal* v. *Ganesh Ram.* (Endorsement of payment implying liability for balance amounts to acknowledgment.)

('23) 10 AIR 1923 Bom 239 (240) : 72 Ind Cas 249 : 47 Bom 632 (DB), *Ganesh Narhar* v. *Dattatraya Pandurang.* (The whole endorsement and the words of the note should be taken together.)

(1865) 2 Mad H C R 307 (309, 310) (DB), *Krishtna Row* v. *Hachapa Sugapa.* (Case under Act of 1859—It is left to the Court to decide in each case whether the writing, reasonably construed, contains a sufficient admission that the debt or part of it is due.)

('71) 6 Beng L R 299 (301), *Madhusudan Chowdhry* v. *Brajanath Chandra.*

('66) 5 Suth W R 45 (46) (DB), *Shumboo Chunder Shaha* v. *Baroda Soonderee.* [But see ('67) 8 Suth W R 334 (336) (DB), *Gorachand Dutt* v. *Lokenath Dutt.* (Admission must be *direct* and not implied—Case under Act of 1859.)]

[3] ('70) 5 Beng L R 619 (638) (DB), *Shearman* v. *Fleming.* (The words "remittance of £40 to old account" were ambiguous, and did not necessarily import that a further sum was due.)

('35) 22 AIR 1935 All 946 (956) : 159 Ind Cas 387 · 58 All 261 (FB), *Udeypal Singh* v. *Lakshmi Chand.* (Endorsement of payment without specification—No acknowledgment.)

in each case.[4]

Where on account of some defect an endorsement of payment fails to be effective under section 20, it may nevertheless operate as an acknowledgment of liability under this section.[5] Thus, where an endorsement of payment towards the debt due on a promissory note is made, but no payment is actually made, the plaintiff will not be entitled to a fresh period of limitation under section 20. Nevertheless, the endorsement may amount to an acknowledgment of liability under this section.[6]

An acknowledgment under S. 19 only operates against the person who makes the acknowledgment and those claiming under him, but subject to the provisions of S. 21, sub-s.(2), a payment under S. 20 saves limitation against all the persons who are liable for the debt.[7]

('33) 20 AIR 1933 All 453 (455) : 55 All 632 : 144 Ind Cas 899 (DB), *Ram Prasad* v. *Binack Shukul* (Payment by debtor — There is implied acknowledgment of amount paid, but not of the remaining liability proved *aliunde.*)

('10) 8 Ind Cas 349 (349) (DB) (Mad), *Lakshminarasimham* v. *Bharata Mahanty.*

[4] ('39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad* v. *Chandrabhan Prasad.*

[5] ('39) 26 AIR 1939 Bom 252 (253) : 182 Ind Cas 965, *Tayarali Mahomed Ali* v. *Garabad Sadu.* (Endorsement on pronote stating that certain amount is paid towards payment without specifying whether it is towards interest as such — Payment being on account of debt secured by note, endorsement amounts to acknowledgment of liability.)

('35) 22 AIR 1935 Mad 245 (245) : 157 Ind Cas 272, *Krishnaswami Naicker* v. *Thiruvengada Mudaliar.*

('17) 4 AIR 1917 Mad 805 (805, 806) : 40 Mad 698 : 36 I. C. 240 (DB), *Venkatakrishniah* v. *Subbarayudu.* (The fact that S. 20 deals with an acknowledgment of a particular kind and is therefore a *special* section when compared with S. 19 is no objection to this as the operation of the two sections is different.)

('16) 3 AIR 1916 Mad 624 (626) : 27 Ind Cas 747 (DB), *Jaganadha Sahu* v. *Rama Sahu.*

('26) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba* v. *Gopi.*

[6] ('16) 3 AIR 1916 Mad 138 (139) : 28 Ind Cas 15, *Ramakrishna Chetty* v. *Venkatasubbiah Chetty.*

('16) 3 AIR 1916 Mad 512 (512) : 26 Ind Cas 754 (DB), *Lakshmi Ammal* v. *Ramaswamy Iyengar.* (Endorsement even without actual payment is good as acknowledgment if it was the intention of the parties that it should be treated as such.)

[7] ('41) 28 AIR 1941 Mad 110 (110), *Kunjandi* v. *Chinnavava Rowther.*

('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendra Nath.*

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu* v. *Gunnamma.*

('32) 19 AIR 1932 Oudh 1 (5) : 7 Luck 270 : 138 Ind Cas 800 (DB), *Amir Mirza Beg* v. *Lachhmi Narain.*

('30) 17 AIR 1930 Mad 738 (739) : 127 Ind Cas 641, *Lokhanda Naiko* v. *Lokhono Naiko.* (AIR 1917 Mad 805 followed.)

[*See* ('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saroda Charan* v. *Durga Ram De.* (There is nothing in S. 20 that the extended period of limitation is intended to operate only against the person making payment.)]

An acknowledgment need not be addressed to the person entitled. But a payment under S. 20 must be made to the person entitled.[8]

Under S. 19, a mere writing containing an admission of liability in respect of the right claimed is enough. But under S. 20, two things are necessary, viz., (1) a payment and (2) a writing recording such payment.

Under S. 20, it is enough if the payment is acknowledged in the handwriting of the person making the payment; it need not be signed by him. But, under S. 19, the acknowledgment must be signed by the person making the acknowledgment.[9]

Section 19 applies to *any* right or property. But S. 20 applies only to debts and legacies.

Under this section, a fresh period of limitation is allowed from the date when an acknowledgment of liability is *signed*. But, under S. 20, the fresh period is allowed from the time when the payment mentioned in the section is made.

6. Distinction between this section and Article 183. — See Section 20, Note 37.

7. Acknowledgment does not confer title. — An acknowledgment of liability only extends limitation. It does not *confer* any right or title on the person whose right is acknowledged.[1]

See also Note 8 below.

8. Acknowledgment, if operates as fresh contract. — Under this section, an acknowledgment of liability may be accompanied by a refusal to pay or deliver the thing claimed. (See Note 44.) The section is not based upon the theory of implied promise.[1] Hence, a promise to pay is not a necessary ingredient of an acknowledgment under this section.[2] But, at the same time, an *unqualified* acknow-

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[8] ('17) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrishniah* v. *Subbarayudu*.

[9] *See* ('40) 27 AIR 1940 Nag 354 (357) (DB), *Gajadhar Prasad Ramlal* v. *Udaichand Kapurchand*.

Note 7

[1] ('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal* v. *Soni Ram*.
('13) 19 Ind Cas 291 (295) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram* v. *Kanhaiya Lal*. (Acknowledgment is not a "thing done" within Section 6 of the General Clauses Act.)

Note 8

[1] ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Kar P C 134 : ILR (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand*.

[2] ('38) 25 AIR 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bishunath Ojha*.
('69) 13 Moo Ind App 37 (55) : 12 Suth W R P C 36 : 3 Beng L R P C 37 : 2 Suther 261 : 2 Sar 479 (PC), *Gopee Kishen Goshamee* v. *Bindabun Chunder Sircar Chowdhry*. (It is one thing to acknowledge a debt and another to promise to pay it.)

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ledgment of liability in respect of a debt necessarily implies a promise to pay the debt.[3]

Under the English law, a suit on such an implied promise is regarded as a suit on a new contract, the consideration for the promise being presumed to be the giving up by the creditor of the old debt;[4] and it will be so regarded even where the pleadings do not show that the suit is based on the new contract or the suit purports to be on the old contract, and the new promise is only relied on for the purpose of avoiding the bar of limitation.[5] Under the Indian law, such a promise does not constitute a new contract[6] or give rise to a

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('06) 33 Cal 1047 (1058, 1059, 1060) : 33 Ind App 165: 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand.* (An acknowledgment of liability should the balance turn out to be against the person making it, is a sufficient acknowledgment under this section.)

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.*

('72) 9 Beng L R App 43 (43), *Harrison* v. *Hope.*

('71) 6 Beng L R 299 (302), *Madhusudan* v. *Brajanath.*

('36) 23 AIR 1936 Mad 939 (939) : 166 Ind Cas 750, *Chinna Subbaroyudu* v. *Narasimha Reddi.*

('25) 12 AIR 1925 Mad 261 (263) : 48 Mad 693 : 85 Ind Cas 297 (DB), *Ramasami* v. *Chandra Kottayya.*

('21) 8 AIR 1921 Mad 704 (706) : 44 Mad 971 : 68 Ind Cas 100 (DB), *Govindasami Pillai* v. *Desai Goundan.*

('21) 8 AIR 1921 Mad 464 (465) : 70 Ind Cas 593 (DB), *Subbarama Aiyar* v. *Veerabadra Pillai.*

('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan* v. *Jananukoola Sankanidhi.*

('13) 21 Ind Cas 30 (30) (DB) (Mad), *Shaik Meera Sahib & Co.* v. *Nainar Lubbay.*

('25) 12 AIR 1925 Sind 8 (8) : 86 Ind Cas 228 (DB), *Secretary of State* v. *Kotumal Maghanmal.*

[3] ('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L J 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand.*

('95) 22 Cal 434 (444) : 22 Ind App 68 : 5 Mad L Jour 14 : 6 Sar 545 : R & J's No. 137 (PC), *Kalka Singh* v. *Paras Ram.*

('30) 17 AIR 1930 Lah 177 (178) : 119 Ind Cas 417, *Ram Ditta Mal Ram Dhan* v. *Kesar Das.*

[*See* ('38) 25 AIR 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bisunath Ojha.* (Endorsement by debtor acknowledging correctness of account showing extent of his liability implies a promise to pay.)]

[4] Halsbury's "Laws of England", (1911), Vol. 19, pages 58, 59.

[5] (1837) 7 L J Ex 25 (32) : 3 M & W 90 : M & H 313 : 49 R R 511, *Irving* v. *Veitch.*

[6] ('41) 28 AIR 1941 Nag 100 (102) : ILR (1941) Nag 144 (DB), *Shivjiram* v. *Gulabchand.*

('38) 25 AIR 1938 Lah 234 (239) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.* (Where acknowledgment implies a promise to pay, a suit can be brought on the basis of such acknowledgment considered as an agreement provided consideration is proved.)

('35) 22 AIR 1935 All 129 (131) : 57 All 434 : 152 Ind Cas 370 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi.*

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new cause of action,[7] it being considered that a promise to pay an

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('30) 17 AIR 1930 Nag 298 (299) : 26 Nag L R 320 : 127 Ind Cas 894, *Chhedilal* v. *Manoharlal.*

('77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghogi Bhikaji* v. *Abdul Karim.*

('22) 9 AIR 1922 Lah 425 (425, 426) : 3 Lah 326 : 69 Ind Cas 502 (DB), *Nand Lal* v. *Partab Singh.*

('15) 2 AIR 1915 Lah 279 (280) : 1916 Pun Re No. 16 : 30 Ind Cas 491 (DB), *Jas Ram* v. *Attar Chand.*

('23) 10 AIR 1923 Lah 301 (301) : 74 Ind Cas 939 (939), *Tikkan Ram* v. *Lal.*

[7] ('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo* v. *Anandi Brindawan.* (Suit cannot be based on acknowledgment of liability.)

('35) 22 AIR 1935 All 129 (131) : 57 All 434 : 152 Ind Cas 370 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi.*

('34) 21 AIR 1934 All 76 (77) : 56 All 281 : 149 Ind Cas 571 (DB), *Bal Krishna* v. *Debi Singh.*

('33) 20 AIR 1933 All 280 (281) : 144 I. C. 130 (DB), *Dhonkal Singh* v. *Harbans Lal.* (Debt due on unstamped pro-note acknowledged—Acknowledgment is part of the same transaction and cannot be treated as an independent transaction upon which the plaintiff could frame a cause of action.)

('26) 13 AIR 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram* v. *Lachman Prasad.*

('09) 1 Ind Cas 759 (759) (DB) (All), *Ram Charan* v. *Ram Das.*

('01) 23 All 502 (504) : 1901 All W N 150 (DB), *Ganga Prasad* v. *Ram Dayal.*

('97) 1897 All W N 144 (145) (DB), *Gopal Lalji* v. *Raman Lalji.*

('01) 25 Bom 616 (621, 622, 623) : 3 Bom L R 213 (DB), *Atmaram* v. *Umedram.* (An instrument which creates a liability and gives rise to a cause of action is one thing and a written acknowledgment of that liability is another.)

('98) 22 Bom 513 (517, 518) (DB), *Shankar* v. *Mukta.* (Account stated or adjusted —Such account is only evidence of the existing debt and not a fresh contract.)

('85) 9 Bom 516 (518) (DB), *Tribhovan Gangaram* v. *Amina.* (Do.)

('88) 1888 Bom P J 129 (DB), *Govind* v. *Devchand.*

('84) 8 Bom 194 (195) (FB), *Chowksi Himutlal Harivalubhdas* v. *Chowksi Achrutlal Harivulabhdas.* (Suit on khata—Such khata is a mere acknowledgment.)

('33) 20 AIR 1933 Lah 174 (175) : 145 Ind Cas 159, *Badri Das* v. *Besu.* (Suit for mortgage amount by sale—Contention that only possession could be asked for as per the mortgage deed and not sale—Plaintiff's contention that acknowledgment gave him right to sue for *sale*, held not sound.)

('15) 2 AIR 1915 Lah 167 (168) : 1915 Pun Re No. 76 : 31 Ind Cas 209 (DB), *Ram Adin* v. *Munshi Ram.*

('13) 20 Ind Cas 501 (501) (DB) (Lah), *Mukand Lal* v. *Abdul Majit.*

('08) 1908 Pun W R No. 206, p. 776 : 1908 Pun Re No. 119, *Pala Mal* v. *Tulla Ram.*

('04) 1904 Pun L R No. 123 (pp. 436, 437, 438) : 1904 Pun Re No. 68 (DB), *Ganpat* v. *Daulat Ram.*

('27) 14 AIR 1927 Mad 1200 (1200) : 106 Ind Cas 619, *Somasundaram Ayyar* v. *Krishna Ayyar.*

('20) 7 AIR 1920 Nag 244 (244) : 58 Ind Cas 30, *Jethmal* v. *Saroo.*

('98) 11 C P L R 65 (71), *Beohar Raghubir Singh* v. *Udechand.*

('89) 2 C P L R 40 (41), *Vittalsha Nanesha* v. *Sheodin.*

('32) 19 AIR 1932 Oudh 49 (50) : 7 Luck 313 : 135 Ind Cas 390 (DB), *Mt. Janaka* v. *Sheo Charan.*

('29) 16 AIR 1929 Oudh 529 (529) : 121 Ind Cas 83 (DB), *Deo Dutt* v. *Lal Behari.*

('29) 16 AIR 1929 Pat 258 (259, 260) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari* v. *Indrasan Tewari.*

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existing debt is not for any consideration. Hence, even where a person *expressly* promises to pay an existing debt, there is no new *contract* but only an *acknowledgment* of liability.[8] But, where a party promises to do something in consideration of the other party giving up his original rights against the former, there is a *fresh contract* which gives rise to a new cause of action.[9] In such a case the promise may

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('20) 7 AIR 1920 Pat 161 (161) : 56 Ind Cas 379, *Suraj Prasad Pandey* v. *W. W. Boucke.*

('92-96) 2 Upp Bur Rul 462 (464), *Maung Aung Gyi* v. *Maung Shwe Kyu.*
[*See also* ('11) 12 Ind Cas 617 (617) (Lah), *Amir Chand* v. *Sundar Mal.*
('13) 19 Ind Cas 291 (295) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram* v. *Kanhaiyalal.* (Acknowledgment does not create title.)
('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal* v. *Lala Soni Ram* (Do.)
('69) 13 Moo Ind App 37 (55) : 12 Suth W R P C 36 : 3 Beng L R P C 37 : 2 Suther 261 : 2 Sar 479 (PC), *Gopee Kishen Goshamee* v. *Bindabun Chunder Sircar Chowdhry.* (It is one thing to acknowledge a debt and another to promise to pay it.)]

8. ('91) 14 Mad 258 (262) : 18 Ind App 37 : 6 Sar 30 : 15 Ind Jur 224 (PC), *T. Ramachandra Rau* v. *Vellayanandan Ponnusami.*
('71) 6 Mad H C R 51 (56, 57) (DB), *Kittappa* v. *Somanna.* (An express verbal promise by the debtor to pay the amount.)
('02) 1 Low Bur Rul 190 (191), *Kankani* v. *Maung Po Yin.* (A naked promise to pay what a person is already under an obligation to pay is without consideration, and therefore does not constitute a fresh contract.)
('16) 3 AIR 1916 Mad 774 (775) : 29 Ind Cas 36 (DB), *Ramaswami Patter* v. *Tirucha Mannadiar.*
('71) 6 Mad H C R 197 (200, 201) (DB), *Hirada Karibasappa* v. *Muddappa.* (Oral acknowledgment.)
('93) 16 Mad 339 (340, 341) (DB), *Amuthu* v. *Muthayya.* (Promise being oral cannot save limitation.)
('06) 29 Mad 205 (208) (DB), *Venkataramiah Pantulu* v. *Ramakrishna Pantulu.*
('67) 7 Suth W R 46 (46, 47) (DB), *Giree Dharee Singh* v. *Kalika Sookul.*
('98) 8 Mad L Jour 219 (222) (DB), *Rajah of Venkatagiri* v. *Sheikh Bade Saheb.* (Promise to pay in muchilika amounts to acknowledgment.)
See also the cases cited in foot-note (3) above.

9. ('31) 18 AIR 1931 Oudh 97 (98) : 130 Ind Cas 503, *Sheo Govind* v. *Jai Sri Singh.* (Accounts settled between parties and certain sum acknowledged by defendant as due from him — Entry made in plaintiff's account book that defendant agreed to pay the amount with interest — *Held* it was not mere acknowledgment but a novation of contract.)
('29) 16 AIR 1929 Lah 263 (263) : 10 Lah 745 : 115 Ind Cas 764 (DB), *Kahan Chand Dularam* v. *Dayaram Amritlal.* (Account adjusted — Balance struck, accepted and signed — *Held* it was a novation of contract.)
('09) 4 Ind Cas 38 (41) : 32 Mad 284 (DB), *Seshan Pattar* v. *Raghava Pattar.*
('23) 10 AIR 1923 Cal 578 (579) : 76 Ind Cas 603 (DB), *Sarifun Mandalin* v. *Feradaul Khatun.* (Adjustment of account is fresh cause of action. 11 Ind Cas 540 followed.)
('08) 11 Oudh Cas 152 (153), *Humayun* v. *Wajid Ali.* (Acknowledgment containing the words "and shall be paid,"—*Held* that these words evidence a fresh contract furnishing an independent cause of action.)
('23) 10 AIR 1923 Cal 71 (72) : 72 Ind Cas 692 (DB), *Guljar Mandal* v. *Sriman Manadalini.* (Promise to pay old loan along with new gives rise to a new agreement.)

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be oral or written.[10] Further, under S. 25 (3) of the Contract Act, a promise in writing to pay a time-barred debt is a valid *contract.*

It has been held in certain decisions[11] that even in India, a promise to pay which is involved in the acknowledgment of a debt is sufficient to constitute a fresh contract and a new cause of action. These decisions are based on the judgment of the Privy Council in *Maniram Seth* v. *Seth Rupchand,*[12] in the course of which their Lordships of the Privy Council observed as follows :

> "An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing

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('23) 10 AIR 1923 Cal 659 (660) : 79 Ind Cas 77 (DB), *Prasanna Kumar Pal* v. *Panaulla Miji.*

('34) 21 AIR 1934 Lah 789 (790) : 154 Ind Cas 668, *Sada Ram* v. *Sahazada Ram.* (Where a creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes a good consideration for the new contract.)

('28) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal* v. *Roochand.* (Acknowledgment of previous debts implies promise to pay and can be a basis of fresh contract after limitation.)

[10] ('21) 8 AIR 1921 Cal 67 (69) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal Khan* v. *Tarubala Dassi.*

('24) 11 AIR 1924 Cal 388 (389) : 50 Cal 974 : 79 Ind Cas 489 (DB), *Ibrahim Mallick* v. *Lalit Mohan Roy.*

[11] ('32) 19 AIR 1932 All 199 (201,202, 205) : 53 All 963 : 137 Ind Cas 243 (DB), *Abdul Rafiq* v. *Bhajan.* (Per Niamatullah, J.)

('29) 16 AIR 1929 All 980 (981, 983) : 52 All 169 : 121 Ind Cas 108 (DB), *Govind Singh* v. *Bijay Bahadur.*

('22) 9 AIR 1922 Bom 183 (184) : 46 Bom 24 : 63 Ind Cas 923 (DB), *Chunni Lal Ratanchanda* v. *Laxman Govind.*

('33) 20 AIR 1933 Lah 47 (47) : 141 Ind Cas 425, *Punjab Ram* v. *Jowaya.*

('32) 19 AIR 1932 Lah 400 (400) : 137 Ind Cas 155, *Baru Mal* v. *Daulat Ram.*

('31) 18 AIR 1931 Lah 233 (235) : 131 Ind Cas 292 (DB), *Milkhi Ram* v. *Rupchand.*

('31) 130 Ind Cas 570 (570) (DB) (Lah), *Jesa Ram Diwan Chand* v. *Lachman Das.*

('29) 16 AIR 1929 Lah 591 (591): 123 Ind Cas 90 (DB), *Hannu Ram* v. *Jhanda.*

('29) 16 AIR 1929 Lah 421 (422): 116 Ind Cas 464 (DB), *Dalip Singh* v. *Jowahar.*

('29) 16 AIR 1929 Lah 264 (264) : 10 Lah 748 : 115 Ind Cas 853 (DB), *Fateh Mahomed* v. *Ganga Singh.*

('30) 124 Ind Cas 624 (624) (Nag), *Gopal Das* v. *Ramnath.*

('25) 12 AIR 1925 Nag 9 (11) : 78 Ind Cas 234, *Sitaram* v. *Nandram.*

[*See* ('26) 13 AIR 1926 Lah 472 (472) : 97 Ind Cas 800, *Jalla Ram* v. *Labhu.* (Acknowledgment, if can be basis of suit, is doubtful.)]

[*See also* ('39) 26 A I R 1939 Lah 31 (34) : 182 Ind Cas 330 (DB), *Sri Chand Sheo Parshad Firm* v. *Lajjia Ram.* (In this case it is assumed that a suit can be based on an unconditional acknowledgment of liability.)

('16) 3 AIR 1916 Pat 39 (41) : 38 Ind Cas 85 : 2 Pat L Jour 24 (DB), *Baluk Chand* v. *Nathuni Singh.*

('24) 11 AIR 1924 Lah 684 (684) : 78 Ind Cas 163, *Firm Nanak Chand Kishori Lal* v. *Firm Ram Sarup Gujar Mal.*]

[12] ('06) 33 Cal 1047 (1058): 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501: 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199: 3 All L Jour 525 : 2 Nag L R 130 (PC).

is said to the contrary. It is what every honest man would mean to do."

But these decisions have overlooked the fact that their Lordships of the Privy Council have not said that the promise to pay, implied in an unconditional acknowledgment, would necessarily constitute a new *contract* between the parties. Hence, the above decisions must be regarded as not laying down correct law.

8a. Acknowledgment, if operates as fresh cause of action. — See Note 8 above.

9. Distinction between this section and Section 25, clause 3, Contract Act. — Under this section, an acknowledgment of liability in respect of a debt must be made before the expiry of the period of limitation, in order to give a fresh start of limitation in respect of such debt. But, by virtue of S. 25, cl. (3) of the Contract Act, a fresh period of limitation for a debt can be obtained even after the expiry of the original period, if there is a *promise* in writing to pay such debt.[1] Reading the two sections together, it would appear that the expression "promise" is used in S. 25, cl. (3) of the Contract Act as contradistinguished from an acknowledgment and does not include a promise which is merely implied in an acknowledgment of liability.[2]

Note 9

[1] ('38) 25 AIR 1938 Rang 134 (135) : 1938 Rang L R 6 : 177 Ind Cas 63 (DB), *Smith* v. *Heptonstall.* (Equitable mortgage — Promissory note executed for the mortgage debt when the personal remedy has barred — *Held* that though the promissory note could not operate as a valid acknowledgment, it could be sued upon under S. 25 (3), Contract Act.)

('37) 24 AIR 1937 Lah 642 (644) : 174 Ind Cas 258 (DB), *Shanti Parkash* v. *Harnam Das.* (Reversed in AIR 1938 Lah 234 (FB) on another point.)

('09) 2 Ind Cas 379 (380) : 31 All 495 (DB), *Mohammad Abdullah Khan* v. *Bank Instalment Co. Ltd.*

('81) 1881 All W N 95 (95) (DB), *Karan Mal* v. *Bal Kishen.*

('13) 20 Ind Cas 809 (809) (DB) (Cal), *Matu Sheikh* v. *Baikantha Nath Kar.* (The promise need not be made with the consciousness that the debt is *barred.*)

('13) 21 Ind Cas 254 (255) (DB) (Cal), *Bhawani Misser* v. *Peari Jha.* (Do.)

('78) 4 Cal 500 (508) : 3 Cal L R 554 (DB), *Heera Lall Mookhopadhya* v. *Dhunpat Singh Bahadur.*

('06) 1906 Pun L R No. 22, p. 78 (80) : 1905 Pun Re No. 102 : 1905 Pun W R No. 134, (DB), *Mahbub Jan* v. *Nuruddin.*

('99) 23 Mad 94 (97, 98) : 9 Mad L Jour 330 (DB), *Appa Rao* v. *Surya Prakasa Rao.* (It is not necessary that the promisor should be aware of the debt having been barred.)

('83) 6 Mad 293 (294) : 7 Ind Jur 357 (DB), *Narayanasami* v. *Samidas.* (Plaintiff sued the defendant, a Hindu, to recover the amount secured by a promissory note executed by the latter's deceased father, in consideration of a debt for which the plaintiff sued the father and which had been declared barred by limitation — *Held* that the defendant was bound to pay the debt from any assets of his father received by him.)

See also Section 29 Note 2.

[2] ('41) 28 AIR 1941 Nag 100 (101) : ILR (1941) Nag 144 (DB), *Shivjiram* v. *Gulabchand.* (An acknowledgment to the effect that after taking old accounts

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To hold otherwise would be to nullify, so far as debts are concerned,

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into consideration there remains to be paid a balance of Rs. 3200 is not a promise to pay within the scope of Section 25 (3), Contract Act.)

('38) 25 AIR 1938 Lah 234 (240) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.* (AIR 1937 Lah 642 reversed on another point.)

('38) 25 AIR 1938 Lah 264 (266) : 178 Ind Cas 259 (DB), *Basheshar Nath* v. *Baij Nath.* (Mere acknowledgment of liability without any express promise to pay or without any reference to the future liability to pay does not fall within the meaning of Section 25 (3), Contract Act.)

('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo* v. *Anandi Brindawan.*

('32) 19 AIR 1932 All 461 (464) : 54 All 506 : 140 Ind Cas 783 (DB), *Girdari Lal* v. *Bishun Chand.* (Reversed in AIR 1934 P C 147 on another point.)

('35) 22 AIR 1935 All 129 (131, 132) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi.*

('31) 18 AIR 1931 All 160 (162): 130 Ind Cas 702 (DB), *Allah Bakhsh* v. *Hamid.*

('08) 30 All 268 (270) : 5 All L Jour 274 : 1908 All W N 129 (DB), *Gobind Das* v. *Sarju Das.*

('01) 23 All 502 (504) : 1901 All W N 150 (DB), *Ganga Prasad* v. *Ram Dayal.*

('28) 15 AIR 1928 Bom 319 (321, 322, 323) : 112 Ind Cas 24 : 52 Bom 521 (DB), *Maganlal Harjibhai* v. *Amichand Gulabji.*

('12) 17 Ind Cas 722 (726) (Bom), *Jethibai* v. *Putlibai.*

('33) 20 AIR 1933 Cal 658 (659, 660) : 60 Cal 714 : 146 Ind Cas 834, *Satyakel Dutt* v. *Romesh Chunder.*

('29) 16 AIR 1929 Cal 444 (444) : 121 Ind Cas 412 : 57 Cal 394 (DB), *Sasi Kanta* v. *Sonaulla Munshi.*

('22) 67 Ind Cas 298 (299) (DB) (Cal), *Panchanan Poddar* v. *Khitish Chandra.*

('15) 2 AIR 1915 Cal 186 (187) : 25 Ind Cas 89 (DB), *Debi Prosad* v. *Ram Ghulam.*

('36) 23 AIR 1936 Lah 164 (165) : 161 Ind Cas 703, *Baru Mal* v. *Daulat Ram.*

('33) 20 AIR 1933 Lah 209 (209) : 141 Ind Cas 617, *Mukhi Lal Chand* v. *Gul Mahomed.*

('30) 17 AIR 1930 Lah 985 (990) : 12 Lah 239 : 129 Ind Cas 281 (DB), *Davindar Singh* v. *Mt. Lachhmi Devi.*

('08) 1908 Pun W R No. 206, p. 766 : 1908 Pun Re No. 119, *Pala Mal* v. *Tulla Ram.*

('07) 1907 Pun W R NO. 173, p. 740 : 1907 Pun Re No. 132, *Gulzari Mal* v. *Kishen Chand.*

('86) 1886 Pun Re No. 36, *Pandit Harkishen Das* v. *Pir Baksh.*

('10) 7 Ind Cas 901 (901) (Mad), *Ramaswami Pillai* v. *Kuppuswami.*

('30) 17 AIR 1930 Nag 236 (237) : 124 Ind Cas 243, *Babulal* v. *Badridas Jainarayan.*

('32) 19 AIR 1932 Oudh 49 (51) : 7 Luck 313 : 135 Ind Cas 390 (DB), *Mt. Janaka* v. *Sheo Charan.*

('30) 17 AIR 1930 Oudh 287 (289) : 128 Ind Cas 276 : 6 Luck 7 (DB), *Lalji* v. *Ghashi Ram.* (Promise referred to in S. 25 (3) of Contract Act is a promise constituting a novation of contract.)

('30) 17 AIR 1930 Pat 604 (605) : 129 Ind Cas 95, *Kanai Lal Marwari* v. *Babulal Muchi.*

('29) 16 AIR 1929 Pat 258 (260, 261, 262) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari* v. *Indrasan Tewari.* (If an acknowledgment contains express promise, such as fixing the date of payment and so on then it not only serves as an acknowledgment but also a promise under S. 25 (3) of Contract Act.)

('21) 8 AIR 1921 Pat 29 (30) : 60 Ind Cas 514 : 6 Pat L Jour 121 (DB), *Ram Bahadur Singh* v. *Damodar Prasad Singh.*

See also Article 64 Note 3.

the provisions of this section according to which an acknowledgment of liability would furnish a fresh starting point of limitation only if such acknowledgment is made before the expiry of the period of limitation.[2a] No doubt, S. 29, sub-s. (1) provides that nothing in this Act shall affect S. 25 of the Contract Act. But it is submitted that S. 29 does not preclude S. 25 of the Contract Act from being *construed* in such a way as not to conflict with the provisions of this Act. At the same time, a promise under section 25, clause (3) of the Contract Act need not be *express*. It may be implied; only, it must be implied otherwise than by a mere acknowledgment of liability. It is a matter of construction of each document whether it amounts to a mere acknowledgment of liability or contains a promise within the meaning of S. 25, cl. (3) of the Contract Act.[3] The view has often been expressed

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2a. ('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo* v. *Anandi Brindawan.*

('08) 30 All 268 (270) : 5 All L Jour 274 (DB), *Gobind Das* v. *Sarju Das.*

3. ('38) 25 AIR 1938 Lah 505 (507) : 181 Ind Cas 115, *Punjab Zamindars Bank Ltd., Lyallpur* v. *Babu Mohammad Shaffi.* (A letter of acknowledgment admitting a certain sum as due under a promissory note and promising to pay it on a certain date can be the basis of suit although the promissory note is inadmissible.)

('38) 25 AIR 1938 Lah 757 (757, 758) : 178 Ind Cas 754, *Kishen Lal* v. *Gohli.* (Usual acknowledgment of balance due in plaintiff's *bahi* is treated in the Punjab as promise to pay.)

('78) 1878 Pun Re No. 3 (FB), *Ratta Ram* v. *Mt. Nano.* (Whether a statement of account amounts to a fresh contract must depend to a great extent on the nature of the accounts, the mode in which the statement is made and other circumstances of each particular case.)

('23) 10 AIR 1923 Cal 71 (72) : 72 Ind Cas 692 (DB), *Guljar Mandal* v. *Sariman Mandalini.* (Where old loan is acknowledged along with new, the transaction amounts to an agreement.)

('08) 1908 Pun W R No. 164, p. 579 : 1908 Pun Re No. 102, *Shankar Das* v. *Jasodhan.* (*Held*, that the entries were mere balances struck and acknowledgment of an existing debt, and at the utmost they amounted to an acknowledgment of the amounts found to be due at the time, and that they could not be construed as a new agreement between the parties within the meaning of S. 25 (3) of the Contract Act.)

('29) 16 AIR 1929 Pat 258 (261, 262) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari* v. *Indrasan Tewari.* (Acknowledgment not mere admission of existing debt but words being such from which a clear promise to pay is made out, such as fixing the date of payment and so on — Such acknowledgment would come under S. 25 (3), Contract Act.)

('82) 6 Bom 683 (685) (DB), *Ramji* v. *Dharma.*

('84) 8 Bom 405 (407) (DB), *Ranchhoddas Nathubhai* v. *Jeychand Khushalchand.*

('25) 12 AIR 1925 Cal 338 (338) : 78 Ind Cas 139 (DB), *Kshitish Chandra Das* v. *Umed Mondal.*

('32) 19 AIR 1932 All 38 (40) : 132 Ind Cas 420, *Mihin Lal Jwala Prasad* v. *Marguerite Butter Dairy Farm.*

('86) 1886 Pun Re No. 36, *Pandit Har Kishen Das* v. *Pir Bakhsh.*

('04) 1904 Pun L R No. 123, p. 436 : 1904 Pun Re No. 68 (DB), *Ganpat* v. *Daulat Ram.*

('38) 25 AIR 1938 Mad 683 (684) : 177 Ind Cas 759, *Pattabhiramayya* v. *Krishna Rao.* (A record was made on the suit promissory note and the words used were "paid ten rupees towards the debt in this pronote" — The payee did not even say "my debt" or "what I owe under the pronote"—*Held* that the expression "debt in this pronote" did not amount to fresh promise.)

that the promise under section 25 (3) of the Contract Act must be an *express* one as otherwise it will not be a promise made in writing.[4] It is submitted that this view is not sound. A promise may be made expressly or impliedly in writing. By analogy, reference may be made to the words "acknowledgment . . . . . . made in writing" which occur in S. 19 of the Limitation Act. It is well established that these words will include an implied acknowledgment. (See Note 18.)

10. Acknowledgment and accounts stated — Distinction between. — See Note 3 under Article 64.

11. Section to be liberally construed. — It is a general principle of the interpretation of statutes of limitation that such statutes being in derogation of the right to sue, exceptions to the

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In the following cases it was held that an acknowledgment, fixing rate of interest to be paid, is not a mere acknowledgment and hence, the promise implied in such a case is sufficient for Section 25, Clause 3, Contract Act :

('38) 25 AIR 1938 Lah 234 (237) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.* (Balance struck and interest fixed — This amounts to promise to pay — A I R 1937 Lah 642 reversed.)

('15) 2 AIR 1915 Lah 402 (402) : 1915 Pun Re No. 42 : 30 Ind Cas 84 (DB), *Makhan Lal* v. *Ganeshi Lal.*

('17) 4 AIR 1917 Lah 432 (434) : 1917 Pun Re No. 66 : 41 Ind Cas 915 (DB), *Bhagwan Singh* v. *Munshi Ram.*

('10) 8 Ind Cas 575 (575, 576) (Lah), *Bhola Ram* v. *Nanak Chand.*

('79) 1879 Pun Re No. 72, *Ladhu Shah* v. *Fazl Dad.*

('81) 1881 Bom P J 112 (DB), *Bai Kasiba* v. *Revabhai.*

('10) 8 Ind Cas 811 (812) (DB) (Lah), *Tirkha* v. *Rizak Ram.*

('29) 16 AIR 1929 Lah 511 (512) : 117 Ind Cas 377 (DB), *Om Parkash Wishwa Mitter* v. *Abdul Rahim & Sons.*

('29) 16 AIR 1929 Lah 695 (696, 697) : 122 Ind Cas 238, *Gopi* v. *Singh Ram.*

('07) 32 Bom 37 (45) : 9 Bom L R 1164 (DB), *Ganesh Narayan* v. *Vishnu Ramchandra.*

(1900) 25 Bom 373 (375) : 2 Bom L R 1132 (DB), *Laxmibai* v. *Ganesh.*

('10) 5 Ind Cas 418 (419) (DB) (All), *Muhammad Abid Hussain Khan* v. *Bhagwan Das.* (Sarkhat executed *in lieu* of debt, partly barred and partly new — *Held,* there was new contract.)

('28) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal* v. *Roochand.*

('23) 10 AIR 1923 Cal 659 (660, 661) : 79 Ind Cas 77 (DB), *Prasanna Kumar Pal* v. *Panaulla Miji.* (Where the balance operates to acknowledge a debt, a statement of future interest to be paid at a certain rate imports a promise to pay the debt as well.)

('82) 1882 Pun Re No. 33, *Jya Ram* v. *Sada Ram.* (It was only a fair and reasonable construction that a memorandum, signed by a debtor in the book of creditor, which acknowledges that one specified sum is to be received by the creditor with interest and another specified sum is to be received on a fixed date, contains a promise though in an indirect form, that he will pay the sum specified.)

[4] ('38) 25 AIR 1938 Cal 861 (862) : 182 Ind Cas 368 (DB), *Satis Chandra* v. *Rampada Chattapadhya.* (Promise implied in an acknowledgment of liability is not enough as S. 25 (3) requires an express promise.)

('41) 28 AIR 1941 Nag 100 (101) : ILR (1941) Nag 144 (DB), *Shivjiram* v. *Gulabchand.* (Do.)

('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo* v. *Anandi Brindawan.* (Do.)

statutes must be construed liberally. (See Preamble Note 10.) Hence, this section which contains an exception to the bar of limitation must be construed *liberally*.[1] In other words, the section must not be held to require an acknowledgment in any *particular form* or an *express* acknowledgment. Even a statement which, if *literally* construed, does not amount to an acknowledgment may be held to be sufficient for the purposes of this section, if it *implies* an admission of liability. (See Note 18.)

12. "Before the expiration of the period prescribed for a suit or application." — An acknowledgment of liability under this section must be made before the expiry of the period of limitation prescribed for the suit or application.[1] The expression "period pres-

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Note 11

1. ('25) 12 AIR 1925 Mad 675 (680) : 91 Ind Cas 833, *Achuthan* v. *Kunnambrath Abdu.* (But inspite of the utmost liberality in construing this section, 'nothing can operate as an acknowledgment of liability, unless it can be brought within its terms'.)

('20) 7 AIR 1920 Lah 447 (448, 449) (DB), *Anantram* v. *Inayat Ali Khan.* (Acknowledgment of liability to pay interest under mortgage amounts to an acknowledgment.)

('19) 6 AIR 1919 Mad 941 (941, 942): 46 Ind Cas 973, *Subba Rao* v. *Parasurama Pattar.* (Plaintiff, the assignee of debt, wrote to the defendant a letter requiring him to credit the amount due under the assignments in a specified manner and to pay him the balance, and the defendant wrote in reply that he could not comply because no assignment deed was shown to him and also because there were counter-claimants claiming the amount for themselves — *Held* that the defendant's letter contained an acknowledgment of liability.)

Note 12

1. ('39) 26 AIR 1939 Nag 113 (118) : 184 Ind Cas 139 : I L R (1941) Nag 222 (DB), *Tapi Bai* v. *Shankarlal.*

('38) 25 AIR 1938 Cal 861 (862) : 182 Ind Cas 368 (DB), *Satis Chandra* v. *Rampada Chattapadhya.*

('38) 25 AIR 1938 Nag 180 (181) : I L R (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo* v. *Anandi Brindrawan.* (Suit however must be based on original cause of action and not on acknowledgment.)

('38) 25 AIR 1938 Rang 134 (138) : 1938 Rang L R 6 : 177 Ind Cas 63 (DB), *C. R. Smith* v. *Mrs. Heptonstall.*

('06) 33 Cal 1047 (1059) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 1 Mad L Tim 199 : 3 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC), *Maniram Seth* v. *Seth Rupchand.*

('35) 22 AIR 1935 All 129 (131) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa.*

('30) 17 AIR 1930 All 467 (468) : 123 Ind Cas 820 : 52 All 480 (DB), *Raj Narain Rao* v. *Ram Sarup.*

('27) 14 AIR 1927 All 677 (678) : 49 All 496 : 100 Ind Cas 593 (DB), *Pralhad Prasad* v. *Bhagwan Das.*

('26) 13 AIR 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram* v. *Lachman Prasad.*

('20) 7 AIR 1920 All 157 (158) : 42 All 390 : 58 Ind Cas 547, *Mutsaddi Lal* v. *B. B. & C. I. Ry. Co. & Rohilkhand-Kumaun Ry.*

('79) 2 All 443 (444) : 4 Ind Jur 580 (DB), *Shib Dat* v. *Kalka Prasad.*

('28) 15 AIR 1928 Bom 319 (320, 321) : 52 Bom 521 : 112 Ind Cas 24 (DB), *Magan Lal* v. *Amichand.* (The period prescribed by the first Schedule and the period

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cribed" does not refer exclusively to the period prescribed by the *first schedule* to the Act. The expression will include any period prescribed by the *Act*, whether in the body of the Act or in the first schedule. Thus, an acknowledgment made during the special period of two years under section 31 (now repealed) will be within this section.[2] Similarly, an acknowledgment made during the additional period of limitation conferred by this section will be sufficient for the purpose of this section.[3] So also will be an acknowledgment made before the expiry of

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within which a suit may be brought are distinct; and the difference is clear from the language of Section 3 of this Act.)

('10) 7 Ind Cas 134 (138) (DB) (Bom), *Ramdas* v. *Chabil Das.*

('83) 7 Bom 414 (417) : 8 Ind Jur 46 (DB), *Nahanibai* v. *Nathu Bhau.*

('82) 6 Bom 683 (685) (DB), *Ramji* v. *Dharma.*

('77) 1877 Bom P J 118 (118) (DB), *Balaji* v. *Bankat.*

('79) 5 Cal 303 (308) (DB), *Parbuttinath* v. *Tejomoy Banerji.* (Acknowledgment of liability given at a time when the period prescribed for bringing the suit under Section 30 of Bengal Act VIII of 1869, had already expired.)

('31) 18 AIR 1931 Lah 691 (694) : 132 Ind Cas 590 : 13 Lah 240 (DB), *Diyalu Mal* v. *Nandu Shah Dev Raj.*

('30) 17 AIR 1930 Lah 985 (990) : 129 Ind Cas 281 : 12 Lah 239 (DB), *Davindar Singh* v. *Mt. Lachhmi Devi.*

('24) 11 AIR 1924 Lah 484 (485) : 78 I. C. 617, *Piroze Khan* v. *Kanhaiya Ram.*

('08) 1908 Pun W R No. 164, p. 579 : 1908 Pun Re No.102, *Shankar* v. *Jasodhan.*

('78) 1878 Pun Re No. 28, *Dyal Singh* v. *Mangal Mal.*

('36) 23 AIR 1936 Mad 70 (71) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar* v. *Subramania Pillai.*

('30) 17 AIR 1930 Mad 218 (221) : 122 Ind Cas 504 : 53 Mad 480 (DB), *Rajarama* v. *Fakruddin Sahib.*

('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahmad Haji* v. *Mayan.*

('95) 5 Mad L Jour 241 (243) (DB), *Venkatacharlu* v. *Venkataramanjulu.*

('28) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal* v. *Roochand.*

('30) 17 AIR 1930 Oudh 287 (288, 289) : 128 Ind Cas 276 : 6 Luck 7 (DB), *Lalji* v. *Ghasi Ram.*

('29) 16 AIR 1929 Oudh 479 (480) : 120 Ind Cas 825 : 5 Luck 510 (DB), *Narain Das* v. *Chandrawati Kuar.*

'30) 17 AIR 1930 Pat 604 (605) : 129 Ind Cas 95, *Kanailal* v. *Babulal.*

('29) 16 AIR 1929 Pat 258 (259, 260) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj* v. *Indrasan.*

[*See* ('22) 9 AIR 1922 Bom 168 (169) : 46 Bom 419 : 64 Ind Cas 1002 (DB), *Narayan* v. *Chapsi.*]

[2] ('27) 14 AIR 1927 All 114 (115) : 98 Ind Cas 1005 : 49 All 67 (DB), *Sheo Pratab Singh* v. *Tajamul Hussain.*

('27) 14 AIR 1927 All 577 (578) : 49 All 726 : 102 Ind Cas 111, *Abdul Ghani* v. *Chiranji Lal.*

('25) 12 AIR 1925 All 68 (68) : 80 Ind Cas 743 (DB), *Harish Chandra* v. *Mt. Kastola Kunwar.*

('13) 19 Ind Cas 658 (659) (DB) (All), *Moti Begam* v. *Har Prosad.*

('35) 22 AIR 1935 Mad 64 (66) : 153 Ind Cas 2 : 58 Mad 270 (FB), *Suryanarayana* v. *Venkataraju.*

('30) 17 AIR 1930 Mad 991 (994) : 128 Ind Cas 867 : 54 Mad 445 (DB), *Seshayya Chetty* v. *Subbadu.*

[3] ('87) 11 Bom 282 (283) (DB), *Atmaram* v. *Govind.*

('81) 6 Cal 340 (354) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree.*

the period of limitation as extended by the operation of section 14.[4]

It has also been held that even in cases, where the plaintiff is entitled to a deduction of time under the provisions of some *other* Act, the period will be a "period prescribed" within the meaning of this section. Thus, a period, in computing which time is deducted under S. 78, sub-s. (2) of the Provincial Insolvency Act, will be a "period prescribed" within this section.[5] Similarly, it has been held by the Oudh Chief Court that the period which is got after deducting a certain time under S. 52 of the U. P. Court of Wards Act is a "period prescribed" within the meaning of this section.[6] The Allahabad High Court has, however, taken a contrary view,[6a] on the ground that a period which is required to be excluded in computing the period of limitation is not a "period prescribed." It is submitted that the reasoning on which the decision proceeds is not correct.

The extra time which a litigant gets under section 4 is not part of a period prescribed. The reason is that under that section, the period prescribed for a proceeding is not affected at all. The effect of the section is only to permit the proceeding to be instituted notwithstanding the expiry of the prescribed period.[7]

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[4] ('30) 17 AIR 1930 Bom 187 (188) : 124 Ind Cas 791 (DB), *Dunichand* v. *Comptoir National D'Escompte D'Paris.*

[5] ('38) 25 AIR 1938 Mad 19 (22) : I L R (1938) Mad 439 : 176 Ind Cas 321 (DB), *Sambayya* v. *Pedda Subbayya.*

[6] ('37) 24 AIR 1937 Oudh 26 (28, 29) : 165 Ind Cas 269 : 12 Luck 531 (DB), *Sukhnandan Prasad Shukla* v. *Ahmad Ali Khan.* (Section 52 of U. P. Court of Wards Act directing certain period, viz., the period during which an estate is under the management of the Court of Wards, to be excluded in computing the period of limitation for suits against the ward—Acknowledgment made before the expiry of the period computed thus, i. e., after excluding the period mentioned in the above provision, is acknowledgment made within the period of limitation "prescribed.")

[6a] ('38) 25 AIR 1938 All 217 (220) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal* v. *Rana Lal Singh.*

[7] ('41) 28 AIR 1941 Nag 100 (101) : I L R (1941) Nag 144 (DB), *Shivjiram* v. *Gulabchand.* (A I R 1928 Nag 192 held no longer good law.)

('38) 25 AIR 1938 Lah 234 (236) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash* v. *Harnam Das.* (A I R 1937 Lah 162 overruled.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (DB), *Hemkore* v. *Masamali.*

('29) 16 AIR 1929 Cal 68 (68, 69) : 114 Ind Cas 483 : 55 Cal 1210, *Debendranath Roy* v. *Kartic Prasad Das.*

('37) 24 AIR 1937 Mad 367 (368) : 169 Ind Cas 653, *Chidambaram Chettiar* v. *Venkatasubba Naik.*

('37) 24 AIR 1937 Lah 642 (643, 644) : 174 Ind Cas 258, *Shanti Parkash* v. *Harnam Das.* (Reversed in A I R 1938 Lah 234 (FB) on another point.)

[*See* ('38) 25 AIR 1938 All 217 (219) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal* v. *Rana Lal Singh.* (A I R 1927 All 577 impliedly overruled.)]

[But see ('13) 19 Ind Cas 820 (821) (Bom), *Visram* v. *Tabaji.*]

See also Section 4 Note 8 and Section 20 Note 10.

In a few decisions[8] it has been held that the expression "period prescribed" refers only to the period prescribed by the first schedule and that, therefore, the extra period to which a suitor is entitled under section 4 cannot be included within the expression. Though the *decision* in such cases must be held to be correct in view of what is said above, the *reasoning* is not correct. The true reason for holding that the extra period under section 4 does not form part of the period prescribed for a suit, is, as already said, that under that section the period prescribed is not affected at all but the litigant is allowed to file his proceeding *after* the expiry of the prescribed period.

In the undermentioned case[9] the Bombay High Court also held that the expression "period prescribed" only refers to the period prescribed by the first schedule and that the extra period to which a person is entitled under section 6 is not a part of a period prescribed within the meaning of this section. This view also, it is submitted, is not correct in view of the above discussion. (See also Notes 13 to 15 below and Note 41 to section 6.)

13. Acknowledgment made under prior Act — Meaning of expression "period prescribed," with respect to such acknowledgment. — There is a conflict of decisions as to whether in the case of an acknowledgment of liability made while a prior Act was in force, the expression "period prescribed" must be understood as referring to the period prescribed by the prior Act or by the Act in force at the time of the institution of the suit. One view is that the above expression must be taken to refer to the period prescribed by the Act in force at the time of the acknowledgment.[1] The other view is that the expression must be taken to refer to the period prescribed by the Act in force at the time of the institution of the suit.[2] It is submitted that the latter view is correct on principle inasmuch as it is settled law that the period of limitation for a suit must be determined with reference to the Act in force at the time of the institution of the suit. (See Preamble Note 15.)

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[8] ('31) 18 AIR 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmed* v. *Kalipada Roy.*
('29) 16 AIR 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendranath Roy.* v. *Kartic Prasad Das.*
('22) 9 AIR 1922 Nag 250 (252) : 65 Ind Cas 716 : 19 Nag L R 135, *Nandram* v. *Ranchhoddas.*

[9] ('28) 15 AIR 1928 Bom 319 (320, 321) : 52 Bom 521 : 112 Ind Cas 24 (DB), *Magan Lall* v. *Amichand.* (The period prescribed by the first schedule and the period within which a suit by minor may be brought are distinct.)

Note 13

[1] ('33) 20 AIR 1933 Lah 47 (48) : 141 Ind Cas 425, *Punjab Ram* v. *Jowaya.*
('77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Daia Chand* v. *Sarfraz Ali.*
('94) 1894 All W N 87 (87) (DB), *Jamna Prasad* v. *Gokla.*

[2] ('81) 5 Bom 688 (689) (DB), *Luvar Chunilal Ichharam* v. *Luvar Tribhovan Laldas.*
('82) 5 Mad 182 (184) (DB), *Mukkanni* v. *Manan Bhatta.*
('82) 12 Cal L R 277 (279) (DB), *Mongola Koiburto* v. *Annodaram.*

14. Applicability of section to period prescribed by special or local law. — Section 29, sub-s. (2), cl. (b) provides *inter alia* that this section does not apply to periods of limitation prescribed by special or local laws. Hence, the view expressed in the undermentioned cases[1] that this section applies also to periods of limitation prescribed by special or local laws is not correct. But, the particular special or local law in question may itself expressly provide that this section shall apply to the periods prescribed by it. In such cases, this section will apply to such periods.[2]

As to the meaning of the expression "special or local law," see Note 6 under section 29.

15. Applicability of section to period of twelve years under Section 48 of the Civil Procedure Code. — It has been held that this section does not apply to the twelve years' period under S. 48 of the Civil Procedure Code.[1] For a full discussion of the question whether the twelve years' period under S. 48 of the Civil Procedure Code is a "period prescribed" within the Act, see Note 6 under S. 29. See also Note 10 to section 20.

16. "Suit or application in respect of any property or right." — As pointed out in Note 1, the corresponding section in the Act of 1871 only applied to acknowledgments in respect of *debts or legacies.* The scope of the section was enlarged in the later Acts. It

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Note 14

[1] ('25) 12 AIR 1925 All 68 (68) : 80 Ind Cas 743 (DB), *Harish Chandra* v. *Mt. Kastola Kunwar.* (*Obiter* — Period prescribed by Agra Tenancy Act will be a "period prescribed.")

('30) 17 AIR 1930 Lah 978 (979) : 129 Ind Cas 125, *Buta Singh* v. *Bhan Singh.* (The period of two years within which a suit can be filed under Section 5, Punjab Act 3 of 1923, is the "period prescribed for the suit.")

[2] ('30) 17 AIR 1930 Pat 301 (304) : 9 Pat 747 : 126 Ind Cas 299 (DB), *Hasan Imam* v. *Brahmdeo Singh.* (By virtue of S. 185 (2), Bengal Tenancy Act, this section applies to periods prescribed by Schedule III of that Act.)

('29) 16 AIR 1929 Lah 124 (124, 125) : 114 Ind Cas 702, *Balak Ram-Meher Chand* v. *Dev Raj.* (Period prescribed by Punjab Loans Limitation Act, 1904.)

('33) 20 AIR 1933 Cal 90 (92) : 141 Ind Cas 716 (DB), *Wazed Ali* v. *Brojendra Kumar.* (Period prescribed by Bengal Tenancy Act, Schedule 3.)

('22) 9 AIR 1922 Cal 187 (188, 189) : 64 Ind Cas 993 (DB), *Paresh Nath Pal Choudhury* v. *Ismail Sardar.* (Do.)

('05) 9 C W N 1025 (1026) (DB), *Harihar Lal* v. *Gunendar Pershad.* (By virtue of S. 185 (2), Bengal Tenancy Act, this section applies to periods prescribed by Schedule 3 of that Act.)

Note 15

[1] ('17) 4 AIR 1917 Pat 485 (486) : 34 Ind Cas 27 : 1 Pat L Jour 214 (DB), *Krishna Dayal Gir* v. *Sankina Bibi.*

('08) 11 Oudh Cas 220 (223) (DB), *Bhikari* v. *Gauri Shankar.*

now applies to "suit or application in respect of any property or right,"[1] Thus, the section applies not only to suits for debts or legacies but also to suits for recovery of immovable property. Therefore, a suit for redemption of a mortgage being a suit in respect of a property will be within the scope of the section.[2]

The expression "suit or application in respect of any property or right" read in the light of the words "against whom such property or right is claimed" which occur in the same clause, shows that it means a suit or application in which any property or right is *claimed*.

See also Notes 17 and 63.

17. "Application." — This section applies not only to suits but also to applications. Hence, an application for final decree in a mortgage suit can be saved from the bar of limitation by means of an acknowledgment under this section.[1]

See also Note 63.

18. "Acknowledgment of liability" — Essentials. — The word "acknowledgment" is not a word of art and must be construed in its plain, literal sense.[1] Hence, an acknowledgment of liability under this section simply means an admission of the truth of one's liability.[2] The admission may be in any form[3] and may be express or

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Note 16

1. ('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh* v. *Nenumal Rejhumal*.
2. ('30) 17 AIR 1930 Bom 466 (475) : 54 Bom 625 : 128 Ind Cas 417 (FB), *Motilal Jadav* v. *Samal Bechar*.
[*See also* ('10) 5 Ind Cas 992 (993) : 1910 Pun Re No. 39, *Ganga Ram* v. *Pokhar Das*. (Johnstone, J., gives it as his personal view that it is doubtful whether the section was intended to apply to cases of acknowledgment of the continued existence of a mortgage and of the right of redemption.)]

Note 17

1. ('27) 14 AIR 1927 All 159 (160) : 49 All 147 : 98 Ind Cas 818 (DB), *Baldeo Sahai* v. *Jafar Husain*.
('19) 6 AIR 1919 Mad 709 (710) : 42 Mad 52 : 48 Ind Cas 298 (DB), *Subbalakshmiammal* v. *Ramalinga Chetty*.

Note 18

1. ('06) 33 Cal 1047 (1057, 1058, 1059) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand*. (An acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment.)
('26) 13 AIR 1926 Sind 264 (268) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas* v. *Firm of Gokal Khataoo*. (Acknowledgment need not contain an admission that a precise sum is owing; but an acknowledgment that something is or may be due is sufficient.)
2. ('39) 26 AIR 1939 All 483 (486) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Sing* v. *Lal Sing*.
See Concise Oxford Dictionary.
3. ('39) 26 AIR 1939 All 483 (486) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh*.

implied.[4] In other words, a document alleged to contain an acknowledgment of liability must be *liberally* construed.[5] That is to say, in

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('97) 20 Mad 239 (242) : 6 Mad L Jour 266 (DB), *Periavenkan Udaya Tevar* v. *Subramaniam Chetti.*

('93) 16 Mad 220 (222) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.*

('77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877.*

('73) 1873 Pun Re No. 79, *Ruttan Ram* v. *Hakir.*

[4] ('39) 26 AIR 1939 All 483 (485) : ILR (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh.*

('38) 25 AIR 1938 Rang 84 (85) : 1937 Rang L R 421 : 175 Ind Cas 550, *Kasiviswanathan Chettyar* v. *Lakhmahan Chettyar.* (Endorsement of payment on back of promissory note.)

('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram* v. *Radhay Shiam.*

('07) 9 Bom L R 715 (718) (DB), *Gopalrao* v. *Harilal.* (Acknowledgment must relate to the liability in dispute and not *any* liability.)

('10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya* v. *Hiramba Chandra.* (Do.)

('19) 6 AIR 1919 Lah 25 (25) : 1919 Pun Re No. 131 : 53 Ind Cas 425, *Arur Singh* v. *Partab Singh.* (Where a bond, executed by defendant, made mention of a separate bond for a certain sum executed by him in favour of plaintiff — *Held*, this statement implied that money was due to the plaintiff separately on the other bond and therefore amounted to an acknowledgment.)

('36) 23 AIR 1936 Mad 70 (72) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar* v. *Subramania Pillai.*

('27) 14 AIR 1927 Mad 349 (349), *Arokiam Asary* v. *Varana Rowthan.*

('22) 9 AIR 1922 Mad 104 (104) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kondasami Reddi* v. *Suppammal.*

('19) 6 AIR 1919 Mad 941 (941, 942) : 46 Ind Cas 973, *Subba Row* v. *Parasurama Pattar.* (Letter implying that the debt is due but that the defendant is unable to pay it because of the circumstances mentioned by him in the letter.)

('93) 16 Mad 220 (223) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.*

(1865) 2 Mad H C R 307 (309) (DB), *Kristna Row* v. *Hachapa Sugapa.*

('30) 17 AIR 1930 Oudh 67 (68) : 5 Luck 446 : 124 Ind Cas 425 (DB), *Balbhaddar Singh* v. *Sheo Peary Lal.*

('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh* v. *Nenumal Rejhumal.* (The implication must be a necessary implication.)

('25) 12 AIR 1925 Sind 181 (183) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram* v. *Bhudhuram Parmanand.* (Do.)

('19) 6 AIR 1919 Sind 33 (34) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co.* v. *Mahomedalli Essaji.* (Do.)

('16) 3 AIR 1916 Sind 47 (48) : 32 Ind Cas 548 : 9 Sind L R 143 (DB), *Bibi Saheb Zadi* v. *Mir Mohamad Shah.* (Do.)

[But see ('67) 8 Suth W R 334 (335, 336) (DB), *Gorachand Dutt* v. *Lokenath.* (Memoranda of payments made, endorsed on the bond and signed by the defendant are not acknowledgments within the meaning of S. 4 of Act of 1859.)

('70) 1870 Pun Re No. 45, *Nuger Mull* v. *Osman.* (Acknowledgment within the meaning of S. 4 of Act of 1859, must be one distinctly stated in writing.)]

[5] ('19) 6 AIR 1919 Mad 941 (941, 942) : 46 Ind Cas 973, *Subba Row* v. *Parasurama Pattar.* (Plaintiff, the assignee of a debt, wrote to the defendant a letter requiring him to credit the amount due under the assignments in a specified manner and to pay him the balance and the defendant wrote in reply that he could not comply because no assignment deed was shown to him and also because there were counter-claimants claiming the amount for themselves—*Held* that the defendant's letter contained an acknowledgment of liability.)

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construing such document, regard must be had to the *meaning* of the writer, judging from the document read as a *whole*[6] and such surrounding circumstances as the Court can take into consideration in construing the document, rather than to the *literal* meaning of the words used.[7]

But the section requires a *definite* acknowledgment of liability.[8] In other words, the document alleged to contain an acknowledgment of liability must *clearly contain within itself* the meaning that the party is admitting his liability. Where the document is ambiguous and is equally capable of meaning either that the party is admitting a liability or that he is not doing so, the document is not sufficient for the purposes of this section.

('20) 7 AIR 1920 Lah 447 (448, 449) (DB), *Anantram* v. *Inayat Ali Khan.* (Acknowledgment of liability to pay interest under mortgage amounts to an acknowledgment.)

('25) 12 AIR 1925 Mad 675 (680): 91 Ind Cas 833, *Achuthan* v. *Abdu.* (But inspite of the utmost liberality in construing this section, 'nothing can operate as an acknowledgment of liability, unless it can be brought within its terms.')

[6] ('30) 17 AIR 1930 Lah 985 (989): 129 Ind Cas 281: 12 Lah 239 (DB), *Davindar Singh* v. *Mt. Lachhmi Devi.*

('36) 23 AIR 1936 Lah 629 (637, 638) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar* v. *Ralia Ram.*

[7] ('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram* v. *Radhay Shiam.* (Terms of contract to be found in older note—Renewed promissory note inadmissible in evidence as being insufficiently stamped — Plaintiff can fall back on old note and the subsequent pronote can be used as acknowledgment.) [*See also* (1856) 6 Moo Ind App 393 (411): 18 Suth W R 81 foot-note : 2 Suther 29 : 1 Sar 552 (PC), *Hunooman Persaud Panday* v. *Mt. Babooee Munraj Koonweree.* (Meaning of liberal construction of documents.)]

[8] ('39) 26 AIR 1939 All 483 (485) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh.*

('39) 26 AIR 1939 Cal 488 (488) : 183 Ind Cas 473 (DB), *Corporation of Calcutta* v. *Monjoor Ahmed.*

('06) 33 Cal 1047 (1059) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand.*

('36) 23 AIR 1936 All 522 (525): 163 Ind Cas 872 (DB), *Kamal Debi* v. *Khudadad.* (Admission that instalment of rent was due but *not clear* if the admission referred to the instalment claimed in the suit—No sufficient acknowledgment.)

('35) 22 AIR 1935 All 129 (131) : 57 All 434 : 152 Ind Cas 370 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi.*

('17) 4 AIR 1917 All 304 (305) : 39 All 357 : 38 Ind Cas 105, *Lachman Das* v. *Ahmad Hasan.* (Objection to execution by arrest on ground of being poor—Mere absence of statement that debt had been discharged is not enough for acknowledgment.)

('07) 9 Bom L R 715 (718) (DB), *Gopalrao* v. *Harilal.*

('35) 22 AIR 1935 Rang 152 (155): 156 Ind Cas 783 (DB), *Maung Po Gyi* v. *R. K. Banerjee.* (Affidavit by defendant specifying his creditors with the amounts due to or claimed by them — Plaintiff included as one of the creditors but not clear whether the suit amount was put under the category of debt *due* or simply that of debt *claimed—Held*, no clear acknowledgment.)

('12) 15 Ind Cas 363 (365) (Low Bur), *A. P. S. V. Firm* v. *Shree Safatulla.*

('28) 15 AIR 1928 Sind 45 (45): 104 Ind Cas 572: 22 Sind L R 117 (DB), *Hukumat Singh Kundan Mal* v. *Nenumal Rejhumal.*

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Illustration.

A document stated that on accounts being made up between the parties a certain sum was found due to the plaintiff from the defendant and that a usufructuary mortgage was executed by the defendant. It was not clear whether the usufructuary mortgage was in lieu of the *whole* of the sum said to be found due or whether it was in lieu of only a *portion* of such sum so that the balance after deducting such portion was to be recoverable from the defendant. It was held that the document did not amount to an acknowledgment of liability in regard to such balance.[9]

An acknowledgment of liability necessarily implies a *knowledge* on the part of the person alleged to make the acknowledgment that he is admitting something. In other words, the section requires a *conscious* acknowledgment of liability.[10] Hence, in considering whether certain words amount to an acknowledgment of liability, it must be seen whether, at the time of writing them, the writer had in his mind the question as to his liability (or other matter from which such liability is inferred), or whether he was thinking of and referring to some other matter.

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[9] ('26) 13 AIR 1926 All 75 (76) : 89 Ind Cas 617 (DB), *Meharban Singh* v. *Panna Lal.*

[10] ('39) 26 AIR 1939 All 483 (485): I L R (1939) All 728: 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh.*

('29) 16 AIR 1929 All 242 (242, 243) : 115 Ind Cas 627, *Chhedda Lal* v. *Ghulam Abbas.* (Admission by defendant that he is mortgagee in possession is conscious admission of liability.)

('16) 3 AIR 1916 All 201 (204, 205) : 38 All 540 : 36 Ind Cas 452 (DB), *Khiali Ram* v. *Taik Ram.*

('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi* v. *Bhagwat Dayal.* (Statement by *A* that he purchased certain mortgagee rights held to mean only that he purchased property which had come into the hands of the vendor as mortgagee and not that there was a subsisting mortgage with reference to the property.)

('08) 10 Bom L R 385 (387, 388) (DB), *Sheikh Mahomed* v. *Jamaluddin Mahamed.* (Mortgagor narrating the relationship of mortgagor and mortgagee — Latter admitting its correctness by signature—It is conscious admission.)

('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar Dhar* v. *Ramdin Poddar.* (Decree-holder applying for execution for smaller sum than awarded by decree, by mistake — Judgment-debtor acknowledging liability for such smaller sum — Limitation saved only to the extent of such smaller sum — Acknowledgment imports knowledge of the burden one assents to bear.)

('31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Haji Abdulla* v. *Bhoja Mal.* (*X* signing statement as *scribe* of *Y* does not admit the thing stated.)

('35) 22 AIR 1935 Mad 287 (288) : 159 Ind Cas 486, *Muthu Chettiar* v. *Venkatachalam Chetty.* (Where defendant purported to say 'no doubt there is a contract into which we entered, but no money is liable to be paid, because I am prepared to see the contract through'—*Held* no acknowledgment.)

('28) 15 AIR 1928 Sind 45 (45): 104 Ind Cas 572: 22 Sind L R 117 (DB), *Hukumat Singh Kundan Mal* v. *Nenumal Bejhumal.*

[*See also* ('10) 27 Cal 1004 (1011, 1012): 27 Ind App 103: 4 Cal W N 565 : 7 Sar 718 (PC), *Fatimunnissa Begum* v. *Soonder Dass.* (Application for mutation of names not sufficient acknowledgment.)]

Illustration.

> A, a mortgagee who was entitled as such to possession of the mortgaged property, sued and obtained a decree for such possession. He obtained delivery of possession of the property under the decree and in token of his having received such delivery, gave a receipt acknowledging that he had received delivery of possession of the property *as directed by the decree.* The decree set forth the fact that the claim of the decree-holder was based on a mortgage. It was held that the reference to the decree was merely intended for the purpose of *defining* the thing delivered and at the time when the words containing such reference were written, the writer had no idea of saying anything about the *grounds* on which the decree was based. Hence, the receipt did not contain any acknowledgment of liability with respect to the mortgage so as to save limitation for a suit for redemption of the mortgage.[11]

From the above, it is clear that the question whether a document contains an acknowledgment of liability depends purely on the terms of the document and their construction by the Court.[12] Where on a

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[11] ('84) 8 Bom 99 (102) : 8 Ind Jur 261, *Dharma Vithal* v. *Govind Sadvalkar.*

[12] ('39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad* v. *Chandrabhan Prasad.* (The Court cannot go beyond the words used in the document.)

('39) 26 AIR 1939 All 483 (485) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh.*

('26) 13 AIR 1926 All 75 (76, 77) : 89 Ind Cas 617 (DB), *Meharban Singh* v. *Panna Lal.*

('34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal* v. *Bonderbai.* (Admission of execution of promissory notes coupled with denial of liability is not acknowledgment.)

('31) 18 AIR 1931 Bom 74 (75) : 128 Ind Cas 911, *Velchand* v. *Bhagvandas.*

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.* (Letter denying and repudiating liability is not sufficient acknowledgment.)

('21) 8 AIR 1921 Cal 331 (332) : 48 Cal 1046 : 64 Ind Cas 988 (DB), *Prasanna Kumar Ray* v. *Niranjan Ray.* (No useful purpose can be served by a meticulous examination of other endorsements made under different circumstances and expressed in different phraseology.)

('19) 6 AIR 1919 Cal 48 (49, 50) : 53 Ind Cas 898 (DB), *Janardan Shaha Poddar* v. *Radha Bullav.* (Statement in *abichalnama* that accounts are remaining unadjusted, which arbitrators are to adjust, amounts to acknowledgment.)

('18) 5 AIR 1918 Cal 294 (298, 301) : 43 Ind Cas 893 (DB), *Kali Das* v. *Danapadi Sundara Dassee.* (Liability to account partly acknowledged — This section does not operate to save entire right.)

('11) 12 Ind Cas 378 (380) : 36 Mad 68 (DB), *Annappa Chetty* v. *Devrajulu Naidu.* (Unless the language of the document be identically the same, a decision upon the construction of one document is not of much assistance to the Court in construing another.)

('30) 17 AIR 1930 Oudh 67 (68, 69) : 5 Luck 446 : 124 Ind Cas 425 (DB), *Balbhaddar Singh* v. *Sheo Peary Lal.*

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reasonable construction of a document, it contains an express or implied admission by the author of the document of a subsisting liability, the document will operate as an acknowledgment of liability under this section.[13] Where the document does not contain such admission, it

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('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.*

[13] ***Acknowledgments relating to mortgage.***

('39) 26 AIR 1939 Pat 427 (428) : 180 Ind Cas 795 (DB), *Bachu Lal* v. *Jang Bahadur Rai.* (Recitation by mortgagee while creating a sub-mortgage of his rights and liabilities under the original mortgage amounts to acknowledgment for the purpose of saving limitation for a redemption suit by original mortgagor.)

('38) 25 AIR 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar* v. *Dowlat Singjee.* (A letter written by the debtor (mortgagor) to a third person, in which the debtor agrees to give him a lien over certain properties "now with the creditor mortgagor as collateral security" (the title deeds having been deposited with the creditor as equitable mortgage previously) is an acknowledgment of the existence of the equitable mortgage.)

('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hira Lal* v. *Narsi Lal.* (A *desai* mortgaged with possession certain *desaigiri dastur.* The Government resolved on paying a money allowance to the *desai* from the treasury instead of allowing him to collect from *raiyats.* The persons in whom the mortgagee rights were vested received the payments from the Government. The payment was entered in the Collector's books, the recipients being described as the mortgagees of the *desai.* To confirm this entry the mortgagees signed a receipt as mortgagees. *Held* that the receipt amounted to an acknowledgment.)

('33) 20 AIR 1933 All 99 (100) : 142 Ind Cas 784 (DB), *Mahomed Rafi* v. *Kripa Ramji.* (Where the acknowledgment was not addressed to the mortgagors directly but was contained in a *dakhalnama* which was filed in Court in an execution proceeding against the mortgagors and it appeared that the document after describing the property stated that it did not include an area which was in their possession as mortgagees, *held* that the document contained a valid acknowledgment in respect of the mortgage.)

('25) 12 AIR 1925 All 174 (175) : 85 Ind Cas 330 (DB), *Sanwal Das* v. *Ali Madhi.* (A statement made by the sub-mortgagees in a sale proclamation relating to the mortgaged properties wherein they had stated that the sub-mortgage was subject to the original mortgage, *held* was an acknowledgment.)

('24) 11 AIR 1924 All 458 (458, 459) : 89 Ind Cas 118 (DB), *Sidhari Ram* v. *Gargi Din.* (Sale of mortgagee rights — Sale deed containing statement by mortgagee that he was mortgagee of *A* and he purported to sell his mortgagee rights to defendant—*Held* that statement was sufficient acknowledgment of the subsisting mortgage.)

('09) 1 Ind Cas 510 (511) (All), *Genda Mal* v. *Ilahi Buksh.* (In sub-mortgage the mortgagees stated "that they held the property under the two mortgages of the 4th September 1839 and the 21st September 1839." *Held* that this statement constituted an acknowledgment.)

('30) 17 AIR 1930 Bom 466 (474) : 54 Bom 625 : 128 Ind Cas 417 (F B), *Motilal Jadav* v. *Samal Bechar.* (A sub-mortgage amounts to a valid acknowledgment that the property at that date was still held in mortgage by mortgagee.)

('28) 15 AIR 1928 Bom 264 (265) : 111 Ind Cas 881 (DB), *Ishram Govind* v. *Trimbak Ganpat.* (Award providing for instalment payment of mortgage amount—Suit on mortgage — Mortgagor pleading that mortgage had merged in award — Admission of liability under award involved in such plea amounts to acknowledgment of liability under award.)

('14) 1 AIR 1914 Bom 141 (142) : 38 Bom 177 : 23 Ind Cas 353 (DB), *Dinkar Hari* v. *Chhaganlal.* (Reference to previous mortgage debt in subsequent pronote passed for another debt by same mortgagor is acknowledgment.)

('14) 1 AIR 1914 Bom 288 (289, 290) : 38 Bom 47 : 21 Ind Cas 407 (DB), *Bacharaj Nyahalchand* v. *Babaji Tulharam*. (An application by the plaintiff mortgagor was made to the Court for certifying certain payments in satisfaction of the decree, the decree being referred to therein as an outstanding decree and the payments being mentioned as payments made on account of the decree. The application was signed by the plaintiff and was consented to by the defendant. *Held* that the application clearly contained an acknowledgment.)

('33) 20 AIR 1933 Lah 33 (33, 34) : 140 Ind Cas 177, *Ralla Ram* v. *Bhana Mal*. (Mortgagee re-mortgaging property mortgaged to him — Recital in deed that property is mortgaged to mortgagee, is acknowledgment of existence of mortgage.)

('11) 11 Ind Cas 377 (377) (Lah), *Hari Chand* v. *Phiraya Ram*. (*Held*, that a statement contained in a plaint in a case filed by the grandfather of the mortgagee of immovable property, to the effect that it is mortgaged to him, amounts to an acknowledgment of liability in respect of the mortgagor's right to redeem.)

('84) 1884 Pun Re No. 97, *Ram Rakha* v. *Karam Chand*. (Agreement to refer to arbitration — Suit described as one "to redeem a one-storied house." and in the body of the agreement the house mentioned as the "mortgaged house." *Held*, that the above document contained a sufficient acknowledgment.)

Acknowledgments of debts.

('39) 26 AIR 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ram Chander* v. *Firm Seth Kishen Lal Babulal*. (Debtor's letter to creditor informing him that he had asked his debtor to dispatch money to creditor and that he was also sending money to creditor amounts to acknowledgment.)

('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal* v. *Banwari Lal*. (Defendant admitting existence of promissory note but pleading that there was an agreement by which the plaintiff had agreed to take certain amount and that only a certain sum remained due under it—*Held* that it was a sufficient acknowledgment.)

('84) 7 Mad 392 (396) (DB), *Raman* v. *Vairavan*. (Letter by drawer of hundi to the drawee asking him to pay the amount covered by the hundi to the person in whose favour it is drawn, is sufficient acknowledgment.)

('08) 32 Bom 296 (299) : 10 Bom L R 374 (DB), *Srinivas Krishna Shiralkar* v. *Narhar Khando Khanvilkar*. (Statement by the defendant that he has asked creditor to take away the sum from a third party with whom he has deposited it is sufficient acknowledgment.)

('06) 3 All L Jour 800 (801, 802) : 1906 All W N 185 (DB), *Bholanath* v. *Net Ram*. (Where the defendants had money-dealings with the plaintiff and borrowed money from time to time and on several occasions—*N* as manager of the family acknowledged the amount remaining due by striking the balance and signing in plaintiff's account-book, *held*, that the plaintiff was entitled to recover the balance due inasmuch as the acknowledgment is an acknowledgment of the accuracy of details of the account as appearing in the plaintiffs' account-book.)

('19) 6 AIR 1919 Cal 83 (84) : 46 Cal 746 : 53 Ind Cas 854 (DB), *Mahendranath Chaterji* v. *Lalit Mohan Dutta*. (Hatchitta executed in lieu of old one amounts to acknowledgment.)

('25) 12 AIR 1925 Cal 338 (338) : 78 Ind Cas 139 (DB), *Kshitish Chandra Das* v. *Umed Mondal*. (Mablakbandi is good acknowledgment so as to preserve any debt due and not barred at the time when it was made.)

('74) 6 N W P H C R 150 (152) (DB), *Mullins* v. *Beddy*. (On the construction of the letter written by the maker of pronotes to the agent of the holder thereof previous to suit acknowledging his debt under the pronotes but praying for time to pay them up, *held*, that the letter was a sufficient acknowledgment to take the claim under the notes out of the statute of limitation.)

('35) 22 AIR 1935 Oudh 170 (175) : 153 Ind Cas 987, *Shah Muhammad Khan* v. *Ahmad Ali Khan*. (In answer to a letter by the creditor to the debtor stating the amount due to him, the debtor's secretary sent a letter by post reciting that he had been directed to intimate to the creditor by the debtor that all the arrears of accounts would be paid in a particular month — *Held*, that it was a sufficient acknowledgment of the debt.)

('29) 16 AIR 1929 Cal 714 (715) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd.* v. *Jatindra Nath.* (Banker and customer — Letter forwarding bills against overdraft—*Held*, sufficient acknowledgment.)

('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan* v. *Jananukoola Dana Sekhara Sankanidhi.* (The cash-keeper of a fund wrote to the manager a letter clearly meaning thus: "I admit my liability to the *nidhi* and I am ready to pay the amount that is due from me as soon as I know from you or the higher authorities" — *Held*, that this was not a conditional acknowledgment of liability by the cash-keeper but was sufficient to keep the liability alive as against him.)

('37) 24 AIR 1937 Rang 503 (504) : 173 Ind Cas 1006 (DB), *Shree Ramulu* v. *A. K. Chatterjee.* (Endorsement on policy of life assurance — Endorsement referring to assignment of policy in consideration of loan advanced on promissory note—Endorsement held acknowledgment of liability on promissory note.)

Acknowledgments of liability pertaining to execution proceedings, etc. :

('39) 26 AIR 1939 All 483 (486) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh* v. *Lal Singh.* (Statement of judgment-debtor in reply to decree-holder's application for injunction, acknowledging existence of decree against him amounts to acknowledgment to save limitation.)

('39) 26 AIR 1939 Cal 399 (402) : ILR (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Debi* v. *Jugal Kishore.* (Personal decree against *A* and his minor sons — Before decree, decree-holder applying for attachment before judgment—Properties disposed by *A* before their attachment — Suit by decree-holder against *A*'s sons for declaring dispositions as void — Mother as guardian ad litem of minor sons admitting decree to be unsatisfied but contending that other properties left by *A* are sufficient to satisfy decree — This amounts to acknowledgment.)

('24) 11 AIR 1924 Nag 147 (148) : 79 Ind Cas 66, *Daji Mahar* v. *Mahadev Kunbi.* (An unqualified admission of liability under a decree coupled with a declaration as regards the arrangement proposed for its satisfaction is an acknowledgment.)

('09) 2 Ind Cas 102 (105) : 1909 Pun Re No. 52, *Peachey* v. *Punjab Banking Company Ltd., Lahore.* (Letter to one decree-holder asking him to take steps for stay of sale under decree of another decree-holder acknowledges former's right.)

('17) 4 AIR 1917 Cal 422 (423) : 37 Ind Cas 738 (DB), *Jogendra Prosad Mittra* v. *Asutosh Goswami.* (Application for adjournment of execution sale — Judgment-debtor stating that on failure to pay decretal money on date of sale, he would not object to validity of sale — Application held to contain acknowledgment.)

('22) 9 AIR 1922 Cal 187 (189) : 64 Ind Cas 993 (DB), *Paresh Nath* v. *Ismail Sardar.* (Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that the instalment for *Pous* remained unpaid but as it had not become due, the decree-holder could not proceed with the execution—*Held*, that was a sufficient acknowledgment.)

('33) 20 AIR 1933 All 364 (366) : 55 All 393 : 146 Ind Cas 836 (DB), *Adya Prasad Singh* v. *Lal Girish Bahadur Pal.* (An application made by the judgment-debtor alleging that the matter had been settled, that in consequence of a part payment the decree-holder had agreed in his letter not to take out execution before the end of the next year and praying that the original letter of the decree-holder may be placed on the record was *held* in the circumstances to be an acknowledgment.)

Miscellaneous.

('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bhageshwari Charan* v. *Jagarnath Kuari.* (Estate which had been under management of manager appointed under Chota Nagpur Encumbered Estates Act will not amount to an acknowledgment under the section.[14]

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restored to owner—Section 12 of that Act providing that the owner on such restoration shall not be competent to alienate any part of such estate without previous sanction of the Commissioner — Owner making gift to wife — Petition by wife to Commissioner praying that the gift must be sanctioned or that a fresh grant must be ordered on same terms—*Held*, that the petition contained clear acknowledgment that unless one of the two things was done, she had no title at all or that she recognized that the title was in the donor—AIR 1929 Pat 117 reversed.)

('99) 22 Mad 32 (37, 38) (DB), *Venkatagiri Rajah* v. *Sheikh Bade Saheb.* (A muchalka given by a tenant at the end of fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgment of liability.)

('17) 4 AIR 1917 Oudh 193 (194) : 20 Oudh Cas 13 : 38 Ind Cas 582, *Kubra Bibi* v. *Khudaija Bibi.* (During a pre-emption suit, by an inferior pre-emptor, the vendee entered into an agreement to sell the property, the subject-matter of the suit, to a superior pre-emptor, on the ground of his preferential right—*Held*, the agreement was an acknowledgment of the right, but was not enforceable as it offended against rule of *lis pendens.*)

[14] ***Acknowledgments relating to mortgage.***

('39) 26 AIR 1939 Mad 678 (681) : 189 Ind Cas 200, *Krishna Aiyar* v. *Subba Reddiar.* (Mortgage debt merged into decree—Acknowledgment of existence of decree is not acknowledgment of subsistence of mortgage debt.)

('67) 2 Agra 227 (227) (DB), *Chujjoo Singh* v. *Nazir Hossein.* (*Held*, on the construction of an entry in a wajib-ul-arz, that it did not amount to an admission of a subsisting liability to be redeemed.)

('32) 19 AIR 1932 All 62 (63) : 136 Ind Cas 624 (DB), *Nait Ram* v. *Roshan Lal.* (The plaintiff sued on a first mortgage—In a prior suit on a second mortgage, the decree-holder had filed a statement under O. 21 R. 66, C. P. C., wherein he had informed the Court that upon an examination in the registration office he had found that there was a mortgage deed of the property—*Held*, that the statement did not amount to an acknowledgment.)

('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi* v. *Bhagwat Dayal.* (Admission of purchase of mortgagee rights—No acknowledgment of liability to be redeemed.)

('16) 3 AIR 1916 All 201 (204, 205) : 36 Ind Cas 452 : 38 All 540 (DB), *Khiali Ram* v. *Taik Ram.* (Dakhalnama containing a description of property as mortgaged property is not acknowledgment.)

('36) 23 AIR 1936 Mad 70 (71, 72) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar* v. *Subramania Pillai.* (The auction-purchaser was buying property which was described in the sale proclamation and sale certificate as subject to a mortgage and acknowledged that he had purchased property so described—*Held*, that this was not sufficient acknowledgment of liability under the mortgage.)

Letters repudiating liability.

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Brothers* v. *R. D. Mehta & Co., Asansol.* (Letter denying and repudiating liability to pay is not sufficient acknowledgment.)

('34) 21 AIR 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram* v. *Mt. Mahmudi Begam.* (A letter stating that nothing is due but offering to pay as a matter of grace and for the sake of recommendation of a third person does not amount to an acknowledgment of liability but amounts to repudiation of liability.)

('19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co.* v. *Mahomed Ali Essaji.* ("Please note, no interest is to be charged as you know us, a century old, dealing with you." This does not convey an admission of liability to pay interest as it amounts to repudiation.)

('23) 10 AIR 1923 Pat 298 (299) : 71 Ind Cas 565, *Rameshwar Dass Mali Ram* v. *East Indian Railway Company, Ltd.* (A letter expressly repudiating liability does not amount to acknowledgment.)

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Illustrations.

1. The Court of Wards in charge of an estate gave notice to a creditor of the estate, stating that it had been ascertained that a debt was due to him from the estate and requiring him to appear before the Collector with his account books and papers and informing him that he would then be questioned about the debt. It was held that the notice was an acknowledgment of liability as its opening sentence contained

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('25) 89 Ind Cas 376 (378) (Sind), *Sind Typewriting Co.* v. *Karachi Port Trust and British India Steam Navigation Co., Ltd.* (Do.)

Suit for damages against Railway Company.

('07) 1907 Pun L R No. 2, p. 4 (8) : 1906 Pun Re No. 108 (FB), *Moti Ram* v. *E. I. Ry. Co.* (Suit against Railway Company for compensation for non-delivery of goods — Letter from the Railway Company, which says "in regard to your claim for compensation, I regret the Railway is in no way responsible in this case," cannot be construed as an acknowledgment of liability, but, on the contrary, must be taken as a distinct repudiation of liability.)

('18) 5 AIR 1918 Sind 6 (9) : 13 Sind L R 1 : 51 Ind Cas 570, *Ludhomal Purtomal & Co.* v. *Secretary of State.* (Suit against Railway Administration—Goods delivered to a third person under an indemnity bond by the Railway—Letter from Railway informing that delivery of goods was perfectly correct — No acknowledgment of liability to plaintiff.)

Miscellaneous.

('39) 26 AIR 1939 All 177 (179) : ILR (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad* v. *Chandrabhan Prasad.* (Where an endorsement was in these words : 'Signature of so and so, Rs. 25 paid to the mahajan in respect to (or relating to) this promissory note. Date May 2, 1931 by his own pen'; it was *held*, that it neither imported nor implied any acknowledgment whatsoever in respect to anything beyond the amount which was then paid—*Note*: See however Note 5 and the cases cited thereunder.)

('39) 26 AIR 1939 Cal 488 (488) : 183 Ind Cas 473 (DB), *Corporation of Calcutta* v. *Monjoor Ahmed.* (Decree passed in respect of charge — Applications by judgment-debtor for adjournment in proceedings for rehearing under O. 9 R. 13, Civil P. C., do not constitute acknowledgment.)

('71) 3 N W P H C R 129 (132), *Kalai Khan* v. *Madho Pershad.* (Letter containing a request to a third person to pay the plaintiff his dues is not an acknowledgment of liability.)

('93) 22 Cal 952*n* (955*n*), *Administrator-General of Bengal* v. *Chunder Kant Mookerjee.* (Where the attorney of a party writes to the attorney of the opposite side in a suit which is coming for trial asking him to consent to a postponement "in order that the parties might settle the suit, and if they would not settle the case would go on," it was *held* that this was not an acknowledgment of liability in any sense of the term.)

('33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri* v. *Kalu.* (Gift by Hindu widow — Declaratory suit by reversioner—Defendant pleading that *K* was a preferential heir and plaintiff could not sue in her presence—Defendant's plea held not acknowledgment with reference to *K's* right.)

('29) 16 AIR 1929 Lah 883 (884) : 123 Ind Cas 878, *Ramjimal Narain Das* v. *Gulzara Singh.* (The answer given to one of the interrogatories in a previous suit by the firm, merely stated an existing fact, namely, that there was an entry in the firm's account-books credited to the name of a certain person. *Held*, it was wrong to infer that an acknowledgment of an existing liability was made at the time the *answer* was given to the interrogatories.)

('35) 22 AIR 1935 Mad 287 (288) : 159 Ind Cas 486, *Muthu Chettiar* v. *Venkatachalam Chetty.* (Where the defendant purported to say "no doubt there is a

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a clear admission of the debt, although the last sentence said that the creditor would be questioned about the debt.[15]

2. A letter from the debtor admitting the correctness of the account sent by the creditor and requesting for time for payment is an acknowledgment of liability.[16]

3. Where a decree is partly in favour of the plaintiff and partly in favour of the defendant, the plaintiff by merely applying for execution of that portion of the decree which is in his favour does not acknowledge liability in favour of the defendant.[17]

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contract into which we entered but no money is liable to be paid under the contract because I am prepared to see the contract through"—*Held*, it did not amount to an acknowledgment.)

('26) 13 AIR 1926 Mad 452 (453) : 92 Ind Cas 626 (DB), *Kesavaramayya* v. *Venkataratnam*. (Resolution by a certain committee (which is debtor) authorizing certain of its members to execute a promissory note to the creditor is not acknowledgment of debt.)

('15) 2 AIR 1915 Mad 1155 (1155) : 28 Ind Cas 864 (DB), *Subramania Pillai* v. *Sankaralingam Chettiar*. (Acceptance of an award directing the parties to share equally the outstandings and "amounts payable" found in the accounts of the partnership is not an acknowledgment of liability.)

('10) 5 Ind Cas 756 (756) (Mad), *Muthia Nadar* v. *David Nadar*. (The fact that the defendant signed the account kept by the plaintiff does not necessarily show that he thereby acknowledged that there was debt due. The entry must show that the defendant by his signature acknowledged the debt, otherwise it would only be an acknowledgment of the correctness of the figures entered therein.)

('26) 13 AIR 1926 Nag 57 (59) : 90 Ind Cas 135 (DB), *G. I. P. Ry. Co.* v. *Radhakishan Jaikisan*. (Defendant suggesting compromise "without prejudice" —Suggestion is not acknowledgment.)

('25) 12 AIR 1925 Pat 473 (474) : 88 Ind Cas 478 (DB), *Imdad Ali* v. *Nand Kumar Lal*. (An admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the property.)

('34) 21 AIR 1934 Rang 287 (288, 289) : 152 Ind Cas 501, *Talok Theingan* v. *Sevugan Chettyar*. (Bare signature of debtor on back of promissory note is not acknowledgment of liability.)

('17) 4 AIR 1917 All 304 (305) : 39 All 357 : 38 Ind Cas 105, *Lachman Das* v. *Ahmad Hasan*. (Objection to execution by arrest on the ground of being poor—Mere absence of statement that debt had been discharged is not admission of liability for it.)

('25) 12 AIR 1925 Sind 181 (183, 184) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram* v. *Budhuram Parmanand*. (Statement denying defendant's liability to render an account to the plaintiff cannot be relied on as an acknowledgment.)

[15] ('95) 17 All 198 (208, 209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah*.

[16] ('31) 18 AIR 1931 Bom 74 (75) : 128 Ind Cas 911, *Velchand* v. *Bhagwandas*. [*See* ('38) 25 AIR 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bishunath Ojha*. (The endorsement made by the debtor acknowledging the correctness of an account which showed him a debtor to the extent stated is a clear acknowledgment of the debt, with the ordinary implication of a promise to pay.)]

[17] ('98) 22 Bom 998 (1000, 1001) (DB), *Jeddi Subraya* v. *Ramarao*.

4. In a suit by a consignor of goods against a railway company for compensation for non-delivery of the goods, a letter written by the railway company informing the consignor that the goods are lying at a particular place and that the consignor's instructions as to their disposal are awaited, cannot serve as an acknowledgment of liability.[18]

5. In a suit for compensation for land compulsorily acquired by the Government, a letter written by the Commissioner of Revenue to the Magistrate of the District, expressing his willingness to recommend to the Government to pay for the land, cannot serve as an acknowledgment of liability.[19]

6. A letter was written by the executor of a will informing the plaintiff that his claim against the estate of the testator had been registered and that due notice would be given to him when the assets were to be distributed. It was held, that the letter did not contain any admission of the existence of the debt.[20]

As to whether an endorsement of payment will operate as an acknowledgment, see Note 5.

Where a document contains an acknowledgment of liability, the fact that the document is not intended to be acted upon will not invalidate the acknowledgment.[21] It is immaterial, for the purpose of this section, for what purpose the statement, containing the acknowledgment, is made.[22] An acknowledgment of liability is sufficient under this section although accompanied by a statement that it is not to be enforced in a particular manner.[23] An acknowledgment of liability coupled with a proposal for its discharge in a particular manner is sufficient.[24] But, the section requires an admission of *liability* of the defendant. Hence, a mere admission of the *title* of the plaintiff without in any way implying that there is any *liability* on the part of the defendant is not sufficient for the purposes of this section.[25]

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18. ('20) 7 AIR 1920 All 157 (158) : 42 All 390 : 58 Ind Cas 547, *Mutsaddi Lal* v. *B. B. & C. I. Ry. Co. & Rohilkhand Kumaun Ry.*

19. ('69) 11 Suth W R 1 (2) (DB), *James Hills* v. *Magistrate of Nuddea.*

20. (1864) 2 Mad H C R 84 (87, 88), *Raja Iswar Das* v. *Richardson.*

21. ('30) 17 AIR 1930 Mad 796 (796, 797) : 125 Ind Cas 68, *Mariappa Goundan* v. *Palaniappa Gounden.*

22. ('08) 10 Bom L R 385 (387) (DB), *Sheikh Mahomed* v. *Jamaluddin Mahomed.*

23. ('24) 11 AIR 1924 Mad 856 (857): 82 I. C. 933, *Satyanarayana* v. *Ramireddy.*

24. ('24) 11 AIR 1924 Nag 147 (148) : 79 Ind Cas 66, *Daji Mahar* v. *Mahadeo.*
('38) 25 AIR 1938 Mad 496 (497) : 179 Ind Cas 236, *Ramaswami Mestrier* v. *Velayuthan Pillai.* (Admission of liability coupled with declaration as regards the arrangement proposed for its satisfaction is sufficient acknowledgment even if the proposed discharge proves ineffective.)

25. ('03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer* v. *Nanu Sastry.*
('97) 1 Cal W N 569 (572) (DB), *Jagabandhu Bhattacharjee* v. *Hari Mohan.* (It was observed that in this case the defendant not only admitted the title of the plaintiff to the lands in suit but also that he was in possession of the land.)

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19. Conditional acknowledgment of liability. — In *Maniram Seth* v. *Seth Rupchand*,[1] their Lordships of the Privy Council observed as follows :

> "The Indian Limitation Act, section 19, however, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that *an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing.*"

Hence, this section will apply not only where liability is admitted unconditionally but also where the admission is conditional, provided that the condition is fulfilled.[2]

Thus, where a person admits the existence of open and unsettled accounts between himself and another, there is impliedly an admission of liability coupled with a qualification of such admission by the condition that the balance is found on investigation to be against the person making the admission.[3] Such an admission is sufficient for

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[1] ('06) 33 Cal 1047 (1059, 1060) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 1 Mad L Tim 199 : 3 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC).

[2] ('06) 29 Mad 519 (525) : 16 Mad L Jour 563 : 1 Mad L Tim 318 (DB), *Arunachella Row* v. *Rangiah Appa Row.*

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghela Bhai & Bros.* v. *R. D. Mehta & Co.*

See also cases in foot-notes (3) and (7) below.

[3] ('40) 27 AIR 1940 Bom 172 (174) : ILR (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif* v. *Jawhar State.* (Per Sen, J. — Where a letter written by the defendants' pleader does not admit the balance mentioned in the notice sent to him and requests to take proper accounts and says that if on taking accounts some balance be found due from the defendant, he should be absolved from the dues, it amounts to an acknowledgment.)

('39) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya* v. *Iragam Reddi.* (Admission of existence of open account and expression of willingness to have it settled implies admission of liability for amount which may be found due on settlement.)

('06) 33 Cal 1047 (1059, 1060) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 3 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC), *Mani Ram Seth* v. *Seth Rupchand.*

('30) 17 AIR 1930 All 124 (125) : 124 Ind Cas 24 (DB), *Mahomed Abdullah Khan* v. *Ford & MacDonald Co., Ltd.* (Even where it is doubtful on which side the balance would lie it is sufficient acknowledgment.)

('25) 12 AIR 1925 All 340 (341) : 87 Ind Cas 985 (DB), *Sant Lal* v. *Beni Prasad.*

('28) 111 Ind Cas 617 (618) (DB) (Bom), *Pandurang Shivram* v. *Maruti Niloba.*

('11) 10 Ind Cas 888 (889) : 35 Bom 302, *Ebrahim* v. *Chunilal.*

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.*

('29) 16 AIR 1929 Cal 714 (715) : 121 Ind Cas 741 : 56 Cal 556, *Bengal National Bank, Ltd.* v. *Jatindranath.*

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the purposes of this section provided that the balance is found to be against the person making the admission. In such a case, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission or that the balance would be found to be against the other side.[4]

('19) 6 AIR 1919 Cal 48 (49, 50) : 53 Ind Cas 898 (DB), *Janardan Shaha Poddar* v. *Radha Bullav.*

('99) 26 Cal 715 (723) : 3 Cal W N 524, *W. R. Fink* v. *Buldeo Dass.*

('36) 23 AIR 1936 Lah 629 (638, 639) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar* v. *Ralia Ram.*

('32) 19 AIR 1932 Lah 470 (471) : 137 Ind Cas 840 (DB), *Kanshi Ram Banshi Ram* v. *Arjan Das.*

('20) 7 AIR 1920 Lah 359 (360) : 58 Ind Cas 787 : 1 Lah 357 (DB), *Ganga Sahai* v. *Khazan Chand.*

('10) 6 Ind Cas 948 (951, 952) : 1910 Pun Re No. 55 (DB), *Firm of Sherumal Chaina Mal* v. *Goldstein.*

('25) 12 AIR 1925 Mad 1260 (1262) : 91 Ind Cas 338 (DB), *Arunachellam Chetti* v. *Sethupathi.* (Letter stating that the arrears have not been paid for the sole reason that the accounts have not been settled is an acknowledgment that the accounts have to be settled and that the arrears found to be due, upon settling accounts, will then be paid up.)

('24) 11 AIR 1924 Mad 619 (619) : 80 Ind Cas 355, *Kumarasami* v. *M. Narayana Rao.*

('20) 7 AIR 1920 Mad 742 (742) : 59 Ind Cas 898, *Arumuga Chettiar* v. *Ramanadan.*

('11) 12 Ind Cas 410 (410) (DB) (Mad), *Narayana Chetty* v. *Chidambaram Chetty.*

('87) 10 Mad 259 (264) (DB), *Sitayya* v. *Rangareddi.*

('28) 15 AIR 1928 Pat 221 (223, 224) : 7 Pat 238 : 107 Ind Cas 533 (DB), *Joharmal Mathuradas* v. *Hira Lal Shewchand.*

('26) 13 AIR 1926 Sind 264 (268) : 21 Sind L R 336 : 96 Ind Cas 79, *Gordhandas* v. *Gokul Khataoo.*

[*See* ('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal* v. *Gopal Rao.*]

[But see ('04) 31 Cal 195 (200) : 8 Cal W N 168, *Jogeshwar Roy* v. *Rajnarain Miller.* (On appeal from 30 Cal 699—Submitted not correct.)

('04) 1 All L Jour 58 (Jour). (Submitted not correct.)]

[4] ('39) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya* v. *Iragam Reddi.* (A denial of liability for the amount claimed by the creditor based upon certain calculations by him cannot be read as a total denial of liability for any amount, but is only a denial of liability to the extent asserted by the debtor.)

('87) 10 Mad 259 (265) (DB), *Sitayya* v. *Rangareddi.*

('09) 2 Ind Cas 370 (370, 371) : 3 Sind L R 53 (DB), *Jesomal* v. *Bansimal.* (Such denial is not a denial of the *right* itself; it is only an assertion that the exercise of the right will be fruitless.)

[*See also* ('39) 26 AIR 1939 Lah 216 (217), *Mt. Diwanni Widyawati* v. *Ramji Das & Co.* (A letter of a debtor, who as agent collected rent of and looked after the bungalow of his principal, to the effect that according to his accounts kept correctly only a definite particular amount was due from him, being an admission of existence of an outstanding unsettled account between them amounts to an acknowledgment, as his assertion does not in any way make the unsettled outstanding account into a settled closed account.)]

[But see ('09) 4 Ind Cas 929 (932) (DB) (Lah), *Ram Pershad* v. *Rattan Chand.*

('87) 1887 Pun Re No. 60, *Murree Brewery Co.* v. *Hazuramal.*]

Section 19
Note 19

The admission of the existence of open and unsettled accounts between the parties may itself be express or implied.[5] Thus, where in reply to a demand for payment by the creditor the debtor calls for accounts, he impliedly admits the existence of an unsettled account.[6]

An admission of liability coupled with the condition that the liability is found by arbitrators to exist, is sufficient for the purpose of this section, provided that such condition has been fulfilled.[7]

Where a person admits the existence of unsettled accounts between himself and another but the accounts are submitted to arbitrators for settlement, the admission of the *existence* of unsettled accounts is *unconditional* and does not depend on the success of the arbitration proceedings. Hence, such admission will save limitation for a suit for *accounts* under this section, notwithstanding the failure of the arbitration proceedings.[8]

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[5] ('17) 4 AIR 1917 Mad 845 (845) : 36 Ind Cas 593, *Nagendran Chetty* v. *Kuppusami Ayen.* (Letter saying, "I have insured and sent Rs. 100. On receipt of it please credit the said sum of Rs. 100 in our accounts"—*Held* that this letter acknowledges the existence of an account between the parties.)

[*See* ('40) 27 AIR 1940 Oudh 305 (306, 307) : 15 Luck 537 : 187 Ind Cas 624 (DB), *Deputy Commissioner Kheri* v. *Brijendra Bahadur Singh.* (Entry in debtor's account books that payments are made 'alal hisab'—*Held* that it did not amount to payment in full settlement of account but merely payment towards that account and that the entry constituted an acknowledgment.)]

[6] ('35) 22 AIR 1935 Oudh 170 (175) : 153 Ind Cas 987 (DB), *Shah Muhammad* v. *Ahmad Ali.*

('33) 20 AIR 1933 Rang 147 (147, 148) : 144 Ind Cas 996, *Hamida Bi* v. *Abdul Gaffar.*

('27) 14 AIR 1927 Lah 832 (832) : 101 Ind Cas 544, *Kirpa Ram Kashi Ram* v. *Devi Dayal Mal Dhan Raj.*

('33) 20 AIR 1933 Cal 90 (93) : 141 Ind Cas 716 (DB), *Wazed Ali Khan* v. *Brojendra Kumar.*

[But see ('11) 12 Ind Cas 378 (380) : 36 Mad 68 (DB), *Andiappa Chetty* v. *Devarajulu Naidoo.*]

[7] ('27) 14 AIR 1927 All 488 (490) : 102 Ind Cas 181 : 49 All 801 (DB), *Phul Singh* v. *Bhojraj.*

('19) 6 AIR 1919 Mad 838 (839) : 48 Ind Cas 89 (DB), *Narayanasami Mudali* v. *Gangadhara Mudali.* (Reference to arbitration fell through—No acknowledgment.)

('17) 4 AIR 1917 Mad 892 (893, 894) : 35 Ind Cas 575 : 40 Mad 701 (DB), *Ramamurthy* v. *Gopayya.* (Arbitration failing—No acknowledgment.)

('34) 21 AIR 1934 Lah 973 (974) : 154 Ind Cas 687, *Nanak Chand* v. *Omkar Nath* (Do.)

('37) 24 AIR 1937 Pat 616 (617) : 171 Ind Cas 946, *Sheo Charan Das* v. *Chhakowri Sao.* (Do.)

[8] ('87) 10 Mad 259 (264, 265) (DB), *Sitayya* v. *Rangareddi.*

('37) 24 AIR 1937 Mad 38 (39, 40) : 169 Ind Cas 340, *Jankirama* v. *Narasimha.*

('28) 15 AIR 1928 Sind 45 (45, 47, 48) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumatsing* v. *Nenumal Rejhumal.* (Admission of the existence of an account, which implies a liability to pay the amount found due on a settlement of accounts, and the suggested mode in which the accounts should be settled are two different things.)

An admission of the *execution* of a promissory note coupled with a denial of liability under it on the ground that no consideration passed is not an acknowledgment of liability subject to proof of consideration.[9]

A statement by a debtor that he is willing to pay as soon as he hears from the creditor full details as to how much is exactly due from him, is an unconditional acknowledgment and not one which is subject to the condition that the debtor hears further from the creditor.[10]

Where one cosharer who was in exclusive possession of the whole property wrote a letter to the other cosharer calling upon him to pay up his share of the expenses incurred by him for the repair of the property or surrender his interest, it was held that the acknowledgment of the other's right which the letter implied was not *conditional*.[11]

Where a guardian filed the list of debts due by the estate of the minor in the guardianship Court and at the end of the list added that as the original documents were in the possession of the creditors it was difficult to fix the correct amount of each debt and to admit the correctness of the documents until they had been seen, it was held that the acknowledgment was conditional.[12]

20. Acknowledgment of past liability.—The section requires an acknowledgment of a *subsisting* liability.[1] A mere acknowledgment

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[*See* ('39) 26 AIR 1939 Sind 113 (123) : ILR (1939) Kar 693 : 181 Ind Cas 596, *Tikamdas Mathradas* v. *Kalianji Gordhandas.* (Reference to arbitration for ascertaining and determining debts payable by the debtor — Recitals in a reference to arbitration admitting liability to pay a certain debt amount to sufficient acknowledgment even though the reference may prove infructuous.)]

[9] ('34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal* v. *Bonderbai.*

[10] ('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan* v. *Jananukoola Danasekhara Sanka Nidhi Ltd.*

[11] ('24) 79 Ind Cas 279 (280) (Lah), *Balmokand* v. *Wazirchand.*

[12] ('39) 26 AIR 1939 Lah 31 (34) : 182 Ind Cas 330 (DB), *Sri Chand Sheo Parshad Firm* v. *Lajjia Ram.*

Note 20

[1] ('41) 28 AIR 1941 Pat 147 (150) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain* v. *Ram Lochan.*

('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Sham Devi* v. *Bhagwat Dayal.*

('20) 7 AIR 1920 All 92 (94, 95, 96) : 42 All 575 : 56 Ind Cas 986 (FB), *Anup Singh* v. *Fatehchand.*

('96) 18 All 384 (385) : 1896 All W N 101 (DB), *Hingan Lal* v. *Mansa Ram.* (A mere statement of a fact that a decree was passed against a party on a certain date for a certain amount is not an acknowledgment that there is a present liability under the decree.)

('99) 1899 All W N 222 (223) (DB), *Tirloki Nath* v. *Bhagwat Das.*

('82) 9 Cal 616 (618) : 12 Cal L R 284 (DB), *Ram Das* v. *Brijnundun Das.*

('16) 3 AIR 1916 Lah 234 (235) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu* v. *Mehru Lal.*

of a *past* liability is not sufficient. Hence, a statement that a liability originally existed but that it has since been discharged is not an acknowledgment of liability within this section.[2]

An admission of a past liability, unaccompanied by a denial of the continuance of the liability, does not *necessarily* imply that such liability continues and that the admission is one of a subsisting liability.[3]

('06) 1906 Pun L R No. 155 p. 508, (511) (DB), *Hari Charan* v. *C. Brook.*

('22) 9 AIR 1922 Mad 104 (104) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kandaswami Reddi* v. *Suppammal.*

('19) 6 AIR 1919 Mad 317 (319) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasami Chetii* v. *Thengaralu Chetti.*

('02) 25 Mad 220 (232) (FB), *Narayana Ayyar* v. *Venkataramana Ayyar.*

('97) 20 Mad 239 (242, 243) : 6 Mad L Jour 266 (DB), *Udaya Tevar* v. *Subrahmania Chetti.*

('93) 16 Mad 220 (223) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.* (An intention to continue a subsisting relation of debtor and creditor until it is lawfully determined must also be evident.)

('32) 19 AIR 1932 Oudh 154 (155, 156) : 134 Ind Cas 1022, *Baij Nath Prasad* v. *Sheo Dularey.* (Mere statement of fact of decree having been passed is not sufficient acknowledgment of liability under it.)

('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh* v. *Nenumal Rejhumal.*

[2] ('32) 19 AIR 1932 Oudh 154 (156) : 134 Ind Cas 1022, *Baij Nath Prasad* v. *Sheo Dulary.*

('13) 20 Ind Cas 10 (11) (DB) (All), *Badri Dass* v. *Manohar Dass.* (Post-card stating, "we owe nothing to the shop styled *Moti Ram Bhojraj* because we have paid the amount of a *hundi* for Rs. 1200 on account of Ghanshyamdas proprietor of the shop aforesaid . . . . Nothing is now due by us"—*Held*, this was not acknowledgment but was a direct and express repudiation of the debt giving delails of the manner in which it has been discharged.)

('06) 1906 Pun L R No. 155, p. 508 (511, 512) (DB), *Hari Charan* v. *C. Brook.*

('19) 6 AIR 1919 Mad 317 (319) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasami Chetti* v. *Thangavelu Chetti.*

('13) 21 Ind Cas 30 (31) (DB) (Mad), *Shaik Meera Sahib & Co.* v. *Nainar Lubbay,* (A plea of accord and satisfaction of a debt by reason of an agreement said to have been entered into between the parties at an earlier date, cannot be said to operate as an acknowledgment of specific liability at the time the plea was put in.)

('33) 20 AIR 1933 Nag 13 (14) : 28 Nag L R 348 : 141 Ind Cas 34, *Hira Lal* v. *Kripal Singh.*

('24) 11 AIR 1924 Pat 806 (807) : 78 Ind Cas 919 (DB), *Chhaterdhari Mahto* v. *Nasib Singh.* (Where there was an acknowledgment that there was a mortgage but there was no express statement that it was discharged, but there was a statement that in order to pay it off a sale was effected and since the date of the sale the vendees had been in possession of the property, it was held that the writing did not constitute acknowledgement.)

('12) 15 Ind Cas 363 (365) (Low Bur), *A. P. S. V. Firm* v. *Shree Safatulla.* (Liability repudiated on the ground that plaintiff agreed to take 8 as. 6 ps. in full discharge of his claim without any reservation.)

See also Note 44.

[3] ('35) 22 AIR 1935 Mad 371 (373) : 157 Ind Cas 259, *Appasami Pillai* v. *Morangam Muthirian.* (Overruled in A I R 1940 P C 63 on another point.)

('33) 20 AIR 1933 Mad 565 (565) : 143 Ind Cas 681, *Sakala Rattam* v. *Musalayya.*

('25) 12 AIR 1925 Mad 675 (676, 677) : 91 Ind Cas 833, *Achuthan* v. *Abdu.*

Doubts have, however, been felt about the question consequent on the judgment of the Privy Council in *Maniram Seth* v. *Seth Rupchand*.[4] In that case, R and M had money dealings between each other. M died leaving a will under which R was one of the executors. R applied for probate of the will. To this, objection was taken on the ground that he was indebted to the estate and hence, was not entitled to apply for probate. R replied by a statement which ran as follows: "The applicant R is a big mahajan of Burhanpur paying Rupees 106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate." The Privy Council held that this was a clear admission that there were unsettled accounts between the parties at the time of the death of M and that if nothing further was alleged, the natural presumption was that they continued unsettled at the time the statement was made. Hence, it was held by the Privy Council that there was an implied admission of liability by R, conditional upon the balance being found, on investigation, to be against him.

The above judgment of the Privy Council has been taken by the undermentioned decision[5] to lay down that an admission of a past liability unaccompanied by any statement that it has been discharged, necessarily implies that the liability is subsisting at the time the admission is made. But, this view has not been generally accepted. The general view is that the Privy Council decision merely means that even a statement that a liability existed *may*, in the particular context in which it appears and in the circumstances, in the light of which it has to be interpreted, imply an admission of a subsisting liability.[6] See also Notes 21 and 22 below.

('24) 11 AIR 1924 Mad 856 (857) : 82 Ind Cas 933, *Satyanarayanamoorthy* v. *Ramireddi*.

('87) 1887 Pun Re No. 20, *Balmokand* v. *Ramji Lal*.

('31) 18 AIR 1931 Oudh 295 (296) : 132 Ind Cas 542 (DB), *Ram Bilas* v. *Lachmi Narain*.

('30) 17 AIR 1930 Oudh 67 (68, 69) : 5 Luck 446 : 124 Ind Cas 425 (DB), *Balbhaddar Singh* v. *Sheo Pearey Lal*.

[*See* ('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahmed Haji* v. *Mayan*. (In the circumstances of this case it was held that the statement implied the admission of a subsisting liability.)]

[4] ('06) 33 Cal 1047 (1056 to 1060) : 16 Mad L Jour 300 : 3 All L Jour 525 : 33 Ind App 165 : 2 Nag L R 130 : 1 Mad L Tim 199 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 (PC).

[5] ('09) 2 Ind Cas 522 (523) (Mad), *Ranganayakalu Aiyar* v. *Subbayan*.

[6] ('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi* v. *Bhagwat Dayal*.

('22) 9 AIR 1922 Mad 104 (105) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kandasami Reddi* v. *Suppammal*.

('23) 10 AIR 1923 Mad 634 (635) : 73 Ind Cas 952 (DB), *Muthukumara Mudaliar* v. *Chokalinga Mudaliar*.

('27) 14 AIR 1927 Mad 219 (222 to 224) : 50 Mad 548 : 100 Ind Cas 10 (DB), *Swaminatha Odayar* v. *Subbarama Ayyar*. (When the admission of past liability is made in a deposition given in Court, the Court must be particularly careful to

21. Admission of execution of document, whether implies admission of liability under it. — The admission of the *execution* of a document does not necessarily imply an admission of a subsisting *liability* under it.[1] But such admission *may*, in the particular context in which it appears and the circumstances in the light of which it has to be construed, imply an admission of a present liability.[2] See also Note 20.

22. Admission of execution of document before Sub-Registrar. — In the undermentioned cases[1] it was held that the admission of the execution of a document, before the Sub-Registrar before whom it was presented for registration, was an acknowledgment of liability under the document. (See Note 21 above.)

23. Submission to arbitration, if can be acknowledgment. — See Note 19.

24. Admission of existence of open and unsettled accounts, whether acknowledgment. — See Note 19.

25. Acknowledgment, if may be made by a person who is not liable at the time of the acknowledgment. — There is a conflict of decisions on the question whether an acknowledgment under this section may be made by a person who is not under any liability with regard to the matter acknowledged *at the*

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consider whether the witness had an opportunity of denying the continuance of the liability.)

('24) 11 AIR 1924 Mad 286 (288, 291) : 77 Ind Cas 740 (DB), *Official Assignee of Madras* v. *Subramania Aiyar.*

[*See also* ('21) 8 AIR 1921 Mad 464 (466, 467) : 70 Ind Cas 593 (DB), *Subramania Iyer* v. *Veerabadra Pillai.*]

Note 21

[1] ('24) 11 AIR 1924 All 70 (71) : 74 Ind Cas 353 : 45 All 679, *Lallu Mal* v. *Reoti Ram.*

('34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal* v. *Bonderbai.* (Admission of execution of note—Liability denied for want of consideration—There is no acknowledgment.)

('35) 22 AIR 1935 Cal 721 (722) : 63 Cal 512 : 159 Ind Cas 618, *Sagoremal Gopalka* v. *A. C. Banerjee & Co.*

(1865) 2 Bom H C R 330 (332), *Narbadashankar* v. *Raghunath Ishwarji.*

[2] ('27) 14 AIR 1927 Mad 219 (222 to 224) : 100 Ind Cas 10 : 50 Mad 548 (DB), *Swaminatha Odayar* v. *Subbarama Aiyar.*

('35) 22 AIR 1935 Cal 721 (722, 723) : 63 Cal 512 : 159 Ind Cas 618, *Sagoremal Gopalka* v. *A. C. Banerjee & Co.*

Note 22

[1] ('33) 20 AIR 1933 Mad 713 (714, 715) : 145 Ind Cas 654 : 57 Mad 43 (DB), *Rosayya* v. *Pitchayya.*

('23) 10 AIR 1923 Lah 369 (370) : 76 Ind Cas 751 (DB), *Labha Mal* v. *Iman Din.*

[*See also* ('38) 25 AIR 1938 Mad 429 (432) : 182 Ind Cas 355, *Balasubramania Chettiar* v. *Manickam.* (Recital in sale deed as to liability under a mortgage — Admission of execution of deed before Registrar amounts to an acknowledgment as to mortgage saving limitation.)]

time of the alleged acknowledgment. One view is that an acknowledgment of liability necessarily implies an acknowledgment by a person who, *at the time,* is under a liability in regard to the matter in question. Hence, according to this view, a so-called acknowledgment by a person, who is not under any liability in regard to the matter in question *at the time of the acknowledgment,* is not an acknowledgment at all under this section.[1] The other view is that it is not necessary to constitute an acknowledgment that the person acknowledging must be under liability in regard to the matter in question *at the time of the acknowledgment.*[2] The balance of authority is in favour of the former view. It is submitted that it is the correct one.

Note 25

[1] ('41) 28 AIR 1941 Pat 147 (150) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain* v. *Ram Lochan.* (One co-mortgagor redeeming entire mortgage and being subrogated to the original mortgage—Subsequent statement by the original mortgagee as to the existence of the mortgage is not an acknowledgment so as to save limitation for a suit for redemption of his share by another co-mortgagor against the redeeming co-mortgagor.)

('37) 24 AIR 1937 Lah 507 (511, 512) : I L R (1937) Lah 171 : 170 Ind Cas 245 (DB), *R. H. Skinner* v. *Bank of Upper India Ltd.* (Acknowledgment by person not himself liable will not have the 'legal quality' of acknowledgment—A mortgagor who though he has parted with the equity of redemption is still personally liable and can acknowledge so as to bind the transferee.)

('19) 6 AIR 1919 All 242 (242) : 51 Ind Cas 829 (DB), *Arbindakeb Rai* v. *Jageshar Rai.* (Acknowledgment by mortgagor when he is no longer liable is not binding on transferee of equity of redemption.)

('32) 19 AIR 1932 Oudh 1 (5) : 138 Ind Cas 800 : 7 Luck 270, *Amir Mirza Beg* v. *Lachhmi Narain.* (Do.)

('20) 7 AIR 1920 Mad 1026 (1033) : 62 Ind Cas 833 (DB), *Lakshmanan Chetty* v. *Muthaya Chetty.* (In order to bind puisne mortgagee, the mortgagor must have retained some substantial right in the property at the date of the acknowledgment in favour of first mortgagee.)

('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amarchand* v. *Narayan.* (Acknowledgment by mortgagee before he gets the mortgage right cannot bind transferee of such right from him.)

('71) 3 N W P H C R 129 (132) (DB), *Kalai Khan* v. *Madho Pershad.* (In order to entitle creditor to fresh period of limitation there should be a distinct acknowledgment of the debt as due by the person who makes the acknowledgment—Statement which is consistent with the suggestion that other persons and not the person making the statement are liable is not acknowledgment of liability.)

[*See also* ('40) 27 AIR 1940 Mad 470 (473) : I L R (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi* v. *Palanivela Goundan.* (Mortgage by *A* to *B* in 1913 — Sale of equity of redemption to *C* in 1919 — Acknowledgment in 1920 by *A* is not binding on *C*—A I R 1935 Mad 899 and A I R 1932 Mad 516 overruled—A I R 1925 Mad 1108 and 1 C L J 337 approved—*Bolding* v. *Lane,* (1863) 1 De G J & S 122 and *Newbould* v. *Smith,* (1886) 33 Ch D 127 applied—*Note.*—It is not quite clear whether the ground of decision is that in such a case, there is no acknowledgment at all or it is that an acknowledgment binds only persons deriving title after it is made; but from the trend of the decision, the latter seems to be the ground—The decision specially points out that even where only some of the mortgaged items are transferred and the mortgagor retains his interest in the others, an acknowledgment by the mortgagor after the transfer will not bind the transferee.)]

[2] ('06) 29 All 90 (91, 92) : 3 All L Jour 680 : 1906 All W N 286 (DB), *Jugal Kishore* v. *Fakruddin.* (Acknowledgment need not be by person who has an interest in the property concerned at the time of the acknowledgment.)

Section 19
Notes 25–26

The above question has arisen in regard to the following three matters under this section :

(1) Whether a statement by a person made at a time when he was not in any way liable in regard to the matter alleged to be acknowledged can be used against him as an acknowledgment when subsequently he becomes liable in some way in regard to that matter.

(2) Whether an acknowledgment of mortgage by a mortgagor, after he has parted with his entire interest in the equity of redemption and when he is also not under any personal liability in regard to the mortgage money, can be used against a transferee of the equity of redemption as an acknowledgment by a person through whom the transferee derives his liability.

(3) Whether an admision of the existence of a mortgage made by a person on whom the mortgage right devolves subsequently can be used as an acknowledgment against a transferee of the right from such person, as an acknowledgment by a person through whom the transferee derives his title.

The above questions have been fully discussed in Notes 33 to 35.

26. Acknowledgment must be in respect of the particular property or right claimed in the suit or application. — An acknowledgment of liability under this section must be in respect of the particular property or right claimed in the suit.[1] In other words,

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('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram*. (Acknowledgment by person not liable at the time of the acknowledgment, but becoming liable subsequently—Acknowledgment sufficient.)

('25) 12 AIR 1925 Mad 134 (135) : 80 Ind Cas 940, *Krishnayya* v. *Venkatapayya*. (Do.)

Note 26

1. ('39) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya* v. *Iragam Reddi*. (Where the suit is in respect of a certain sum as due on the basis of certain accounts, a letter which acknowledges the right of the plaintiff to have a settlement of accounts and to recover what is due on that settlement is in respect of the same right as is claimed in the suit even though a certain sum is claimed to be due.)

('39) 26 AIR 1939 Mad 678 (681) : 189 Ind Cas 200, *Krishna Aiyar* v. *Subba Reddiar*. (Mortgage debt merged into decree—Acknowledgment of existence of decree is not acknowledgment of subsistence of mortgage debt.)

('33) 20 AIR 1933 All 348 (349, 350) : 144 Ind Cas 1029, *F. D. R. Footwear* v. *N. W. Ry*. (Letter from Railway Company informing the consignee that in the absence of instructions from him the consignment had been sold at lost-property office and a certain sum, namely, the balance of the sale proceeds of the property was payable to him on certain conditions cannot be taken as an acknowledgment of any liability for the price of the goods or compensation for any wrongful detention or compensation for non-delivery.)

('22) 9 AIR 1922 Bom 356 (356, 357, 358) : 46 Bom 1000 : 70 Ind Cas 906 (DB), *Bhagwan* v. *Madhav*. (Acknowledgment of *the sub-mortgage* did not constitute acknowledgment of a liability to be redeemed by the *original* mortgagor.)

unless it is shown that the right acknowledged is identical with the right claimed in the suit, the section will not apply. Thus, where the defendant acknowledges his liability in respect of a debt, but there are several debts owing by the defendant to the plaintiff and it is not possible to identify the debt acknowledged with the one claimed in the suit, the acknowledgment will be ineffective under this section.[2] But,

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('21) 8 AIR 1921 Bom 291 (292, 293, 294) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjiwandas Parshottamdas* v. *Bai Mani.*

('07) 9 Bom L R 715 (718) (DB), *Gopalrao* v. *Harilal.*

('70) 7 Bom H C R A C 125 (129), *Narayanappa* v. *Bhaskar Parmaya.* (Admission of liability in regard to two instalments is not admission that the entire amount has fallen due.)

('77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877.*

('14) 1 AIR 1914 Cal 487 (488) : 23 Ind Cas 587 (DB), *Bhairo Prasad* v. *Gajadhar Prasad.* (Letter merely saying that the writer after looking into the account will sign it, is acknowledgment of liability on an *open* account and not on an *account stated.*)

('37) 24 AIR 1937 Mad 826 (828) : 176 Ind Cas 939, *Madapayya* v. *Mahabala Rao.* (Acknowledgment of decree debt is not acknowledgment of the debt on which the decree is based.)

('13) 21 Ind Cas 30 (31) (DB) (Mad), *Shaik Meera Sahib & Co.* v. *Shaik Nainar Lubbay.* (Statement that defendant and plaintiff had entered into a compromise in regard to an original liability and that under such compromise, he was bound to pay only a fourth of the original liability is not an acknowledgment in respect of the *original* liability but only one with reference to the liability under the *compromise.*)

('83) 6 Mad 182 (184) (DB), *Venkataramana* v. *Srinivasa.* (Claim to rent as a chalgaini tenant—Acknowledgment of liability to pay rent as a mulgaini tenant is not sufficient.)

('20) 7 AIR 1920 Oudh 236 (238) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.* (Acknowledgment contained in document making no definite reference to debt in suit—No other debt is existing—Presumption is that debt acknowledged is debt under consideration.)

('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh* v. *Nenumal Rejhumal.* (Suit for the settlement of partnership accounts—Subject-matter of the suit being the taking of accounts of a dissolved partnership, all that the plaintiff must prove is that the defendant has admitted the existence of the partnership accounts between the parties and his obligation to settle such accounts—It is not necessary that he should go further and state that he was bound to pay any particular sum or such sum as may be found due by him.)

('19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L S 183 : 55 Ind Cas 822 (DB), *Fillip & Co.* v. *Mahomed Ali Essaji.* (Acknowledgment about principal is not good for interest.)

[2] ('39) 43 Cal W N 943 (945) (DB), *Himangshu Kumari* v. *Radha Madan Mohan.* (A letter written by the guardian of a succeeding shebait promising to pay any debt incurred for legal necessity by the previous shebait, does not constitute an acknowledgment of any particular debt.)

('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *The Collector of Etawah.*

('10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya* v. *Heramba Chandra.*

('18) 5 AIR 1918 Lah 248 (249) : 1918 Pun Re No. 34 : 45 Ind Cas 99, *Kapur Chand* v. *Narinjan Lal.*

[*See also* (13) 20 Ind Cas 27 (27) : 35 All 437, *Meghraj* v. *Mathura Das.*
('97-01) 2 Upp Bur Rul 448 (450), *W. A. Roussac* v. *Peer Mahomed & Son.*]

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the acknowledgment need not be in respect of the particular *relief* claimed in the suit.[3]

The section uses the words "where, ... , an acknowledgment of liability *in respect of such property or right has been made in writing.*" Hence, it is necessary under this section that the document which contains an admission of liability must also *indicate* that such admission is in respect of the right sued on. In other words, it is not enough under this section that there is a written admission of liability and that such admission is proved to be *intended* to refer to the right claimed in the suit. The fact that the admission is intended to refer to the right claimed in the suit must be *indicated* in the document containing the admission.[4] But this does not mean that the indication must be complete in itself so as to enable the Court to hold entirely on the basis of the writing that the right acknowledged and the right sued on are one and the same. The reason is that, as will be seen in Note 32, external evidence is admissible under the *law of evidence* to identify the things and persons referred to in a document and hence, the right indicated in a document may be identified with the right sued on, with the help of external evidence. Hence, it is sufficient for the purpose of the section, if the right is indicated in such a way that with the help of external evidence it can be identified with the right claimed in the suit.[5] (See Note 32.)

Thus, an acknowledgment of a debt need not specify any precise sum as due.[6] Similarly, where the right acknowledged is indicated to

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[See however ('39) 26 AIR 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ramchander* v. *Firm Seth Krishanlal Babulal.* (Suit for balance found due an taking accounts—Acknowledgment need not be in respect of each item—Acknowledgment of total liability is enough.)]

[3] ('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.*

[4] ('07) 9 Bom L R 715 (718) (DB), *Gopalrao* v. *Harilal.*
('10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya* v. *Heramba Chandra.*
('21) 8 AIR 1921 Bom 291 (292, 293, 294) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjiwandas Parshottamdas* v. *Bai Mani.*
('22) 9 AIR 1922 Bom 356 (356, 357, 358) : 46 Bom 1000 : 70 Ind Cas 906 (DB), *Bhagwan Ganpat* v. *Madhav Shankar.*
('77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877.*
('19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co.* v. *Mahomed Ali Esaji.*
[*See also* ('87) 14 Cal 801 (808) : 14 Ind App 168 : 5 Sar 50 : 11 Ind Jur 397 (PC), *Vyapoory Moodaliar* v. *Yeo Kay.*
('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*]

[5] ('69) 12 Suth W R O C 2 (2, 3) : 5 Beng L R 633n (DB), *Umesh Chandra Mookerjee* v. *E. Sageman.*
('70) 5 Beng L R 619 (638) (DB), *Shearman* v. *Fleming.*

[6] ('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal* v. *Mewa Ram.* (But where a definite sum has been acknowledged, the acknowledgment can be used to save limitation only with reference to sum acknowledged.)

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be a right to a debt, the fact that at the date of the acknowledgment there was no other debt due from the defendant to the plaintiff may be proved for establishing the identity between the right acknowledged and that sued on.[7] On the same principle a mere admission that there is a mortgage on one's property may be sufficient although there is nothing in the statement itself to identify the mortgage with the mortgage in suit.[8] So also, an acknowledgment of liability with reference to a mortgage is not bad merely because the date of the mortgage is given wrongly, the reason being, that notwithstanding such mistake it may be possible to identify the mortgage acknowledged

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('11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim Haji Yakub* v. *Chunilal Lal Chand.*

('72) 9 Beng L R App 43 (43), *Harrison* v. *Hope.* (A letter from defendant, asking for time is sufficient acknowledgment.)

('70) 5 Beng L R 619 (638) (DB), *Shearman* v. *Fleming.*

('36) 23 AIR 1936 Lah 276 (278) : 162 Ind Cas 306, *Shanti Lal* v. *Lyallpur Bank Ltd.*

('10) 6 Ind Cas 948 (951, 952) : 1910 Pun Re No. 55 (DB), *Firm of Sheru Mal Chaina Mal* v. *Von Goldstein.* (An admission that there was open and current account between the parties is valid acknowledgment.)

('09) 4 Ind Cas 902 (906) : 1910 Pun Re No. 43 (DB), *Abdul Ali* v. *Von Goldstein.* (Letter admitting that the plaintiff has a good and subsisting claim is enough for this section.)

('67) 3 Mad H C R 308 (310) (DB), *John Young* v. *Mangalapilly Ramaiya.*

('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal* v. *Gopal Rao.*

[*See* ('26) 13 AIR 1926 Sind 264 (268) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas* v. *Firm of Gokal Khataoo.*]

[But see ('28) 15 AIR 1928 Cal 850 (852) : 115 Ind Cas 263, *Manikya Bewa* v. *Pushpa Charan.* (Acknowledgment not stating amount of liability acknowledged is not proper acknowledgment.)

('66) 5 Suth W R S C C Ref 3 (4) (DB), *Nobin Chunder Moozoomdar* v. *T. J. Kenny.* (Letter merely admitting that something was due, was held not sufficient acknowledgment.)]

7. ('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*

('20) 7 AIR 1920 Oudh 236 (238) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.*

('96) 1896 Bom P J 621 (DB), *Balaram* v. *Govinda.*

('37) 24 AIR 1937 Lah 827 (828) : 169 Ind Cas 973, *Gumani Shah* v. *Hukam Chand.*

('09) 3 Ind Cas 407 (408) (DB) (Mad), *Arunachalam Chettiar* v. *Subramania Iyer.* (Signature in account book containing computation of interest—Entry not expressly referring to suit pronote—*Held* sufficient.)

8. ('02) 25 Mad 220 (231, 232) (FB), *Narayana Ayyar* v. *Venkataramana.*

('24) 11 AIR 1924 Mad 286 (287) : 77 Ind Cas 740 (DB), *The Offcial Assignee of Madras* v. *Subramania Iyer.*

('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji* v. *Mammavan.* (Suit for redemption of *kanom* — Acknowledgment by mortgagee—Name of mortgagor or date of mortgage not necessary.)

('69) 5 Mad H C R 320 (323) (DB), *Padmanabhan* v. *Kunhi Kolendan.*

[But see ('86) 1886 Bom P J 317 (DB), *Bhikshet* v. *Balaji.* (Document where the fact of mortgage is stated without mentioning the name of the mortgagor cannot be regarded as valid acknowledgment.)]

with the one to which the suit relates.[9] Similarly, it has been held that where a letter containing an acknowledgment of a debt has been addressed to one Mrs. W as being the creditor, parol evidence is admissible to show that Mrs. S was known as Mrs. W and that this letter was given to her.[10]

Although an acknowledgment under this section must indicate the property or right in respect of which the admission of liability is made, yet, according to explanation I to the section, such acknowledgment need not specify the *exact nature* of the property or right.[11] According to some decisions, the reason why external evidence is admissible for the purpose of identifying the property or right referred to in an acknowledgment of liability is contained in the above provision.[12] It is submitted that this view is not correct as the expression "the *nature*" of a property or right is not synonymous with the particulars necessary for identifying such property or right. As will be seen in Note 32, the true reason for holding that external evidence is admissible for the above purpose is that such evidence is rendered admissible by the law of evidence. The reason does not depend on the above provision of this section.

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[9] ('04) 26 All 313 (316) : 1 All L Jour 1 : 1904 All W N 38 (DB), *Dip Singh* v. *Girand Singh.*
('13) 18 Ind Cas 95 (96) (All), *Har Narain* v. *Sheo Prasad.*

[10] ('69) 12 Suth W R O C 2 (2) : 5 Beng L R 633*n* (DB), *Umesh Chunder Mukerjee* v. *Sageman.*
[*See also* ('31) 18 AIR 1931 Oudh 54 (55) : 130 Ind Cas 347 (DB), *Aijaz Husain* v. *Ram Sarup.* (Parol evidence is admissible to prove that the name of the creditor was through mistake put down as *K* instead of *R* in the acknowledgment.)]

[11] ('40) 27 AIR 1940 Bom 172 (174) : I L R (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif* v. *Jawhar State.* (Per Sen, J., in the lower Court's judgment.)
('26) 13 AIR 1926 All 75 (76) : 89 Ind Cas 617 (DB), *Meharban Singh* v. *Panna Lal.*
('32) 19 AIR 1932 Bom 531 (534) : 139 Ind Cas 218, *Amarchand Rajaram* v. *Narayan Vishnu.*
('07) 6 Cal L Jour 544 (546) (DB), *Ram Khelawan Mahto* v. *Nanhoo Singh.*
('85) 1885 Pun Re No. 28, *Bhagatram* v. *Chint Ram.*
('03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayar* v. *Nanu Sastry.*
('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.*
[*See* ('39) 26 AIR 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ramchander* v. *Firm Seth Krishan Lal Babu Lal.* (Where certain monies are due in respect of transactions between the parties and the defendant acknowledges that money is due from him to the plaintiff, it is unnecessary to specify any particular item and the acknowledgment can be treated as being in respect of the total liability of the defendant to the plaintiff.)]

[12] ('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal* v. *Banwari Lal.*
('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal* v. *Mewa Ram.*
('30) 17 AIR 1930 All 368 (369) : 126 Ind Cas 353 (DB), *Jagannath* v. *Girwar.*
('34) 21 AIR 1934 Lah 835 (837) : 16 Lah 258 : 155 Ind Cas 1074 (DB), *Nihalu Ram Chela Ram* v. *Radhu Ram Hukmi Ram.*
('24) 11 AIR 1924 Mad 286 (287) : 77 Ind Cas 740 (DB), *Official Assignee of Madras* v. *Subramania Ayyar.*
[*See* ('01) 25 Bom 330 (331) : 2 Bom L R 1086 (DB), *Kalian Das* v. *Lotu.* (Under S. 19, Expl. 1, it is open to the plaintiff by reference to the accounts or otherwise to establish a connexion between two *khatas* and show that the second was an acknowledgment of the debt due under the first.)]

27. **Acknowledgment of anything includes acknowledgment of its legal consequences.**—An acknowledgment of liability under this section can only be relied on if it is in respect of the particular property or right claimed in the suit. But, it is enough if the right claimed in the suit is a legal consequence of the matter which has been admitted.[1] The acknowledgment need not *directly* refer to

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Note 27

[1] ('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (P C), *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy.* (Acknowledgment need not specify every legal consequence of the thing acknowledged.)

('28) 15 AIR 1928 Sind 45 (45, 46) : 22 Sind L R 117 : 104 Ind Cas 572 (DB), *Hukumat Singh* v. *Nenumal Rejhu Mal.* (Suit for accounts of dissolved partnership—Proof of admission by defendant of existence of partnership accounts between the parties and his obligation to settle such account is sufficient acknowledgment—Admission of liability to pay a definite amount is not necessary.)

('88) 10 All 93 (96) : 1888 All W N 13 (DB), *The Uncovenanted Service Bank Ltd.* v. *Grant.* (In a suit upon a bond brought against the defendant as a principal debtor, *an acknowledgment of liability as a surety only* is sufficient.)

('02) 26 Bom 562 (569, 570) : 4 Bom L R 447 (DB), *Hajee Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Co.* (Suit against carrier for compensation for non-delivery of goods consigned—Admission that goods were not delivered is acknowledgment of liability for non-delivery.)

('08) 10 Bom L R 385 (387) (DB), *Sheikh Mahomed* v. *Jamaluddin Mahamed.* (Admission of mortgage by mortgagee implies admission of liability to be redeemed.)

('15) 2 AIR 1915 Mad 962 (963, 965) : 28 Ind Cas 69 (DB), *Kallianiamma* v. *Narayanan Nambiar.* (Do.)

('14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan Saha* v. *Surendra Krishna Rai.* (Where person admits that land, of which he is in possession at the time, is the property of another, he admits that he is liable to be made to restore it to that other.)

('09) 3 Ind Cas 34 (38) (DB) (Cal), *Kamal Krishna* v. *Rai Kedar Nath Bahadur.* (Acknowledgment of liability for rent sufficient to save limitation in regard to special remedy under Tenancy Act.)

('28) 15 AIR 1928 Mad 713 (719) : 109 Ind Cas 872 (FB), *Rajaha of Kalahasti* v. *Venkatappa Nayanim.* (Where liability to pay a debt is admitted, it is immaterial that the right to enforce the liability in any particular *manner* is not admitted.)

('19) 6 AIR 1919 Mad 709 (710) : 42 Mad 52 : 48 Ind Cas 298 (DB), *Sabbalakshmi Ammal* v. *Ramalinga Chetty.* (Acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree saves limitation for application for a final decree for sale.)

('09) 3 Ind Cas 19 (20) (DB) (Mad), *Kadri Pakirappa* v. *Manki Husan Sahib.* (Suit for value of goods sold—Defendant's acknowledgment of delivery of goods sufficient to save limitation.)

('10) 7 Ind Cas 797 (797) (Mad), *Narayana Iyengar* v. *Balasubramania Iyer.* (Do.)

[*See also* ('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.* (Acknowledgment need not be in respect of the relief sought in the suit.)]

the liability sought to be enforced in the suit. Thus, where A is liable to contribute to B for a joint debt which the latter has discharged, but merely admits that the debt is a joint debt, his admission is sufficient acknowledgment of liability with reference to a suit for *contribution* by B against him. The reason is that A's liability to contribute is incidental to his position as joint debtor with B, and is merely a consequence of such position.[2] Similarly, where A admits a mortgage he thereby admits all the legal incidents of the mortgage, including the mortgagee's right to the possession of the mortgaged property under the terms of the mortgage.[3]

28. Acknowledgment of liability with reference to portion of claim made by plaintiff—Effect. — This section will only apply to a case if it is shown that the acknowledgment of liability relied on relates to the right claimed in the suit. Hence, where an acknowledgment of liability is made only with reference to a portion of the claim put forward by the plaintiff, such acknowledgment will save limitation only with regard to such portion and not with regard to the entire claim of the plaintiff.[1] But it has been held that an acknowledgment

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[But see ('14) 1 AIR 1914 Cal 253 (254) : 21 Ind Cas 926, *Jogendra Nath Sarkar* v. *Probhat Nath Chatterjee.* (Application by decree-holder stating that he had received a certain sum under the decree and had agreed to give the judgment-debtor further time to pay the balance and praying for the dismissal of the execution does not amount to an acknowledgment of the judgment-debtor's right to have the adjustment recorded as certified.)]

2. ('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (P C), *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy.*

[But see ('19) 6 AIR 1919 Mad 332 (333) : 52 Ind Cas 243, *Marudai Muthirian* v. *Chinnakanu Muhthirian.* (Submitted not correct.)]

3. ('22) 68 Ind Cas 185 (186, 187) (DB) (Lah), *Anant Ram* v. *Inayat Ali Khan.* (Admission of liability to pay interest due on a mortgage deed amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee.)

('22) 9 AIR 1922 Oudh 135 (136, 137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar* v. *Beni Singh.*

('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram.*

('19) 6 AIR 1919 Oudh 217 (224) : 51 Ind Cas 985 (DB), *Basant Singh* v. *Rampal Singh.*

[But see ('18) 5 AIR 1918 Oudh 293 (294, 295) : 21 Oudh Cas 151 : 46 Ind Cas 813, *Beni Madho* v. *Bir Bal Singh.* (Recital in sale deed that a sum is left with vendee to pay off mortgage does not amount to acknowledgment of mortgagee's right to possession.)

('96) 1896 Bom P J 621 (DB), *Balaram* v. *Govinda.* (Acknowledgment of mortgage debt without reference to possession is not sufficient for mortgagee's right to possession.)]

Note 28

1. ('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal* v. *Mewa Ram.*

('91) 1891 All W N 126 (127) (DB), *Mathuradasa* v. *Bhawani.* (Acknowledgment with reference to principal and interest under bond up to due date is not sufficient acknowledgment of liability for *post diem* interest.)

('99) 23 Bom 177 (179, 180, 181) (DB), *Madhavrav* v. *Gulabbhai.*

that interest is due implies that there is some principal due upon which the interest is assessed, and therefore such an acknowledgment can be taken not only as an acknowledgment as to interest but also as to principal.[2]

29. Acknowledgment of liability in respect of promissory note, whether available in respect of original cause of action. — Where a promissory note is given in respect of a pre-existing debt, and an acknowledgment of liability is made in respect of such note, the question arises whether such acknowledgment can be relied on in a suit on the *original cause of action*. The answer to this question depends on the *intention* with which the promissory note is given. If the intention is to *substitute a new contract* in the place of the old one, the original debt is replaced by the new debt and no longer exists. Hence, in such cases, the acknowledgment of liability in respect of the promissory note can only refer to the new debt substituted by the note and cannot be availed of in a suit for the original debt, where such debt revives by reason of the unenforcibility of the promissory note.[1]

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.*

('18) 5 AIR 1918 Cal 294 (298, 301) : 43 Ind Cas 893 (DB), *Kali Das Chaudhuri* v. *Danapadi Sundari Dassee.* (Suit for taking partnership accounts up to the year 1910—Plaintiff relied on a letter by defendant admitting liability to account up to the year 1904—*Held* that the admission is sufficient only to save plaintiff's claim up to the year 1904 and not further.)

('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nand Lal Marwari* v. *Rampal Singh.*

('12) 13 Ind Cas 702 (704, 705) (DB) (Cal), *Chandra Kumar Dhar* v. *Ramdin.*

('26) 13 AIR 1926 Sind 264 (270) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas* v. *Gokal Khataoo.*

('25) 12 AIR 1925 Sind 8 (8, 9) : 86 Ind Cas 228 (DB), *Secretary of State* v. *Kotumal Maghanmal.* (Suit against Railway for loss of goods.)

('19) 6 AIR 1919 Sind 33 (34, 35) : 55 Ind Cas 822 : 13 Sind L R 183 (DB), *Fillip & Co.* v. *Mohammad Ali Essaji.* (Acknowledgment of the liability in respect of the sum due as principal does not involve an admission as to interest.)

The following decisions appear to be incorrect from this point of view.

('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal* v. *Banwari Lal.* (Statement that the plaintiff had agreed to take a certain amount out of which a portion had already been paid and only the balance was due is sufficient to save limitation as regards whole amount due to plaintiff.)

('07) 6 Cal L Jour 141 (142) (DB), *Brojonath Saha* v. *Gayasundari Dassya.* (Judgment-debtor in acknowledging his liability even for a part of his liability under the decree makes such an acknowledgment as required by this section.)

('30) 17 AIR 1930 Cal 304 (305) : 124 Ind Cas 830 (DB), *Hatimulla* v. *Sukhamoy Chaudhury.* (Acknowledgment by judgment-debtor of his liability for portion of money by means of an application for adjustment under O. 21 R. 2, C. P. C., is sufficient acknowledgment in respect of the entire amount.)

[2] ('37) 1937 Mad W N 1312 (1313), *Narayana Iyer* v. *Narayana Iyer.*

Note 29

[1] ('35) 22 AIR 1935 All 129 (132) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi.*

But, where the intention is to give a promissory note in *conditional payment* of the original debt, the note does not extinguish such debt, but is only given on the terms that if it is paid when it falls due, this must be equivalent to a payment of the original debt.[2] In other words, in such cases, the promissory note does not create a *substantive* obligation, but is only given as a *mode of payment* of the original debt.[3] Hence, the original debt is the only debt in such cases, and although an acknowledgment of liability may profess to be made with reference to the *promissory note*, the *debt* to which it refers can only be the original debt. It follows, therefore, that such an acknowledgment can be relied on whether the suit is on the promissory note or on the original cause of action, the *debt* to be recovered in either case being one and the same, viz., the *original* debt.[4]

Although, as already said, it is a question of the intention of the parties in each case whether a promissory note given in regard to a pre-existing debt is given in conditional payment of such debt or otherwise, it is to be presumed, in the absence of a clear indication of a contrary intention, that the promissory note has been given by way of conditional payment only.[5]

The above principles will also apply to other negotiable instruments.[6]

Where a promissory note is given in lieu of an earlier debt and on the same day the debtor gives a receipt to the creditor acknowledging the receipt of the sum mentioned in the promissory note of that date, it has been held[7] that the receipt constitutes an acknowledgment in regard to the *earlier* debt and so can be relied on in a suit on the original cause of action where such suit is brought on account of the promissory note being unenforceable. The reason given is that in such cases, the receipt is a document unmeaning with reference to existing facts because it states that a certain sum of money has been received on a certain day while on that day no money is, in fact, received. Hence, according to the above decisions, evidence is admissible under S. 95 of the Evidence Act to prove that the money referred to in the receipt is the money paid at the time of the earlier debt.

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[2] Halsbury's "Laws of England," (1909), Vol. 7, page 447.
Leake on "Contracts," Fifth Edition, page 633.
(1803) 7 R R 449 (452, 453) : 3 East 251, *Drake* v. *Mitchell.*
(1895) 43 W R (Eng) 66 (67, 68) : (1895) L R 1 Q B 108 : 63 L J Q B 728, *Weg Prosser* v. *Evans.*
('81) 7 Cal 256 (259, 260) : 8 Cal L R 528 (DB), *Sheikh Akbar* v. *Sheikh Khan.*
('02) 25 Mad 580 (582, 583) (DB), *Dargavarapu Sarrapu* v. *Rampratapu.*
('12) 17 Ind Cas 721 (722) : 35 Mad 639 (DB), *Subramania Chetti* v. *Muthia.*
('05) 29 Mad 111 (112) : 15 Mad L Jour 484 (DB), *Veera Raghavayya* v. *Ramayya.*

[3] ('13) 41 Ind App 142 (147) : 26 Ind Cas 228 : 1914 A C 618 : 83 L J P C 131 (PC), *Saminathan Chetty* v. *Palaniappa Chetty.*

[4] ('17) 4 AIR 1917 Mad 460 (462, 464) : 34 Ind Cas 417 (DB), *Chokkalingam Chetty* v. *Annamalai Chetty.*
('84) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman* v. *Vairavan.* (Case about hundi.)

[5] Halsbury's "Laws of England," (1909), Vol. 7, pages 447, 448.

[6] Halsbury's "Laws of England," (1909), Vol. 7, pages 447, 448.
('84) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman* v. *Vairavan.* (Case about hundi (bill of exchange).)

[7] ('33) 20 AIR 1933 Oudh 80 (81) : 141 Ind Cas 298 : 8 Luck 195 (DB), *Ram Chaube* v. *Sheo Harakh Tewari.*
('37) 24 AIR 1937 Oudh 387 (388, 389) : 13 Luck 376 : 168 Ind Cas 927 (DB), *Ambika Singh* v. *Jagdeo Upadhya.*

In the undermentioned case,[8] in which also the facts were as stated above, it was held that the receipt constituted an acknowledgment of liability with reference to the new promissory note and although such note was inadmissible in evidence for want of stamp, a suit could be based on the *receipt* as an acknowledgment of liability. It is submitted that the view is not correct, as an acknowledgment of liability does not in itself constitute a fresh cause of action under the Indian law. (See Note 8.)

In the undermentioned cases[9] a new promissory note was executed in lieu of an earlier one and on the back of the earlier note an endorsement was made to the effect that in lieu of such note a new note was executed and the earlier note thereby became void. As the new note was not sufficiently stamped, a suit was brought on the original note and the above endorsement was relied on as an acknowledgment of liability for the purpose of saving limitation. It was held that though the endorsement stated that the promissory note became *void*, it only meant that a new security had been given for the debt and not that the *debt* itself had come to an end, and that therefore, the endorsement constituted an acknowledgment of liability in regard to the old promissory note.

30. "In writing." — An acknowledgment under this section must be *in writing*. Hence, an *oral* acknowledgment is not sufficient.[1]

('30) 17 AIR 1930 All 368 (368, 369) : 126 Ind Cas 353 (DB), *Jagan Nath* v. *Girwar*.

[But see ('35) 22 AIR 1935 All 129 (132) : 152 Ind Cas 370 : 57 All 434, *Ghulam Murtaza* v. *Mt. Fasiunnissa Bibi*.]

[8] ('29) 16 AIR 1929 All 980 (981, 983) : 121 Ind Cas 108 : 52 All 169 (DB), *Govind Singh* v. *Bijay Bahadur Singh*.

[9] ('39) 26 AIR 1939 Mad 34 (36) : 183 Ind Cas 882, *Kondamma* v. *Venkatarayudu*. (Debtor executing fresh promissory note making endorsement of cancellation on old note — Endorsement amounts to valid acknowledgment of liability on date of endorsement.)

('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram* v. *Radhay Shiam*.

Note 30

[1] ('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa*. (Where the agreement containing the acknowledgment is not in writing evidence of the actual agreement is of no avail.)

Similarly, a *mere* payment of a sum of money towards the debt is not sufficient under this section although such payment may be intended as an acknowledgment of the debt.[2] So also, the mere fact that to secure an old loan the debtor pledges with the creditor certain shares in a company is not sufficient to save limitation under this section, where the pledge has not been recorded in writing.[3] See also the undermentioned case.[4]

31. **"Signed."** — An acknowledgment of liability under this section must be *signed* by the person making the acknowledgment or by his agent. An acknowledgment not so signed will not be sufficient for the purposes of this section.[1] Thus, a telegram cannot constitute a

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('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din* v. *Sri Kishen.* (A note of the Revenue Officer in his report to the effect that a mortgagee made an oral statement of an acknowledgment of the mortgage before him does not help to extend limitation.)

('11) 11 Ind Cas 445 (446) : 1911 Pun Re No. 93, *Ghasita* v. *Sultan.*

('72) 6 Mad H C R 51 (56, 57) (DB), *Kittappa* v. *Somanna.*

('23) 10 AIR 1923 Nag 332 (333) : 75 Ind Cas 440, *Kamal Narain* v. *Bani Ram.*

('67) 3 Mad H C R 378 (380) (DB), *Subbarama* v. *Eastulu Muttusami.*

(1865) 4 Suth W R S C C Ref 1 (4) (DB), *John Doyel* v. *Allum Biswas.*

('74) 6 Mad H C R 197 (200) (DB), *Hirada Karibasappah* v. *Gadigi Muddappa.*

('67) 8 Suth W R 289 (289) (DB), *Wooma Sunduree Dossee* v. *Biressur Roy.* (Oral evidence cannot be allowed to be let in for the purpose of supplementing the want of a written acknowledgment.)

('67) 7 Suth W R 46 (46, 47) (DB), *Giridhari Singh* v. *Kalika Sookul.* (Do.)

[2] ('36) 23 AIR 1936 All 21 (29) : 58 All 313 : 160 Ind Cas 394 (FB), *Genda Lal* v. *Hazari Lal.*

('34) 21 AIR 1934 Lah 993 (993, 994) : 156 Ind Cas 42, *Jaimal* v. *Ram Ratan.*

('19) 6 AIR 1919 Cal 534 (535) : 45 Ind Cas 241 : 46 Cal 168 (DB), *Padma Lochan* v. *Giris Chandra.* (Mere delivery of hundi or cheque does not constitute acknowledgment.)

[3] ('35) 22 AIR 1935 Bom 213 (215) : 156 Ind Cas 531, *Percy F. Fisher* v. *Ardeshir Hormasji.*

[4] ('83) 6 Mad 325 (327) (DB), *Raman Somayajipad* v. *Krishna Poduval.* (Acceptance of sale certificate by the purchaser of a mortgagee's interest is not acknowledgment of mortgagor's title.)

Note 31

[1] ('28) 15 AIR 1928 All 310 (310) : 109 Ind Cas 398, *Bhaja* v. *Ganga Ram.* (Statement made in a criminal Court which did not contain the signature of the party could not be relied upon as a valid acknowledgment.)

('16) 3 AIR 1916 All 201 (203) : 36 Ind Cas 452 : 38 All 540 (DB), *Khiali Ram* v. *Taik Ram.*

('07) 29 All 773 (778) : 1907 All W N 263 : 4 All L Jour 628 (DB), *Dharam Das* v. *Ganga Devi.*

('68) 3 Agra 81 (81) (DB), *Baboo Ram Narain* v. *Huree Das.*

('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amar Chand Raja Ram* v. *Narayan Vishnu.*

('31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Haji Abdula* v. *Bhoja Mal.* (Entry in the *patwari's* register which is not signed by the mortgagee cannot be assumed to be signed by him so as to save limitation.)

('25) 12 AIR 1925 Lah 529 (529) : 86 Ind Cas 859 (DB), *Chimanlal* v. *Ram Rikh.*

sufficient acknowledgment under this section as telegrams are not signed by the parties sending them.[2] Similarly, where an admission of liability is contained in a plan which is filed with a plaint, the plan cannot be used as an acknowledgment made by the plaintiff under this section, where it is not signed by him.[3] The mere fact that the *plaint* is signed is not sufficient. So also mere entries in an account book which are not signed by the defendant are not sufficient for the purpose of this section.[4]

But, the object of the Act is to regard as sufficient what the writer *intends* to be equivalent to his signature, the *form* being immaterial so long as it verifies the acknowledgment.[5] In other words, as long as the debtor's name has been affixed to the document in question, either by the debtor or by his duly authorized agent, in such a way as to make it appear that the letter is his and that he is the real author of it, it does not matter what is the *form* of the signature.[6]

('24) 11 AIR 1924 Lah 484 (486) : 78 Ind Cas 617, *Piroze Khan* v. *Kanhaiya Ram.*
('18) 5 AIR 1918 Lah 248 (248) : 45 Ind Cas 99 : 1918 Pun Re No. 34, *Kapurchand* v. *Narinjan Lal.* (Deposition made in previous suit but not signed is not valid acknowledgment.)
('14) 1 AIR 1914 Lah 464 (464) : 24 Ind Cas 898, *Wazir Singh* v. *Jhanda Singh.* (Entry in a settlement record of the mortgagor's right to redeem the land on payment of the mortgage money and not signed by the mortgagee or by anybody on his behalf is not an acknowledgment.)
('07) 1907 Pun W R No. 173, p. 790 : 1907 Pun Re No. 132, *Gulzari Mal* v. *Kishan Chand.*
('13) 20 Ind Cas 62 (65) (DB) (Oudh), *Gajraj Singh* v. *Mahomed Bakerali Khan.*
('92-96) 2 Upp Bur Rul' 462 (463), *Maung Aung Gyi* v. *Maung Shwe Kyu.* (Drawing up of document after old Burmese fashion does not amount to signing.)

[2] ('06) 1906 Pun L R No. 155, p. 508 (512) (DB), *Hari Charan* v. *Captain C. Brook.*

[3] ('25) 12 AIR 1925 Lah 529 (529) : 86 Ind Cas 859 (DB), *Chiman Lal* v. *Ram Rikh.*

[4] ('30) 17 AIR 1930 All 124 (125) : 124 Ind Cas 24 (DB), *Mohamed Abdullah Khan* v. *Ford & McDonald Co., Ltd.*
('12) 16 Ind Cas 146 (146) : 34 All 464 (DB), *Jaggi Lal* v. *Sri Ram.*
('81) 1881 All W N 87 (88) (DB), *Mahpal Singh* v. *Mohesh Singh.*
('71) 8 Bom H C R A C 6 (8) (DB), *Mul Chand Gulab Chand* v. *Girdhar Madhav.*
(1865) 3 Suth W R 94 (94) (DB), *Rutton Monee Debia* v. *Gunga Monee Debia.*
('12) 13 Ind Cas 650 (651) (Lah), *Karam Chand* v. *Sultan.*
('18) 5 AIR 1918 Mad 238 (239) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa Chettiar* v. *Veerappa Chettiar.*

[5] ('35) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Vellayappa Chettiar* v. *Somasundaram Chettiar.*
('35) 22 AIR 1935 Mad 555 (555) : 156 Ind Cas 449 : 59 Mad 72, *Tevudu* v. *Venkataratnam.*
('04) 31 Cal 1043 (1048, 1049) : 9 Cal W N 83 (DB), *Sadasook Agarwala* v. *Baikanta Nath Basunia.*
('89) 1889 Pun Re No. 122, *Ram Ditta* v. *Ebrahim-ud-din.*

[6] ('40) 27 AIR 1940 Pat 6 (7) : 18 Pat 715 : 186 Ind Cas 225 (DB), *Ramjan Ali* v. *Khawja Meer Ahmed.* (Name of the debtor whether written or printed is sufficient.)

Hence, the full signature of the party is not necessary to constitute signing. Initials are enough.[7] Similarly, the actual *name* of the alleged signatory need not be written. It is enough if any words or letters by which a person usually authenticates documents as being his own are written.[8]

It was held in a case decided under the Act of 1859 that affixing one's seal to an acknowledgment is not equivalent to signing it.[9] This view was embodied in the first illustration to S. 20 of the Act of 1871. Accordingly, it was held under that Act that affixing one's seal or stamp to an acknowledgment was not a sufficient signature of such

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('35) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Vellayappa Chettyar* v. *Somasundaram Chettyar.* (Affixing of rubber stamp containing principal's name is a sufficient signature.)

[*See* ('40) 27 AIR 1940 Mad 887 (888) : 192 Ind Cas 350, *Kanthasami Reddiar* v. *Pethusami Reddiar.* (Defendant striking balance in plaintiff's account book in his own handwriting but not signing it or in any other way indicating that he accepts it — Defendant's name written by himself at the top of the account at the time of opening of the account — *Held* there was no statement of account in writing signed by the defendant within the meaning of Art. 64—31 Cal 1043 and 5 Bom 88 distinguished.)]

[7] ('35) 22 AIR 1935 Mad 555 (555, 556) : 156 Ind Cas 449 : 59 Mad 72, *Tevudu* v. *Venkataratnam.*

[But see ('26) 13 AIR 1926 Mad 827 (828, 829) : 96 Ind Cas 700, *Lakshmanacharyulu* v. *Venkataramanujacharyulu.*]

[8] ('94) 18 Bom 586 (590) (DB), *Gangadhar Rao Venkatesh* v. *Sidramapa Balapa Desai.* (The letters in question contained certain specified words in the handwriting of the defendant at the top and bottom and the evidence in the case showed that among the community to which the defendant belonged *(Desais)*, this was the usual mode of signing letters and informal documents with the view of authenticating such documents as the documents of the person so signing — *Held*, on such evidence, that the writing of the specified words amounted to signing.)

('25) 12 AIR 1925 All 85 (86, 87) : 75 Ind Cas 1004 (DB), *Gopal Das* v. *Goswami Banmali Lal.* (Where the habitual method of a Guru while sending communications to his disciples is to subscribe the communication with the words "Shree Hari Sharanam" and not to affix his signatures, any communication of this form and written by the Guru himself will be regarded as signed by him.)

('15) 2 AIR 1915 Mad 506 (508) : 26 Ind Cas 911 (DB), *Chidambaram Chetti* v. *Ramaswami Chettiar.* (Where it is proved that Nattukottai Chettys in writing their private letters do not usually sign their names, but only write words invoking the help of the family deity, a letter thus signed may be taken as signed by the writer.)

('04) 31 Cal 1043 (1048, 1049) : 9 Cal W N 83 (DB), *Sadasook Agarwala* v. *Baikanta Nath Basunia.* (It is necessary in such cases to consider the intention of the parties.)

[*See also* ('67) 8 Suth W R 395 (397) (DB), *Gunee Biswas* v. *Shrigopal Paul Chowdry.* (Rajahs, Maharajas and great zamindars often sign without any name.)]

Note:—In this view the definition of the word "sign" in A I R 1935 Rang 160 (161) as meaning "to attest or confirm a document by affixing one's name to it" must be held to be not exhaustive.

[9] ('67) 8 Suth W R 513 (514) (DB), *Luchmun Pershad* v. *Rumzan Ali.*

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acknowledgment.[10] But the above illustration, along with the others that appeared under S. 20 of the Act of 1871, has been omitted in the later Acts. It has been held under such Acts that affixing the seal or stamp to a document containing an acknowledgment is equivalent to signing such document.[11]

Under S. 3, clause 52 of the General Clauses Act of 1897, the word "sign" would include, in the case of a person who is unable to write his name, the making of a mark. Hence, where the person making an acknowledgment cannot write his name, a mark made by him will be a sufficient signature.[12] Thus, if he affixes his thumb impression, it will be enough.[13]

A person may authorise another person to sign his (the former's) name on his behalf and in such cases, the signature will be held to be that of the *principal*.[14] (See also Note 50.)

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10. ('77) 1877 Pun Re No. 93, *Deota* v. *Kesho.* (Acknowledgment under Art. 148 of Act of 1871.)

11. ('83) 1883 Pun Re No. 185, *Gur Sahai Ram* v. *Sadik Muhammad.*

('33) 20 AIR 1933 Lah 12 (13) : 140 Ind Cas 187 : 14 Lah 14 (DB), *Dasaundhi Ram* v. *Moolchand.*

('35) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Vellayappa Chettyar* v. *Somasundaram Chettyar.*

12. ('32) 19 AIR 1932 Bom 531 (533) : 139 Ind Cas 218, *Amarchand Rajaram* v. *Narayan Vishnu.*

('28) 15 AIR 1928 Bom 417 (418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Govind* v. *Gangu Bai Balwant.*

('75) 7 Mad H C R 358 (358) (DB), *Bheeman Gowda* v. *Eeranah.*

('77) 1877 Pun Re No. 93, *Deota* v. *Kesho.*

('91) 1891 Pun Re No. 16, *Jeba* v. *Chaman.*

[*See* ('35) 22 AIR 1935 All 946 (949) : 58 All 261 : 159 Ind Cas 387 (FB), *Udeypal Singh* v. *Lakshmi Chand.*]

[But see ('68) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co.* v. *Koylas Chunder Dass.* (Putting of cross held not equivalent to signature—Case not good law now.)]

13. ('21) 8 AIR 1921 Pat 476 (477) : 62 Ind Cas 644, *Sri Ram Singh* v. *Kashi Mollah.*

14. ('40) 27 AIR 1940 Pat 6 (7) : 18 Pat 715 : 186 Ind Cas 225 (DB), *Ramjan Ali* v. *Khawja Meer Ahmed.* (It is not necessary that the debtor's name should be written by himself — The signature by an agent is enough whether the debtor is literate or illiterate.)

('78) 1 All 683 (685, 686) (DB), *Mathura Das* v. *Babu Lal.* (It is however necessary to show that the name was introduced with a view to authenticate it.)

('91) 1891 All W N 126 (127) (DB), *Mathura Das* v. *Bhawani Ghulam.*

('80) 6 Cal 840 (852, 853, 854) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Basant Kumari.*

('09) 3 Ind Cas 725 (727) : 32 All 33 (DB), *Shib Shankar Lal* v. *Soniram.*

('11) 10 Ind Cas 215 (216) (All), *Maharaj Singh* v. *Shankar Lal.*

('19) 6 AIR 1919 Mad 952 (952, 953) : 43 Ind Cas 20 (DB), *Muthiah Chettiar* v. *Kuttayan Chetty.*

('21) 8 AIR 1921 Nag 1 (2, 3) : 65 Ind Cas 279 : 17 N L R 209, *Onkar Lal* v. *Raj Mohamed.*

('89) 1889 Pun Re No. 122, *Ram Ditta* v. *Ebrahim-ud-din.*

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Where A executes a document but B signs it as a *scribe,* the document cannot operate as an acknowledgment by the *latter.* The reason is that the signature contemplated by this section is one which is affixed with a view to attest or confirm the document. Hence, where a mortgagor signs certain entries in the account book of the mortgagee but the mortgagee also signs the entries as a scribe, the latter does not thereby acknowledge any liability on his part.[15]

It is not necessary that the signature must appear in any particular part of the document.[16] It may appear in any part of the document provided it is clear that the intention of the party is to acknowledge the instrument to be his.[17]

('35) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Velayappa Chettiar* v. *Somasundaram Chettiar.*

('96) 6 Mad L Jour 209 (210), *Krishnachar* v. *Vadichi Goundan.* (Where an illiterate defendant merely touched a pen and asked another person to write his name, this was held to be a sufficient signature.)

('68) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co.* v. *Koylas Chunder.* (Do.)

('87) 1877 Pun Re No. 93, *Deota* v. *Kesho.* (Do.)

('02) 24 All 319 (330) : 1902 All W N 127 (FB), *Deo Narain Roy* v. *Kurur Bind.* (If mortgagor is illiterate, it is a good signature if in the presence and at the request of the mortgagor some other person signs the mortgagor's name on his behalf as executant of the document.)

[*See* ('83) 7 Bom 515 (518), *Hemchand Kuber* v. *Vohora Raji Haji.* (Balance of account written by person at request of illiterate debtor in the debtor's name, and signed by the writer in his own name—*Held* this was an acknowledgment by a duly authorized agent.)]

[15] ('31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Haji Abdullah* v. *Bhoja Mal.*

[16] ('80) 6 Cal 340 (352) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Basant Kumaree.*

('78) 1 All 683 (685) (DB), *Mathura Das* v. *Babu Lal.*

('86) 10 Bom 71 (73) (DB), *Mahlakshmibai* v. *Firm of Nageshwar Purshottam.*

('21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkarlal* v. *Raj Mahomed.*

('89) 1889 Pun Re No. 122, *Ram Ditta* v. *Ibrahim-ud-din.*

(1864) 2 Mad H C R 79 (81) (DB), *Khwaja Muhammad Janula* v. *Venkatarayar.* (The signature need not be formally *subjoined or added* to an acknowledgment written by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself, as an admission without a signature.)

[17] ('41) 28 AIR 1941 Oudh 376 (379, 380) : 194 Ind Cas 168 (171, 172) (DB) (Oudh), *Het Ram* v. *Subhag Chand.* (A letter acknowledging liability for a debt written by a partner of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient.)

('78) 1 All 683 (685) (DB), *Mathura Das* v. *Babu Lal.* (A letter containing an acknowledgment headed as addressed by the principal to a creditor and written by an agent, the last portion of the letter being written by the principal, held to be an acknowledgment sufficiently signed.)

('81) 5 Bom 88 (88) (DB), *Andarji Kalyanji* v. *Dulabh Jiwan.* (Account stated written by the debtor himself with his name at the top was held to be sufficiently signed, the signature being one of the modes of signing most generally practised by natives.)

('81) 5 Bom 89 (91) : 1880 Bom P J 265 (DB), *Jekisan Bapuji* v. *Bhowsar Bhoga Jetha.* (Do.)

32. Admissibility of external evidence for construction of documents alleged to contain acknowledgments of liability. — The construction of documents alleged to contain acknowledgments of liability is governed by the same principles as those that apply to the construction of other documents. The general principle is that the meaning of a document must primarily be ascertained from the language used in it and surrounding circumstances cannot be taken into account except where such language is ambiguous and capable of more than one interpretation.[1] Hence, as a general rule, in determining whether a document contains an admission of liability, it is not open to the Court to take into consideration evidence of external circumstances.[1a] In other words, the document must contain *within itself* an admission of a subsisting liability and the Court cannot, by treating the document as if it stated matters which

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('33) 20 AIR 1933 Lah 12 (13) : 140 Ind Cas 187 : 14 Lah 14 (DB), *Dasaundhi Ram* v. *Mulchand.* (Name of debtor written at top is sufficient.)

('19) 6 AIR 1919 Mad 952 (952) : 43 Ind Cas 20 (DB), *Muthiah Chettiar* v. *Kuttayan Chetty.* (According to the practice of Nattukottai Chettys who do not sign their letters at the foot but begin by saying that the sender is such and such a firm, the name so written is a sufficient signature.)

('24) 11 AIR 1924 All 855 (855) : 80 Ind Cas 6 : 46 All 892 (DB), *Uma Shankar* v. *Govind Narain.* (Letter acknowledging liability for a debt written by the *munim* of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient.)

[See however ('92) 15 Mad 380 (381) : 2 Mad L Jour 42 (DB), *Ramasami* v. *Muthusami.* (Per Weir, J.—*Held* that as no practice of signing at the beginning was proved in the case, such signing was not sufficient.)]

Note 32

[1] ('24) 11 AIR 1924 P C 162 (174) : 80 Ind Cas 807 : 48 Mad 230 : 52 Ind App 1 (P C), *Subhadrayyamma* v. *Venkatapathi.*

('20) 7 AIR 1920 P C 103 (106, 107) (P C), *Lampson* v. *City of Quebec.*

('74) 1 Ind App 157 (163): 13 Beng L R 312 : 3 Sar 354 (PC), *Rani Mewa Kuwar* v. *Rani Hulas Kuar.*

(1839) 2 Moo Ind App 311 (328) : 5 Suth W R P C 129 : 1 Suther 93 : 1 Sar 193 (P C), *Raja Gopal Inder Narain Roy* v. *Jagarnath Gurg.*

('27) 14 AIR 1927 P C 272 (274) : 107 Ind Cas 346 (P C), *Royal Bank of Canada* v. *Joseph Salvatori.*

[1a] ('39) 26 AIR 1939 All 177 (179) : ILR (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad* v. *Chandra Bhan Prasad.* (Court cannot go beyond the words used in order to determine whether the document contains an acknowledgment — An endorsement on the back of the promissory note that a certain amount is paid relating to a promissory note neither imports nor implies any acknowledgment whatsoever in respect of anything beyond the amount which was being paid.)

('71) 6 Beng L R 550 (554), *Rogers* v. *Montriou.* (To satisfy S. 4 of Act of 1859 which corresponds to Sec. 19, there must be some principal writing of the particular date, which can be relied on by itself, when properly construed, as constituting an acknowledgment of the debt. Letters written either before or afterwards may be taken with the principal letter in order to ascertain what that letter means.)

('72) 9 Beng L R App 43 (43), *Harrison* v. *Hope.* (Macpherson, J. held that the defendant's letters taken in connexion with those from the plaintiffs, formed a sufficient acknowledgment to take the case out of the operation of the Limitation Act.)

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are facts but which it does not actually state, come to the conclusion that the document contains an admission of liability.[2] Thus, where A merely says that B is the owner of certain property, his statement cannot be taken in conjunction with the fact that A is at the time in possession of the property so as to make the statement an admission of *liability* by him in respect of such property.[3] Similarly, where a person says that a decree *was* passed against him, his statement cannot be read along with the fact that at the time he makes the statement the decree is in force, so as to prove the statement to be an admission of liability by him.[4]

But, evidence is always admissible for the purpose of showing how the language used in a document is related to existing facts.[5] In other words, extrinsic evidence of every material fact which will enable the Court to identify the persons and things to which the instrument refers is admissible.[6] Hence, external evidence is admissible for the purpose of identifying the property or right indicated in a document, as that in regard to which the acknowledgment of liability is made.[7] But, for the purpose of identifying such right, only evidence of *surrounding circumstances* is admissible. The oral evidence of the person making the acknowledgment, as to his intentions is not admissible.[8] The reason is that it is an established rule of evidence that declarations of intention by the author of an instrument are inadmissible for the purpose of construing such instrument.[9]

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[2] ('03) 26 Mad 34 (37): 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer* v. *Nanu Sastri.*
('32) 19 AIR 1932 Bom 531 (534) : 139 Ind Cas 218, *Amar Chand Rajaram* v. *Narayan Vishnu.*
('07) 6 Cal L Jour 544 (546) (DB), *Ram Khelawan Mahto* v. *Nanhoo Singh.*
('25) 12 AIR 1925 Mad 675 (679, 680) : 91 Ind Cas 833, *Achuthan* v. *Abdu.*
('36) 23 AIR 1936 Lah 629 (637): 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar* v. *Ralia Ram.*
('69) 5 Mad H C R 90 (92) (DB), *Latchumanan* v. *Mutha Iburaki Marakayar.*
('21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkar Lal* v. *Raj Mohammed.*
('84) 1884 Pun Re No. 2, *Simla Bank* v. *Ball.*
('70) 5 Beng L R 619 (638) (DB), *Shearman* v. *Fleming.* (The words "remittance of £40 to old account" are ambiguous, and do not necessarily import that a further sum is admitted to be due.)

[3] ('03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer* v. *Nanu Sastri.*

[4] ('25) 12 AIR 1925 Mad 675 (679, 680) : 91 Ind Cas 833, *Achuthan* v. *Abdu.*

[5] See Evidence Act, Sections 92 (Proviso 6),95, 96 and 97

[6] (1900) 48 W R (Eng.) 591 (593): 16 T L R 211:69 L J P C 22: L R (1900) A C 182 : 82 L T 102, *Bank of New Zealand* v. *Simpson.*

[7] ('41) 28 AIR 1941 Mad 409 (409), *Athmaramayya* v. *Seshappa Aiyar.* (Post-card containing acknowledgment not necessarily referring to suit debt on face of it—Oral evidence to prove that it refers to suit debt is admissible.)
('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*
('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), *Chokkalingam Chetti* v. *Annamalai Chetty.*
('02) 25 Mad 220 (232) (FB), *Narayana Aiyer* v. *Venkataramana Ayyar.*
('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji* v. *Mammavan.*
('36) 23 AIR 1936 Lah 629 (637) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar* v. *Ralia Ram.*

It will be seen from the above, that external evidence is only admissible for the purpose of identifying the right *indicated* in a document as admitted. The reason is that, as seen in Note 26 under this section, the document alleged to contain an acknowledgment must not only contain an admission of liability but also *indicate* that such admission relates to the right claimed in the suit. It will not be sufficient merely to show that the *intention* of the defendant was to admit his liability in regard to the right claimed in the suit where such intention is not *indicated* in any way by the document itself. But, while external evidence is admissible for identifying the right indicated in the document as admitted, no such evidence is admissible in regard to the question as to whether the document contains an admission of liability. The reason is that in the latter case, there is no question of *identifying* anything by means of such evidence. Thus, the difference in the rule as to the admissibility of external evidence in regard to the two matters referred to above is not due to anything contained in the *section*, but is only based on *rules as to evidence and construction of documents.*

33. **"Party against whom such property or right is claimed."** — In *Jugal Kishore* v. *Fakhruddin*,[1] the Allahabad High Court observed as follows:

> "Section 19 does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given. . . . . . ."

('21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkar Lal* v. *Raj Mohamed.*

('31) 18 AIR 1931 Oudh 54 (55) : 130 Ind Cas 347 (DB), *Aijaz Hussain* v. *Ram Sarup.* (Mistake as to name of creditor—Oral evidence can be given to prove the mistake—S. 95 of Evidence Act.)

('33) 20 AIR 1933 Oudh 80 (81) : 8 Luck 195 : 141 Ind Cas 298 (DB), *Ram Chaube* v. *Sheo Harakh.* (Recepit executed and reciting the receipt of money while on that date no money was actually received—Evidence admissible for showing that the reference was to money received on a prior date.)

('01) 25 Bom 330 (331) : 2 Bom L R 1086 (DB), *Kalian Das* v. *Lotu.* (It is open to the plaintiff by reference to the accounts or otherwise to establish a connexion between two *khatas* and show that the second was an acknowledgment of the debt due under the first.)

[8] ('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*

[9] See Phipson's "Law of Evidence," Fifth Edition, page 578.

Note 33

[1] ('06) 29 All 90 (91, 92) : 3 All L Jour 680 : 1906 All W N 286 (DB).

In other words, according to the above decision, it is sufficient under this section if the acknowledgment has been made by a person against whom the right *is* claimed in the suit. It is not necessary that *at the time when the acknowledgment was made,* such person must have had an interest in the property in respect of which the acknowledgment was given. The facts in the above case were these. A and B were co-owners of a certain house. But A was in possession of the whole house to the exclusion of B. C, A's son, who at the time had no interest in the house made a statement that B was a co-owner of the house. Subsequently, A died and his interest in the house became vested in his son, C. B sued C for partition and when the latter pleaded limitation, relied on his previous statement as an acknowledgment of liability. It was held that notwithstanding the fact that at the time when C made the statement he had no interest in the house, the statement could be used against him as an acknowledgment of liability.

A similar view was also taken in another decision of the Allahabad High Court.[2] In that case, A and B were mortgagees of certain property. A made a statement that the money due on the mortgage remained unpaid. Subsequently, the equity of redemption became vested in A. B then sued A for recovery of his share of the mortgage money. It was held that A's statement could be used as an acknowledgment of liability to save limitation for the suit, although at the time when the statement was made, A was not liable for the mortgage money.

The above view has also been followed by the Madras High Court in the undermentioned decision.[3] In that case, A and B were partners in a certain firm. A debt was due to C from the firm. A's son D who had no interest in the firm wrote a letter to C adverting to this debt and promising to pay it. Subsequently, after A's death, D became one of the persons liable for the above debt. In a suit for the recovery of the debt, it was held that his previous statement could be used against him as an acknowledgment of liability, although *at the time when the statement was made* he was not in any way liable for the debt.

Thus, according to all the above decisions, a statement that a certain liability exists may be used as an acknowledgment of liability against the person making the statement, although, *at the time of the statement,* he was not liable in any way in regard to the matter acknowledged.

The above view necessarily implies that an acknowledgment may be made under this section by a person who at the time of the acknowledgment is not himself liable in regard to the matter acknowledged.

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[2] ('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram.*

[3] ('25) 12 AIR 1925 Mad 134 (135) : 80 Ind Cas 940, *Krishnayya* v. *Venkatappaya.*

It is submitted that on the principles discussed in Note 25, the view taken in the cases referred to above cannot be accepted as correct.

34. "Person through whom he derives title or liability." — Suppose a property is mortgaged to A. During A's lifetime, A's son B who has no interest in the mortgage right admits the mortgage. Subsequently, B inherits the mortgage right and after him, it passes to C. In a suit for redemption against C, the acknowledgment by B cannot be relied on as an acknowledgment by a person through whom the defendant derives his liability. The reason is that it was made by B before he became liable in regard to the right acknowledged and as such could not be an *acknowledgment* of liability.[1] (See Note 25.)

An auction purchaser derives his title from the judgment-debtor. Hence, if the judgment-debtor makes an acknowledgment of liability in respect of a mortgage on the property, the acknowledgment will be binding on the auction purchaser.[2] But it has been held that if such acknowledgment is made after the attachment of the property, the auction purchaser will not be bound by the acknowledgment.[3] The reason given is that the auction purchaser is entitled to have the property purchased by him in the condition in which it was at the time of the attachment, while the effect of allowing the acknowledgment would be to give a longer life to the lien, that is, to place a larger burden on the property than it bore at the time of the attachment. It is submitted that this view is not correct. The acknowledgment merely admits a pre-existing liability and does not place any *additional* or *new* liability on the property.

A mortgages his property first to B. Then, he grants a mortgage with possession *(othi)* of the same property to C. C allows the revenue payable on the land to fall into arrears. The property is sold for arrears of revenue. C himself purchases the property at the revenue sale. Under S. 90 of the Trusts Act, C must hold the property for the benefit of the mortgagor, A, and the first mortgagee, B. In other words, notwithstanding the revenue sale, the first mortgage in favour of B is still binding on the property. As this liability is derived through A, the mortgagor, an acknowledgment of liability made by him in regard to B's mortgage will be binding on C.[4]

A pre-emptor of property does not derive his title to the property through the *vendee*. Hence, an acknowledgment by the vendee of a mortgage on the property will not be binding on the pre-emptor.[5]

See also Note 35 below.

Note 34

[1] ('32) 19 AIR 1932 Bom 531 (532): 139 Ind Cas 218, *Amarchand* v. *Narayan.*

[2] ('18) 5 AIR 1918 Cal 978 (979): 44 I. C. 533 (DB), *Rajeswari* v. *Benoda.*

[3] ('18) 5 AIR 1918 Cal 978 (979) : 44 I. C. 533 (DB), *Rajeswari* v. *Benoda.*

[4] ('27) 14 AIR 1927 Mad 349 (350), *Arokiam Asary* v. *Vavana Rowthen.*

[5] ('32) 19 AIR 1932 All 700 (701) : 143 Ind Cas 41 : 54 All 1023 (DB), *Shankar Lal* v. *Hashmi Begam.*

Section 19
Note 35

35. Acknowledgment of mortgage by mortgagor, whether binds transferees of the equity of redemption claiming under transfers made prior to acknowledgment.— Where A mortgages his property first to B and then mortgages or sells the same property to C, the latter derives his title to the property and his liability in respect of the mortgage of B, from A, the mortgagor. In such cases, it is clear from the section that an acknowledgment of liability in respect of B's mortgage made by A will bind him as well as C where such acknowledgment has been made *before* the sale or mortgage in favour of C. The question has arisen whether such acknowledgment will bind C if it was made *after* the transfer to him. On this question there is a conflict of decisions.

The decisions fall into the following three groups:

(1) In the *first* group of cases it is held that the acknowledgment will not bind C in *any* case, irrespective of the question whether at the time of the acknowledgment A was himself liable or not.[1] The reason given is that, on general principles, where C derives his title from A, C should be bound only by such acts of A as are done *before* the title is derived and not by acts done *afterwards*. Hence, according to this view, though at the time of the acknowledgment A was himself liable in respect of the right acknowledged by him, the acknowledgment would not bind C.

(2) The *second* group of cases accepts the proposition that under this section an acknowledgment made by A even after the date the title is derived by C will be binding on the latter; but these cases hold that this principle would apply only where A himself was under liability at the time of the acknowledgment. The reason given is that under this section an acknowledgment must be an admission of one's own liability. Otherwise, the alleged acknowledgment would not really be an *acknowledgment* at all.[2]

Note 35

1. ('40) 27 AIR 1940 Mad 470 (473) : I L R (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi* v. *Palanivela Goundan.* (17 Ind Cas 610 ; A I R 1932 Mad 516 and A I R 1935 Mad 899 overruled and A I R 1937 Mad 826 impliedly overruled — A I R 1925 Mad 1108 and 1 Cal L Jour 337 approved — *Bolding* v. *Lane*, (1863) 1 De G J & S 122 and *Newbould* v. *Smith*, (1886) 33 Ch D 127 applied.)

('05) 1 Cal L Jour 337 (344 to 347) (DB), *Surjiram Marwari* v. *Barhmdeo Persad.* (Per Mookerjee, J.)

('36) 23 AIR 1936 All 636 (638, 639) : 58 All 912 : 164 Ind Cas 725 (DB), *Ram Sarup* v. *Bhagwati.*

('25) 12 AIR 1925 Mad 1108 (1109) : 86 Ind Cas 434 (DB), *Yagnanarayana* v. *Venkatakrishna Rao.*

2. ('19) 6 AIR 1919 All 242 (242): 51 Ind Cas 829 (DB), *Arbindakeb* v. *Jageshar.* (Acknowledgment means a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given.)

('20) 7 AIR 1920 Mad 1026 (1033) : 62 Ind Cas 833 (DB), *Lakshmanan Chetty* v. *Muthia Chetty.* (The mortgagor must have retained some substantial right in the property at the date of the acknowledgment.)

(3) The *third* group of cases also accepts the principle that it is not necessary under this section that the acknowledgment by A must have been made *before* the transfer in favour of C. The question as to whether at the time of the acknowledgment A must himself have been liable is not decided. But the facts of the respective cases show that he was liable at the time of the acknowledgment.[3]

The different views discussed above may be illustrated with reference to the following examples :

(1) A mortgages his property to B and then to C. *After* the mortgage to C, A states that B's mortgage remains undischarged.

(2) A mortgages his property to B and then sells a *portion* of the property to C. *After* the sale to C, A states that B's mortgage is undischarged.

(3) A mortgages his property to B and then sells the *whole* of it to C. But A remains personally liable for the mortgage amount. During the subsistence of this personal liability A states that B's mortgage is undischarged.

(4) A mortgages his property to B. He then sells the *whole* of the property to C. There is no personal liability under the mortgage. After the sale to C, A states that B's mortgage is undischarged.

In illustrations 1 to 3 above, according to the *first* group of cases, A's statement cannot bind C as an acknowledgment at all, notwithstanding the fact that at the time of the acknowledgment, A was himself liable and the acknowledgment would be binding on him.

('37) 24 AIR 1937 Lah 507 (511, 512) : 170 Ind Cas 245 : I L R (1937) Lah 171 (DB), *Robert Hercules Skinner* v. *Bank of Upper India Ltd.* (Mortgagor is personally liable even if he has parted with equity of redemption.)

('32) 19 AIR 1932 Oudh 1 (5) : 138 Ind Cas 800 : 7 Luck 270 (DB), *Amir Mirza Beg* v. *Lachhmi Narain.* (Acknowledgment by person having no interest which can be bound by such acknowledgment lacks the "legal quality" of an acknowledgment.)

('05) 32 Cal 1077 (1080, 1081) : 9 Cal W N 868 (DB), *Krishna Chandra Saha Sardar* v. *Bhairab Chandra Saha Sardar.* (In this case it is not expressly laid down that acknowledgment by person not himself under liability will not be good. But pointed attention is drawn to the fact that in the case before the Court the acknowledgment is by a person who was himself liable in regard to the right acknowledged.)

3. ('27) 14 AIR 1927 Mad 349 (349, 350), *Arokiam Asary* v. *Vavana Rowthan.* (*Othidar* of property, subject to mortgage with another, making default in paying Government dues and the land sold for arrears and purchased by the *Othidar* himself—Acknowledgment of liability by mortgagor to mortgagee—Acknowledgment is binding on *Othidar.*)

('32) 19 AIR 1932 Oudh 314 (316) : 7 Luck 26 : 139 Ind Cas 626 (DB), *Ram Sahai* v. *Kunwar Sah.*

('30) 17 AIR 1930 Oudh 56 (56) : 5 Luck 444 : 124 Ind Cas 435 (DB), *Nigah Ali Khan* v. *Aqilullah Khan.*

According to the *second* group of cases, the acknowledgment will be binding on C, because at the time when it was made A was himself liable for the mortgage debt.

As regards the *fourth* illustration, according to the first group of cases, the acknowledgment of A will not bind C because it is made after C derives his title. According to the *second* group of cases, the acknowledgment will not bind C, as not having the "legal quality" of an acknowledgment, i.e., as not being given by a person who was himself liable.

As seen in Note 25 the view that an acknowledgment can be made by a person who himself is under no liability at the time of acknowledgment is not correct on principle.

36. Renewal of first mortgage after second mortgage—Effect. — When a mortgage is renewed, the mortgagee is entitled to a fresh period of limitation from the date fixed for payment under the renewed mortgage. This, however, is not because the renewal implies an *acknowledgment* of liability with reference to the original mortgage. The mortgagee's right to a new period of limitation is based on the fact that the renewal gives him a *fresh cause of action.*[1] See also the undermentioned case.[2]

Though the renewal of a mortgage furnishes a new cause of action, the mortgagee is entitled to priority over intermediate mortgagees to the extent of the amount of the prior mortgage.[3]

See also Article 132 Note 15.

37. "Fresh period of limitation shall be computed from the time when the acknowledgment was so signed." — The effect of an acknowledgment under this section is that the plaintiff is entitled to a fresh period of limitation from the time when the

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Note 36

1. ('25) 12 AIR 1925 Mad 1108 (1109) : 86 Ind Cas 434 (DB), *Yagnanarayana* v. *Venkata.*
2. ('39) 26 AIR 1939 Lah 212 (214), *Abdullah* v. *Ishaq Mohammad.* (Mortgage without possession—Stipulation in mortgage that mortgagee is entitled to take possession on default in payment of annual interest — Mortgagor subsequently mortgaging the equity of redemption in the properties to the mortgagee in lieu of payment of interest defaulted for five and half years—Suit for possession by mortgagee on subsequent default on the basis of original mortgage — *Held* that the execution of the second mortgage satisfied the cause of action based on the first default and that therefore the starting point for limitation was not the first default but the subsequent default and there was no question of extending the period of limitation by the acknowledgment contained in the second mortgage.)
3. ('18) 5 AIR 1918 Mad 1327 (1329, 1330) : 38 Ind Cas 240 (DB), *Velayuda Reddi* v. *Narsimha Reddi.*
('25) 12 AIR 1925 Mad 1108 (1109, 1110) : 86 Ind Cas 434 (DB), *Yagnanarayana* v. *Venkata.*

acknowledgment is signed.[1] Under the Acts of 1871 and 1859, it was expressly provided that the length of the fresh period of limitation depended on the nature of the original liability. This provision has been omitted in the Acts of 1877 and 1908. But the omission does not mean any change in the law. The fresh period is to be computed from the date when the acknowledgment is *signed.*[2] But, under S. 12 cl. (1), in computing the fresh period the day on which the acknowledgment is signed should be omitted.[3]

The fresh period of limitation computed under this section is period "reckoned" within the meaning of S. 6, and hence, where the plaintiff is under any of the disabilities mentioned in that section at the time of acknowledgment, he is entitled to the benefit of that section also.[4] See also Note 14 under section 6.

38. Admissibility of oral evidence as to date of acknowledgment—Sub-section (2).—Sub-section (2) of this section provides that where the writing containing an acknowledgment is undated, oral evidence may be given of the time when the acknowledgment was signed. This shows that the date of an acknowledgment need not be mentioned in the writing which contains the acknowledgment.[1]

Note 37

[1] ('68) 10 Suth W R 478 (480) (DB), *Runjeet Narain* v. *Shureefoonissa.* (A mortgage not having legally been put an end to and 60 years not having elapsed since the last recognition of the mortgage by the mortgagee, the mortgagor or his representatives can claim to redeem it.)

[2] ('27) 14 AIR 1927 Mad 1200 (1200) : 106 Ind Cas 619, *Somasundaram Ayyar* v. *Krishna Ayyar.*

('22) 9 AIR 1922 Nag 256 (258) (DB), *Waman* v. *Deorao.* (Where a mortgage document dated 1906 acknowledged the liability under a mortgage dated 1904, a fresh period of limitation can commence only from 1906, the date of the later mortgage, and not from the date fixed for payment of the amount due under that mortgage.)

[3] ('23) 10 AIR 1923 Nag 143 (143) : 71 Ind Cas 556, *Jainarayan Bapu* v. *Vithoba.* (Objection was that Section 12 (1) uses word "day" while Section 19 uses "time." Objection overruled.)

('90) 13 Mad 135 (137) (DB), *Venkataramayyar* v. *Kothandaramayyar.* (Under Section 3, clause 2 of the General Clauses Act, the word "from" is sufficient to exclude the first of a series of days or any other period of time.)

See also Section 12 Note 3.

[4] ('33) 20 AIR 1933 All 100 (101) : 142 Ind Cas 794 : 54 All 1019 (DB), *Chandrabhan* v. *Rajkumar.*

('90) 13 Mad 135 (138) (DB), *Venkataramayyar* v. *Kothandaramayyar.*

('19) 6 AIR 1919 Lah 177 (178) : 52 Ind Cas 115, *Ramji Lal* v. *Manya.*

('12) 14 Ind Cas 694 (698) (DB) (Cal), *Sarat Chandra Singh* v. *Sudhan Hari.*

('36) 23 AIR 1936 All 152 (153) : 161 Ind Cas 330, *Rameshchandra* v. *Bashi Ram Bhajan Lal.* (6 All L Jour 378 not followed.)

[*See* ('39) 26 AIR 1939 Bom 237 (239, 244) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.*

Note 38

[1] ('21) 8 AIR 1921 Nag 1 (2) : 65 Ind Cas 279 : 17 Nag L R 209, *Onkar Lal* v. *Raj Mohamed.*

But the express provision that where the writing is *undated* oral evidence as to the date is admissible, implies that where the writing is *dated*, such evidence will not be admissible. But, even in such cases, evidence will be admissible to prove that the date given in the writing is a *mistake* for some other date.[2] (Compare Evidence Act, section 92, proviso 1.)

Where the date given in writing containing an acknowledgment of liability is *scored out*, it has been held that in such cases, the document is *undated* and that therefore oral evidence may be given of the date of the document.[3] In the undermentioned case,[4] where an acknowledgment bore a date which had been altered, it was held by the Bombay High Court that it could not be said that the acknowledgment was undated and hence oral evidence to prove the date was held to be inadmissible.

An inference drawn from a document is not *oral* evidence.[5]

39. Oral evidence of contents of acknowledgment — Sub-section (2). — The expression "contents" of a document simply means what is contained in the document. Hence, evidence of contents of a document is evidence given for proving what is contained in the document. Under the Evidence Act, Ss. 61, 63, 64 and 65, oral evidence of the contents of a document is not admissible except when such oral evidence constitutes secondary evidence as defined in S. 63 of the same Act and the case falls within one of the categories mentioned in S. 65. The provision in sub-s. (2) that subject to the provisions of the Indian Evidence Act, 1872 oral evidence of the contents of an acknowledgment shall not be received, merely re-enacts with reference to an acknowledgment of liability the provisions of the Evidence Act on this point.

In the Act of 1859, there was no provision corresponding to sub-s. (2) of this section. But cl. (c) of S. 20 of the Act of 1871 ran as follows : "When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received." It must be remembered that at the time of the passing of the Act of 1871, the Evidence Act of 1872 had not been passed. Nevertheless, under general principles of evidence, oral evidence of the contents of documents would have been admissible as secondary evidence where, *inter alia*, the document had been lost or destroyed. The effect of the express provision in the above clause was to make such evidence inadmissible where the document was alleged to have been lost or destroyed. In other cases in which secondary evidence would have been admissible under the general law of evidence, oral evidence of the contents of documents embodying acknowledgments of liability would also have been admissible.[1]

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[2] ('77) 1877 Bom P J 238 (DB), *Amratlal* v. *Jamnadas.*

[3] ('33) 20 AIR 1933 Mad 104 (105) : 140 Ind Cas 774, *Peramanayagan Pillai* v. *Raman Chettiar.*

[4] ('02) 26 Bom 128 (130, 131) : 3 Bom L R 574 (DB), *Gulam Ali* v. *Miyabhai.* (See the criticism of this decision in 12 Mad L Jour 142 (Jour).)

[5] ('33) 20 AIR 1933 Mad 104 (105) : 140 Ind Cas 774, *Permanayagan Pillai* v. *Raman Chettiar.*

In S. 19 of the Act of 1877, the clause was amended and re-enacted as follows: "When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received." It will be noted that there were two points of difference between the amended clause and the old clause:

(1) The full stop after the word "signed" was converted into a semicolon.

(2) The words "when it is alleged to have been destroyed or lost" in the second part of the clause were omitted.

Under these circumstances, there was a conflict of decisions as to the interpretation of the clause. According to the Bombay High Court[2] the effect of the amendment was to make oral evidence of the contents of an acknowledgment inadmissible in *all* cases, and not only where the document was alleged to have been destroyed or lost, as under the previous Act. Thus, according to this view, oral evidence of the contents of an acknowledgment could not be given even where the document was in the possession of the opposite party and the case was thus one in which secondary evidence of the contents of the document would have been admissible under the Evidence Act.

But, the Calcutta[3] and Madras[4] High Courts took a different view of the matter. According to these High Courts, the clause did not preclude the admission of oral evidence of the contents of a document embodying an acknowledgment where secondary evidence of such contents would have been admissible under the Evidence Act. In giving reasons for the above view, the Calcutta High Court in *Shambhu*

Note 39

[1] ('86) 12 Cal 267 (268, 269) (DB), *Shambhu Nath Nath* v. *Ram Chandra Shaha.*

[2] ('88) 12 Bom 268 (269) (DB), *Ziulnissa Ladli Begum* v. *Motidev Ratandev.*

[3] ('86) 12 Cal 267 (270, 271) (DB), *Shambhu Nath Nath* v. *Ram Chandra Shaha.*

('86) 13 Cal 292 (294, 295) (DB), *Wajibun* v. *Kadir Buksh.* (Where an original account book containing an acknowledgment of debt had been filed in Court and subsequently lost, it was held that secondary evidence of such acknowledgment might be given, notwithstanding the words of S. 19 of this Act.)

[4] ('92) 15 Mad 491 (492) : 2 Mad L Jour 253 (DB), *Chathu* v. *Virarayan.* (Document containing acknowledgment was in possession of defendant. *Held* that secondary evidence of its contents was admissible.)

Nath Nath v. *Ram Chandra Shaha*,[5] observed as follows :

> "One branch of the law of Evidence is that already referred to. It is contained in S. 64 and the following sections of the Evidence Act, and it determines the cases in which secondary evidence may be given of the contents of a document not produced. Another branch of that law is contained in S. 91, and the following sections. It deals with the question how far *oral* evidence, or evidence of oral communications, may be given to vary, control, or add to the effect of a document.
>
> The first part of the paragraph before us [sub-s. (2) of S. 19] clearly belongs to the latter branch of the law. And, it would seem, the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence to alter the effect of documents might not exclude oral evidence of the date of an undated document, where the date is an essential matter. Accordingly, it is said that oral evidence of the date of the document may be given. The paragraph then proceeds: 'but oral evidence of its contents shall not be received.' These latter words are introduced with a 'but,' and they speak not of *secondary* evidence but of *oral* evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repealing S. 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the prior words interfere with the general rules as to oral evidence further than the express words require."

By the introduction of the words "subject to the provisions of the Indian Evidence Act, 1872" into this clause the Legislature has now given effect to the above view, namely that secondary evidence may be given to prove the contents of an acknowledgment in cases in which such evidence is admissible under the Evidence Act. But, the *reasoning* of the Calcutta High Court in the above passage is not correct. It has proceeded on the view that evidence of the *date* of an undated document and of the *contents* of a document would fall within the category of evidence given for *altering the effect* of a document, while neither class of evidence would fall under such category. In the former case the date not being specified in the document at all, there is no question of *altering* the effect of the document by external evidence. In the latter case, evidence given to prove what is contained in a document cannot be evidence the object of which is to control or alter the effect of the document.

40. Oral evidence of the factum of acknowledgment. — An acknowledgment of liability is required by this section to be in writing if it is to be relied on for saving limitation. Hence, an acknowledgment which is relied on for such a purpose is a "matter required by law to be reduced to the form of a document" within the meaning of S. 91 of the Evidence Act. Hence, under that section, the *fact* that an acknowledgment of liability has been made in writing cannot be proved except by the production of the document itself or by secondary evidence of the contents thereof.[1] In this connexion, the distinction between proving the *contents* of a document and proving the *facts recorded* in such document must be remembered.[2] The prohibition against the admissibility of oral evidence (except in certain cases) as to the *contents* of an acknowledgment arises under the second part of sub-section (2) of this section, which it has been seen, merely re-enacts with reference to acknowledgments of liability the general provisions of the Evidence Act on the point. The prohibition against the reception of such evidence for proving the *factum* of an acknowledgment in writing arises under section 91 of the Evidence Act.

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[5] ('86) 12 Cal 267 (269, 270) (DB).

41. Admissibility of evidence for contradicting or varying, etc., matters stated in document containing acknowledgment of liability. — Though, as seen in Note 32, external evidence is not ordinarily admissible for the purpose of *construing* a document alleged to contain an acknowledgment of liability, such evidence is admissible for the purpose of contradicting, varying, adding to or subtracting from the contents of such document. The reason is that the prohibition contained in S. 92 of the Evidence Act against the admission of evidence to contradict, vary, add to or subtract from the terms of a written instrument does not apply to *unilateral* documents like acknowledgments of liability.[1] Hence, notwithstanding that a document admits that a liability exists at a certain time, evidence is admissible to show that the liability did not exist at that time. Similarly, where a person executes a document containing an acknowledgment of liability and, at the same time, orally promises to pay the debt, the oral promise can be proved in order to show that there was a fresh contract between the parties and not merely an acknowledgment of liability.[2]

Note 40

[1] ('21) 63 Ind Cas 490 (491) (DB) (All), *Hari Murut* v. *Ramhit.* (When plaintiff relies upon written statement in previous suit as amounting to acknowledgment, he ought to produce that statement or a certified copy of it; the production of the decree in the suit will not suffice, nor is the plaint in that suit admissible as secondary evidence of the contents of the written statement.)

[2] See Woodroffe and Amir Ali's "Law of Evidence," 6th Edition, page 552.

Note 41

[1] ('30) 17 AIR 1930 Nag 298 (299) : 26 Nag L R 320 : 127 Ind Cas 894, *Chhedilal* v. *Manoharlal.* (Acknowledgment is not a document contemplated in S. 92 of Evidence Act.)

[2] ('30) 17 A I R 1930 Nag 298 (299, 300) : 26 Nag L R 320 : 127 Ind Cas 894, *Chhedilal* v. *Manoharlal.*

42. Acknowledgment need not specify exact nature of property or right. — See Note 26.

43. Acknowledgment of liability coupled with averment that time for payment, etc., has not yet come. — Under explanation I of this section, an acknowledgment may be sufficient although it is coupled with an averment that the time for payment, etc., has not yet come. Thus, where a judgment-debtor states that the amount due under the decree remains unpaid but that the time for its payment has not yet come, his statement is a sufficient acknowledgment of liability under the decree.[1]

An admission of a debt with the averment that the time for payment has not yet come must be distinguished from a statement that a sum of money will become due on the happening of an event, future and uncertain. In the latter case, there is no acknowledgment of a *debt* at all, but only the allegation of incidents out of which a debt may at some time arise.[2]

44. Acknowledgment of liability may be accompanied by refusal to pay, etc. — Under explanation I, an acknowledgment of liability under the section may be coupled with a refusal to pay or deliver the thing claimed. Thus, an admission that a debt is due from the defendant but that he is unable to pay it to the plaintiff as there are other claimants to the money, is sufficient acknowledgment for the purpose of the section.[1] Similarly, an assertion that a method of payment had been provided which it was the duty of the creditor to resort to before seeking to enforce the remedy against the debtor does not affect the efficacy of an admission of liability made by the debtor for the purposes of this section.[2] But, there must be a clear admission

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Note 43

[1] ('22) 9 AIR 1922 Cal 187 (189) : 64 Ind Cas 993 (DB), *Paresh Nath Pal* v. *Ismail Sardar.*

[2] ('67) 3 Mad H C R 308 (311) (DB), *John Young* v. *Mangalpilly Ramaiya.*

Note 44

[1] ('19) 6 AIR 1919 Mad 941 (942) : 46 Ind Cas 973, *Subba Rao* v. *Parasurama Pattar.*

[*See* ('41) 28 AIR 1941 Oudh 254 (255, 256) : 192 Ind Cas 885 (DB), *Deputy Commissioner, Kheri* v. *Ram Kumar Saxena.* (A letter written by the agent of the debtor that the debtor is unable to pay money to the creditor and that something will be paid when money is recovered is sufficient acknowledgment.)]

[*See also* ('99) 26 Cal 204 (217) : 2 Cal W N 718, *Rungo Lall Lohea* v. *Wilson.* (Letter by defendants to plaintiffs' attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiffs should show a title to give a good receipt to the defendants that would satisfy their lawyers, held to be a sufficient acknowledgment.)]

[2] ('36) 23 AIR 1936 Mad 943 (944) : 170 Ind Cas 288, *Kuppuswami* v. *Sabapathy Pathan.*

[*See also* ('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram* v. *Radhay Shiam.* (Fresh note executed in renewal of earlier pronote—Endorsement on earlier note to the effect that "in lieu of the earlier pronote a second of liability in order to constitute a valid acknowledgment under this section. A mere statement that the liability existed once but has since been discharged is not an acknowledgment of liability coupled with a refusal to pay. The reason is that in such a case, there is no admission of a subsisting liability.[3]

45. Acknowledgment of liability coupled with a claim of set-off.—Under explanation I to this section, an acknowledgment of liability may be coupled with a claim of set-off. Thus, where the defendant *admits* that he owes a certain sum to the plaintiff but states that he is entitled to set off against this sum another sum which the plaintiff owes him, the admission is sufficient acknowledgment under this section.[1]

But, there must be a definite *admission of liability* by the defendant. Thus, where in reply to a demand made by the plaintiff, the defendant claims that the debt has been *discharged* and states that he owes nothing because he has paid a *hundi* on account of the creditor, there is no *acknowledgment of liability* coupled with a claim of set-off. But it is a direct and express repudiation of the debt giving details of the manner in which it has been discharged.[2] Similarly, a statement that the money claimed is *not* due, but that if it is, it must be set off against an amount due from the plaintiff, is not an acknowledgment of liability coupled with a claim of set-off. It is a *denial* of liability with a claim by way of set-off in the alternative.[3] So also, where a defendant denies that he owes anything and claims that it is the plaintiff that owes him a certain sum, but admits that the latter is entitled to set off a certain amount against his claim, there is no acknowledgment of liability under this section. The reason is that in such cases there is no *acknowledgment of liability* coupled with a claim of set-off, but there is an *assertion of a claim* coupled with an admission of a right to set off reducing the amount claimed.[4]

46. Acknowledgment not addressed to person entitled, sufficiency of — Explanation I. — Explanation I to the section

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note was executed and the former thereby became void" — *Held* that the endorsement did not deny liability under the earlier note but only said that a different security was given for it. There was no allegation of the liability having been discharged or paid off. Endorsement amounted to acknowledgment of liability.)]

3. **('19) 6 AIR 1919 Mad 317 (319) : 42 Mad 637 : 50 Ind Cas 380 (DB),** ***Rangasami Chetti* v. *Thangavelu Chetti*.** **(Per Seshagiri Aiyar, J. — Following AIR 1917 Mad 892.)**

See also Note 20.

Note 45

1. **('21) 8 AIR 1921 All 335 (337) : 59 Ind Cas 941 : 43 All 216 (DB),** ***Curlender* v. *Abdul Hamid*.** **(Letter enclosing account and showing how account settled.)**

2. **('13) 20 Ind Cas 10 (11) (DB) (All),** ***Badri Dass* v. *Manohar Dass*.**

3. **('13) 21 Ind Cas 30 (31) (DB) (Mad),** ***Shaik Meera Sahib & Co.* v. *Nainar Lubbay*.**

4. **('87) 1887 Pun Re No. 60,** ***Murree Brewery Co.* v. *Hazura Mal*.**

('27) 14 AIR 1927 All 317 (317, 318) : 100 Ind Cas 189, ***Jugal Kishore* v. *T. Caul*.**

provides that an acknowledgment for the purposes of this section may be sufficient "although it is addressed to a person other than the person entitled to the property or right."

The first question that arises on the above words is whether they imply that an acknowledgment under this section *must* be addressed or communicated to *anyone*. On this point, there is a conflict of decisions. One view is that the section contemplates only an acknowledgment *addressed* or communicated to some particular person,[1] so that an entry in the defendant's own book, not communicated to anyone else will not be a sufficient acknowledgment under this section.[2] The other view is that the section does *not* imply that an acknowledgment of liability *must* be addressed to some person[2a] but only provides that *if* it is addressed to any person, it is not necessary that it must be addressed to the *person entitled*. Thus, according to this view, an acknowledgment under this section may be contained in a *will*.[3]

Where an acknowledgment of liability *is* addressed to any person, it is clear from the language of explanation I that it need not be addressed to the plaintiff or to anyone through whom he claims.[4] In

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Note 46

[1] ('06) 33 Cal 613 (618, 619) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Emam Ali* v. *Baij Nath Ram Sahu.*

[2] ('85) 10 Bom 71 (73) (DB), *Mahalakshmibai* v. *Firm of Nageshwar Purshotam.*
('89) 1889 Bom P J 104 (DB), *Ziaulnisa* v. *Bai Ichha.* (Transfer of a debt in defendant's book to plaintiff's name as heir of the original creditor, was in itself not an acknowledgment.)

[2a] ('39) 26 AIR 1939 Bom 237 (248) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.* (An acknowledgment made in a document though not addressed to any person is a valid acknowledgment.)
('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB), *Amrit Narayan Singh* v. *Baijnath Pandey.* (Acknowledgment addressed to dead person is sufficient — Acknowledgment contained in a document executed in favour of a person who at the time of execution was dead is valid.)
('19) 6 AIR 1919 Cal 48 (50) : 53 Ind Cas 898 (DB), *Janardhan Shaha* v. *Radha Bullav.* (Abichalnama stating that accounts are remaining unadjusted which the arbitrators are to adjust amounts to acknowledgment.)
[*See also* ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar* v. *Joti Prasad.* (If the debtor and creditor agree to the debtor's making an entry in the books that a sum has been paid, whereas in fact it has not been paid, it might be that the entries could in certain special circumstances, amount to an acknowledgment by debtor.)]

[3] ('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji* v. *Mammavan.*

[4] ('40) 27 AIR 1940 Bom 172 (174) : I L R (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif* v. *Jawhar State.*
('38) 25 AIR 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar* v. *Dawlat Singjee.* (Mortgagor while executing another mortgage in respect of suit properties addressing a letter to proposed mortgagee containing a statement that suit properties are under equitable mortgage with plaintiff.)
('21) 8 AIR 1921 Bom 291 (293) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjiwan Das* v. *Bai Mani.* (Entry made in a register of sanads, showing that the sanad-

some early decisions,[5] however, a contrary view was taken and it was held that an acknowledgment under this section must be addressed to the plaintiff or some one through whom he claims. It is submitted

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holder is a mortgagee and signed by the sanad-holder, is sufficient acknowledgment.)

('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand.*

('13) 18 Ind Cas 95 (96) (All), *Har Narayan* v. *Sheo Prasad.* (Statement in the sale deed that the property is a mortgaged property is sufficient acknowledgment for the purpose of redemption.)

('09) 4 Ind Cas 579 (581) (All), *Jai Gopal Misir* v. *Sheo Sagar Singh.*

('08) 1908 All W N 226 (227), *Lachmi Chand* v. *Allah Dia.*

('28) 15 AIR 1928 Cal 850 (852) : 115 Ind Cas 263, *Manikya Bewa* v. *Pushpa Charan Majhi.* (Acknowledgment made in a document to which creditor is not a party is valid.)

('26) 13 AIR 1926 Cal 686 (687) : 91 Ind Cas 461 (DB), *Azizur Rahman* v. *Ramachandra.* (A statement contained in a *kobala* that a certain mortgage on some of the properties comprised in the *kobala* is still subsisting has the effect of an acknowledgment.)

('14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan* v. *Surendra.*

('10) 8 Ind Cas 788 (790) (DB) (Cal), *Nistarini Debi* v. *Chandi Dasi Debi.*

('03) 30 Cal 687 (689) (DB), *Ambica Dat Vyas* v. *Nityanund Singh.*

('23) 10 AIR 1923 Lah 369 (370) : 76 Ind Cas 751 (DB), *Labha Mal* v. *Iman Din.* (Admission of liability contained in an endorsement of the Sub-Registrar about admission of execution and receipt of consideration and signed by the debtor is sufficient acknowledgment.)

('09) 4 Ind Cas 902 (906) : 1910 Pun Re No. 43 (DB), *Abdul Ali* v. *Von Goldstein.*

('97) 1897 Pun Re No. 9, *Jalli* v. *Mahar Pir Bakhsh.* (Statement made by mortgagees in a deed of mortgage executed by them that the land was mortgaged to them amounts to an acknowledgment of their liability.)

('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji* v. *Mammavan.* (Acknowledgment contained in will.)

('84) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman* v. *Vairavan.* (Letter by the drawer of a hundi to the drawee asking him to pay the amount covered by the hundi to the person, in whose favour it is drawn, is a sufficient acknowledgment for the debt due as well on the account as on the hundi (hundi given for debt due on account).)

('31) 18 AIR 1931 Oudh 54 (56) : 130 Ind Cas 347 (DB), *Aijaz Husain* v. *Ram Sarup.* (Admission of liability contained in a deed of gift executed by the debtor in favour of his son constitutes a valid acknowledgment.)

('19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir* v. *Rajman Gir.* (Acknowledgment in a deed of assignment executed by the obligor in favour of a third person is sufficient to save limitation.)

('13) 20 Ind Cas 27 (27, 28) : 35 All 437 (DB), *Megh Raj* v. *Mathura Das.* (Statement acknowledging debt due under a mortgage made and signed before a Judge in a suit is sufficient acknowledgment.)

[*See* ('81) 6 Cal 447 (451, 452) (DB), *Laljee Shahoo* v. *Roghoonundun Lal Sahoo.* (A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor.)]

[5] ('85) 10 Bom 71 (73) (DB), *Mahalakshmi Bai* v. *Firm of Nageshwar Purshotam.*

('06) 33 Cal 613 (618, 619) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali* v. *Baijnath.*

that this view cannot be supported. One of these decisions[6] bases its view on the fact that explanation I to this section only says that an acknowledgment not addressed to the person entitled *may* be sufficient and not that it *shall* be sufficient. It is submitted that the reasoning is not clear. The same decision also professes to follow the judgment of the Privy Council in *Vyapoory Moodliar* v. *Yeo Kay*.[7] In the above judgment, no doubt, the following passage occurs:

> "He (the defendant) does not admit that he was liable to be turned out of possession, or that anyone had a right of possession against him, *nor does he make any admission at all to the plaintiff or to anyone through whom he claims.*"

But, in the face of the clear language of the section, it must be held that the Privy Council in the above passage merely meant to state *as a fact* that in the case before them there was no admission made to the plaintiff or to anyone through whom he claimed, rather than to lay down as a proposition of *law* that an acknowledgment of liability under this section must be addressed to the plaintiff or some one through whom he claims. That this is so, is clear from the fact that the Privy Council itself in later decisions[8] has only proceeded on the view that an acknowledgment under this section need not be addressed to the plaintiff or to anyone through whom he claims.

In *Fatimatulnissa Begum* v. *Sundar Das*,[8a] a decision of the Privy Council, (in which it was held that the alleged acknowledgment was not sufficient) the following passage occurs:

> ". . . . and that is an application for mutation of names in 1839 which was not an acknowledgment made *to the mortgagors*, but only an official proceeding to substitute the successor of a mortgagee for his predecessor under the title which then actually existed."

In view of the above discussion, this passage cannot be taken to imply that an acknowledgment of liability must be addressed to the person entitled. The passage must be taken as meaning only that in the *particular case*, there was no sufficient acknowledgment.

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[6] ('06) 33 Cal 613 (618) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali* v. *Baijnath Ram Sahu*.

[7] ('87) 14 Cal 801 (808) : 14 Ind App 168 : 5 Sar 50 : 11 Ind Jur 397 (PC).

[8] ('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand*.

('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bageshwari Charan* v. *Jagar Nath Kuari*.

('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (PC), *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*.

('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hiralal Ichhalal* v. *Desai Narsilal Chaturbhujdas*.

[8a] (1900) 27 Cal 1004 (1011, 1012) : 27 Ind App 103 : 4 Cal W N 565 (PC).

Illustrations.

1. A was the mortgagee with possession of certain rights in land which later were commuted into a fixed money allowance to be paid from the Government Treasury. A received such money payments from the Government and gave to *Government* receipts for such payments, signed by him as *mortgagee*. It was held that the receipts constituted acknowledgments of liability (i. e., liability to be redeemed) within the meaning of this section and saved limitation for a suit for redemption of the mortgage.[9]

2. A, the proprietor of an estate, governed by the Chota Nagpur Encumbered Estates Act, made a gift of certain property to another. Under section 12 of that Act, the owner could not alienate any of his properties without the previous sanction of the Commissioner. Such sanction being absent in the case, the donee applied to the Commissioner praying that the gift might be sanctioned or that a fresh gift might be ordered on the same terms. The implied admission of the want of title contained in the application was held sufficient acknowledgment under this section though the admission was made to a third person, viz., the *Commissioner*, and not to the plaintiff (owner of the estate) or some one on his behalf.[10]

3. An acknowledgment of a debt contained in a letter to the *attorney* of the creditor is sufficient for the purpose of this section.[11]

4. An acknowledgment of a debt made to the creditor's *brother* is sufficient under this section.[12]

5. An acknowledgment by a mortgagee of the mortgage and of his liability to be redeemed may be contained in a deed of sub-mortgage[13] or other document executed by him in favour of a third person.[14]

6. An acknowledgment of liability may be contained in a document presented or addressed to the *Court*. (See Note 47.)

7. A dispute having arisen among the members of a Hindu joint family as to their respective liabilities in regard to certain debts owed by the family, the matter was referred to arbitration. The agreement

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[9] ('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hiralal Ichhalal* v. *Desai Narasilal Chaturbhujdas.*

[10] ('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bageshwari Charan* v. *Jagarnath Kuari.*

[11] ('26) 13 AIR 1926 Cal 1140 (1142, 1143) : 97 Ind Cas 710 (DB), *Shamsud Ali* v. *Miriam.*

[12] ('28) 111 Ind Cas 617 (618) (DB) (Bom), *Pandurang Shivram* v. *Maruti Niloba.*

[13] (09) 1 Ind Cas 510 (511, 512) (All), *Gendamal* v. *Ilahi Buksh.*

[14] ('04) 6 Bom L R 38 (40) (DB), *Vithu* v. *Keshav.*
('32) 19 AIR 1932 Bom 531 (534) : 139 Ind Cas 218, *Amarchand Rajaram* v. *Narayan Vishnu.*

of reference to arbitration contained an acknowledgment of liability to the creditor. It was held that though the acknowledgment was not made to the creditor but was only contained in a document embodying the mutual arrangement between the members of the family, it was sufficient under this section.[15]

8. An acknowledgment of a debt contained in a document executed in favour of a person who is dead at the time of the execution of the document is sufficient under this section.[16]

9. An acknowledgment of a debt in an application before a Debt Conciliation Board is sufficient under this section.[17]

Although thus, an acknowledgment under this section need not be *addressed* to the plaintiff or some one through whom he claims, the liability admitted must be a *liability to the plaintiff* or some one through whom he claims. This is clear from the fact that the section requires an acknowledgment of liability in respect of the *particular* property or right claimed in the suit.[18]

47. Admission contained in document addressed to Court. — As seen in Note 46 above, an acknowledgment under this section need not be addressed to the plaintiff or anyone through whom he claims. Hence, an acknowledgment contained in a document presented to a *Court* is sufficient for the purposes of this section.[1]

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15. ('39) 26 AIR 1939 Sind 113 (123) : I L R (1939) Kar 693 : 181 Ind Cas 596, *Tikamdas Mathradas* v. *Kalianji Gordhadas.* (In this case an acknowledgment of a debt contained in a reference to arbitration was held sufficient under the section though the arbitration failed.)

('27) 14 AIR 1927 All 488 (489, 490) : 102 Ind Cas 181 : 49 All 801 (DB), *Phul Singh* v. *Bhojraj.*

16. ('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB), *Amrit Narayan Singh* v. *Baijnath Pandey.*

17. ('40) 27 AIR 1940 Nag 214 (215) : 190 Ind Cas 818, *Jawanmal* v. *Akaji.* [But see ('41) 28 AIR 1941 Nag 95 (96, 97) : 194 Ind Cas 120 (DB), *Udhao Nanaji* v. *Narayan Vithoba.* (The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within S. 65 (b), Evidence Act—It is a statement—Under S. 6 of the Debt Conciliation Act the statement is not to be deemed a statement of the amount admittedly due but the amount claimed.)]

18. ('87) 14 Cal 801 (808) : 14 Ind App 168 : 5 Sar 50 : 11 Ind Jur 397 (PC), *Vyapoory Moodliar* v. *Yeo Kay.*

('93) 16 Mad 220 (228) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.* (Per Wilkinson, J.)

('36) 23 AIR 1936 Lah 659 (660) : 165 Ind Cas 74, *Ishar Singh* v. *Sadhu Sihgh.* (Bond executed in favour of several persons having equal shares—Acknowledgment in favour of only one person—Not sufficient as regards others.)

Note 47

1. ('33) 20 AIR 1933 All 364 (366) : 55 All 393 : 146 Ind Cas 836 (DB), *Adya Prasad* v. *Lal Girjish.* (Letter given by decree-holder to judgment-debtor not to take out execution for some time—Application by judgment-debtor to Court to place letter on record is acknowledgment of liability of amount due under decree.)

Illustrations.

1. An admission of liability contained in a plaint may operate as an acknowledgment under this section.[2]

2. An admission of liability contained in a written statement may amount to an acknowledgment of liability under this section.[3]

('33) 20 AIR 1933 All 99 (100) : 142 Ind Cas 784 (DB), *Md. Rafi* v. *Kripa Ramji.* (Dakhalnama filed by mortgagee in execution proceedings against mortgagor—Dakhalnama containing admission of existence of mortgage is sufficient acknowledgment by mortgagee of such mortgage.)

('14) 1 AIR 1914 All 294 (296) : 22 Ind Cas 816, *Bhola Nath* v. *Ghure.* (Compromise of proceedings in Court containing acknowledgment.)

('37) 24 AIR 1937 Cal 226 (229) : 172 Ind Cas 121, *Sm. Sudhartoyee Bose* v. *Bhujendra Nath.* (Acknowledgment in the course of execution proceedings is sufficient to save limitation for suit subsequently brought.)

('10) 6 Ind Cas 366 (367) (DB) (Cal), *Bindeswari Koer* v. *Awadh Behary Lal.* (Compromise to have rest of decree executed at future time is acknowledgment.)

('07) 6 Cal L Jour 141 (142) (DB), *Brojo Nath Saha* v. *Gaya Sundari Dassya.* (Petition in which the judgment-debtor agreed to pay a certain sum to the person who attached the decree and took out execution, constitutes an acknowledgment of liability to the decree-holder's representative.)

('95) 23 Cal 374 (387) (DB), *Norendra Nath Pahari* v. *Bhupendra Narain Roy.* (Petition on behalf of judgment-debtor admitting liability for judgment-debt and making part payment.)

('06) 1906 Pun L R No. 23, p. 83 (DB), *Kanshi Ram* v. *Badda.* (Admission of existence of a mortgage contained in an application to the Court for permission to make a private alienation of property sought to be proceeded against in execution, is sufficient acknowledgment of morfgage.)

('18) 5 AIR 1918 Mad 1122 (1123, 1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai* v. *Aristotle Chakona.* (Receiver of insolvent's estate applying to the Court for permission to sell insolvent's property—Admission in such application that the property is subject to mortgage—This is sufficient acknowledgment.)

('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal* v. *Gopal Rao.* (Application of an arrested judgment-debtor, praying for his release and for an order to pay the decretal amount by instalments, is an acknowledgment of liability in respect of a right of decree-holder.)

[But see ('39) 26 AIR 1939 Nag 113 (118) : 184 Ind Cas 139 : I L R (1941) Nag 222 (DB), *Tapi Bai* v. *Shankar Lal.* (The observations that an entry in a 'list of reliance' a local term meaning a list filed in a suit of the documents which the party relies on is not acknowledgment as it is not addressed to any one juristically connected with the plaintiff, is not correct.)]

[2] ('14) 1 AIR 1914 All 481 (482) : 36 All 408 : 24 Ind Cas 104 (DB), *Baleshwar* v. *Ram Deo.* (Co-mortgagor's statement in the plaint of a redemption suit that the other co-mortgagors have been impleaded as defendants, as they would not join as plaintiffs, is an acknowledgment of the latter's right to redeem.)

('24) 11 AIR 1924 All 876 (877) : 84 Ind Cas 5, *Krishna Misir* v. *Dwarka Pandey.* (Do.)

('21) 64 Ind Cas 979 (979) (DB) (All), *Maqsud Husain* v. *Karimuddin.* (Do.)

('25) 12 AIR 1925 Lah 529 (529) : 86 Ind Cas 859 (DB), *Chiman Lal* v. *Ram Rikh.* (Admission in a *plan filed with a plaint* might possibly for certain purposes be regarded as an admission made in the plaint.)

('25) 12 AIR 1925 All 174 (175) : 85 Ind Cas 330 (DB), *Sanwal Das* v. *Ali Madhi.* (Sub-mortgagee's suit for sale—Description of property as a mortgage interest is sufficient acknowledgment.)

[3] ('39) 26 AIR 1939 Cal 399 (402) : I L R (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Debi* v. *Jugal Kishore.* (Suit by decree-holder for declaring certain aliena-

3. The acknowledgment of a debt by its inclusion in the schedule of creditors filed by an insolvent in the course of insolvency proceeding will be sufficient under this section.[4]

[illegible] judgment-debtor as void—Written statement by mother as guardian ad litem of the minor judgment-debtors admitting decree to be unsatisfied but contending that other properties left are sufficient to satisfy decree amounts to acknowledgment of decretal debt.)

('29) 16 AIR 1929 All 242 (242) : 115 Ind Cas 627, *Chheda Lal* v. *Ghulam Abbas.* (Plaintiff suing for redemption—Allegation in plaint that defendant is in possession as mortgagee — Written statement of defendant admitting allegation is acknowledgment.)

('01) 24 Mad 361 (363) (DB), *Venkataratnam Naidu* v. *Ramaraju.*

('28) 15 AIR 1928 Cal 850 (851) : 115 Ind Cas 263, *Sm. Manikya Bewa* v. *Pushpacharan Majhi.* (Plaintiff depositing certain sum with defendant 1 and father of defendant 2—Defendant 1 admitting deposit in written statement in partition suit by mother of defendant 2 as next friend.)

('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal* v. *Banwari Lal.* (In a suit on second promissory note the plaintiff relied on a written statement of defendant admitting the existence of two promissory notes — *Held* this was sufficient acknowledgment.)

('09) 3 Ind Cas 19 (20) (DB) (Mad), *Kadri Pakkirappa* v. *Manki Husain Sahib.* (Acknowledgment in a prior written statement of the delivery of certain articles is sufficient to save limitation in a suit for the recovery of its price.)

('08) 32 Bom 296 (298, 299) : 10 Bom L R 374 (DB), *Shriniwas Krishna Shiralkar* v. *Narhar Khando Khanvilkar.* (Acknowledgment contained in an application by the judgment-debtor by way of a written statement, wherein he said that he was unable to pay the amount then but would pay if time were given him, is a valid acknowledgment.)

('87) 1887 Pun Re No. 20, *Balmokand* v. *Ramji Lal.* (Suit for redemption — Written statement in former suit containing a distinct acknowledgment of a mortgage will give a fresh start of limitation.)

('14) 1 AIR 1914 All 98 (99) : 36 All 264 : 23 Ind Cas 429 (DB), *Indarpal Singh* v. *Mewa Lal.* (Do.)

('30) 17 AIR 1930 Oudh 67 (68, 69) : 5 Luck 446 : 124 Ind Cas 425 (DB), *Balbhaddar Singh* v. *Sheo Pearey Lal.* (Written statement in another suit, admitting rights of mortgagee is sufficient acknowledgment.)

[4] ('11) 9 Ind Cas 944 (945) : 35 Bom 383, *Shrigopal Chiranjilal* v. *Dhanalal.*

('40) 27 AIR 1940 Cal 210 (210) : I L R (1939) 2 Cal 523 : 188 Ind 280, *Sree Narain Kayan* v. *Bhagwandas Churiwalla.* (An entry of decretal debt in the list of creditors signed by the debtor in his application to the Official Assignee amounts to an acknowledgment.)

('23) 10 AIR 1923 Bom 33 (34) : 67 Ind Cas 757 : 47 Bom 244 (DB), *Sidhraj Bhojraj* v. *Ali Haji.* (Per Macleod, J.)

('12) 14 Ind Cas 1 (1) (DB) (Cal), *Nanda Lal Marwari* v. *Rampal Singh.*

('12) 13 Ind Cas 603 (604) (DB) (Cal), *Rampal Singh* v. *Nand Lal Marwari.*

('22) 9 AIR 1922 Lah 316 (316) : 66 Ind Cas 387 (DB), *Jwala Das* v. *Hukum Chand.*

('12) 14 Ind Cas 335 (338) (Lah), *Ramdas* v. *Kanshi Ram.*

('33) 20 AIR 1933 Mad 565 (565) : 143 Ind Cas 681, *Sakala Rattam* v. *Musalayya.*

('33) 20 AIR 1933 Mad 104 (104) : 140 Ind Cas 774, *Peramanayagam* v. *Raman.*

('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Makanjee Spinning and Weaving Co. Ltd.* (But such an acknowledgment in the insolvency petition by a manager of a Hindu family being personal, is not binding against other members.)

('28) 15 AIR 1928 Rang 326 (327) : 6 Rang 533 : 117 Ind Cas 570, *A. K. R. M. M. C. T. Chettyar Firm* v. *S. E. Munnee.*

4. A applies for probate of the will of B. Objection is raised on the ground that A is a debtor to the estate of B. A files a reply to this objection wherein he admits his liability. This is sufficient acknowledgment under this section.[5]

5. An application by a judgment-debtor for the postponement or stay of a sale in execution may be an acknowledgment of liability under the decree.[6]

6. An application to the Court by the judgment-debtor for entering up part satisfaction of decree amounts to an acknowledgment of liability under the decree.[7]

7. An application for extension of time for payment of the decretal amount is a sufficient acknowledgment of liability under the decree.[8]

48. Admission contained in deposition of witness.—An admission of liability contained in a deposition by a witness may amount to an acknowledgment of liability. But, for this purpose, the deposition must be signed by the witness.[1] If the statement is not

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('28) 15 AIR 1928 Rang 327 (328) : 117 Ind Cas 571, *Tong Hock Hin* v. *Eng Hoe Seng.*

5. ('06) 33 Cal 1047 (1059) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth* v. *Seth Rupchand.*

6. ('80) 3 All 247 (249, 250) (FB), *Ramhit Rai* v. *Satgur Rai.*

('86) 10 Bom 108 (111) (DB), *Venkatrav Bapu* v. *Bijesing Vithalsing.*

7. ('21) 8 AIR 1921 Mad 126 (129, 132) : 61 Ind Cas 979 (DB), *Viswanatha Sastri* v. *Sitalakshmi Ammal.*

('14) 1 AIR 1914 Bom 288 (290) : 38 Bom 47 : 21 Ind Cas 407 (DB), *Bachraj Nyahalchand* v. *Babaji Tukaram.*

('10) 6 Ind Cas 366 (367) (DB) (Cal), *Bindeswari Koer* v. *Awadh Behary Lal.*

('94) 16 All 228 (231) : 1894 All W N 55, *Muhammad Said Khan* v. *Payag Sahu.* (Acknowledgment of liability under decree contained in application certifying part satisfaction—Application presented to Collector to whom execution had been transferred—Application was held to have been rightly presented to Collector and acknowledgment was effective.)

8. ('08) 32 Bom 296 (298) : 10 Bom L R 374 (DB), *Shrinivas Krishna Shiralkar* v. *Narhar Khando.*

('82) 8 Cal 716 (717, 718) : 10 Cal L R 613 (DB), *Ram Koomar Kur* v. *Jakur Ali.*

('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed* v. *Mahomed Mabood Bux.*

Note 48

1. ('97) 20 Mad 239 (242) : 6 Mad L Jour 266 (DB), *Peria Venkan Udaya Tevar* v. *Subramaniam Chetty.*

('93) 16 Mad 220 (222) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.* (Per Muthuswami Ayyar, J.; Wilkinson, J., *contra.*)

('11) 10 Ind Cas 142 (142) (Lah), *Attah Ditta* v. *Karam Chand.*

('27) 14 AIR 1927 Mad 219 (222, 223, 224) : 50 Mad 548 : 100 Ind Cas 10 (DB), *Swaminatha Odayar* v. *Subbarama Ayyar.* (Such acknowledgment need not be express but may be implied from the facts and the surrounding circumstances.)

('02) 25 Mad 220 (231, 232) (FB), *Narayana Ayyar* v. *Venkataramana Ayyar.*

('13) 20 Ind Cas 27 (27) : 35 All 437 (DB), *Meghraj* v. *Mathura Das.*

signed by the witness but is only signed by the Judge or some officer of the Court, the deposition cannot operate as an acknowledgment of liability under this section.[2] The reason is that the Judge or the officer signing the deposition is not the *agent* of the witness. In other words, the Judge or officer does not sign the statement *on behalf* of the witness for the purpose of acknowledging his liability but merely fulfils a statutory duty imposed upon him in order to bring into play the presumption raised by S. 80 of the Evidence Act.[3]

See also Note 50.

49. Entry in Settlement Record, etc. — Where an entry is made in a settlement record or other public record that certain property is under a mortgage and the record is signed by the parties concerned in token of their acceptance of the correctness of the entry, the document can be used as an acknowledgment of liability in respect of the mortgage.[1] But where the record has not been signed by the

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2. ('40) 27 AIR 1940 Nag 354 (355) (DB), *Gajadhar Prasad Ramlal* v. *Udaichand Kapurchand.*

('34) 21 AIR 1934 Rang 282 (283, 284) : 12 Rang 610 : 153 Ind Cas 957, *U Po Yin* v. *U Ba Chit.*

[*See* ('29) 16 AIR 1929 All 332 (333, 334) : 119 Ind Cas 565, *Gayadin Singh* v. *Kalka Singh.*]

3. ('40) 27 AIR 1940 Nag 354 (355, 356) (DB), *Gajadhar Prasad Ramlal* v. *Udaichand Kapurchand.* (The fact that a witness who is a party to the suit voluntarily goes into the witness box does not make any difference.)

Note 49

1. ('75) 1 All 117 (123, 124) (FB), *Daia Chand* v. *Sarfraz.* (Spankie, J., dissenting.)

('77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Daia Chand* v. *Sarfraz Ali.*

('09) 2 Ind Cas 469 (470) (DB) (Bom), *Hiralal Icchalal* v. *Narsilal.*

('08) 10 Bom L R 385 (387, 388) (DB), *Sheikh Mahomed* v. *Jamaluddin Mohamed.*

('19) 6 AIR 1919 All 401 (402) : 52 Ind Cas 229 (DB), *Mewa Ram Singh* v. *Ganga Ram.* (Entry of mortgage in wajib-ul-arz.)

('10) 5 Ind Cas 77 (78) (All), *Shankar* v. *Dharmon.* (Do.)

('11) 10 Ind Cas 215 (216) (All), *Maharaj Singh* v. *Shankar Lal.* (Entry in khewat attested by mortgagee — Signature made in the handwriting of third person but in his presence—*Held* sufficient acknowledgment.)

('27) 14 AIR 1927 Oudh 457 (465) : 105 Ind Cas 93 (DB), *Suraj Baksh* v. *Ganga.* (Statement mentioning mortgage by mortgagee in pedigree table of the cosharers of a village which was the subject of mortgage and an entry in wajib-ul-arz signed by the mortgagee is sufficient acknowledgment.)

('21) 8 AIR 1921 Bom 291 (292, 293) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjivandas Purshottamdas* v. *Bai Mani.* (Entry made in register of Sanads showing that the sanad-holder is a mortgagee is sufficient.)

('33) 20 AIR 1933 Lah 345 (346) : 14 Lah 587 : 147 Ind Cas 1174, *Bhagwan Das* v. *Said Mahommad.*

[*See also* ('88) 1888 Pun Re No. 63, *Maksud Ali* v. *Salar Baksh.* (*Held*, that under the circumstances of the case the entries were not sufficiently specific to operate as acknowledgment.)

('81) 1881 All W N 40 (40) (DB), *Dunni* v. *Basti.* (*Held*, that under the circumstances of the case, a statement contained in a Settlement Record styled "Tafrik Thok Patti" by which the defendant was alleged to have acknowledged the party sought to be bound or by his agent, it cannot be used against him as an acknowledgment of liability. The signature of the settlement officer or other officer who may be signing the record cannot be taken as the signature of the agent of the parties whose rights and liabilities are recorded.[2]

50. Explanation II : Acknowledgment by agent. — Explanation II to the section provides that an acknowledgment under this section may be signed either personally or by an agent duly authorised in this behalf. The "signing" referred to here means the signature which a person affixes to a document in order to indicate that he is the author of the document. Hence, when A authorises B to affix the former's signature to a document on his behalf and B accordingly writes A's name on the document, the document is to be taken as "signed" by A himself and not by his *agent* B. (See Note 31.) In other words, in order to constitute signature by an agent, it is necessary that the latter should sign the document as one of his own authorship, the "agency" referring to the creation of the document itself and not merely to the writing of another person's name on it. Hence, the provision that an acknowledgment under this section may be "signed" personally or by a duly authorised agent really means that an acknowledgment may be *made* personally or by a duly authorised agent. The provision does not refer to the mere act of writing another's name on a document as an agent.

The Act of 1871 used the words "generally or specially authorised in this behalf."[1] These words have been changed into "duly authorised in this behalf." But, this does not mean any change in the law, and even under the present Act, the authority of the agent to make an acknowledgment on behalf of another may be special or general.[2] Thus, where a letter acknowledging a debt on behalf of another is

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titles of two persons to certain shares and their right of redemption was signed for the defendant by his authority.)]

[But see ('11) 10 Ind Cas 238 (240) (All), *Chunni* v. *Hukum Singh*.
('91) 1891 Pun Re No. 116, *Jwala Singh* v. *Sher Singh*. (Signature at foot of wajib-ul-arz not enough—Entry containing admission must be specially signed.)]

[2] ('10) 5 Ind Cas 992 (994) : 1910 Pun Re No. 39, *Ganga Ram* v. *Pokhar Das*.
('05) 1905 Pun L R No. 75, p. 289 (291, 292) : 1905 Pun Re No. 53 : 1905 Pun W R No. 74 (FB), *Bahadur* v. *Nanka Ram*. (It may be observed that the Settlement Officer as the officer entrusted with the preparation of the record would *prima facie* be signing the document in his official capacity, just as a judge recording the deposition of a witness signs the deposition.)
[*See also* ('89) 1889 Pun Re No. 145, *Gul Muhammad* v. *Akbar*. (Fact that the signature of the defendant himself was absent is immaterial—No doubt that the signature was made by some person, probably a settlement official acting for him with *his full authority*.)]

Note 50

[1] ('81) 6 Cal 340 (351) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree*.

[2] (1900) 22 All 123 (128, 129): 1900 All W N 41 (FB), *M. J. Powell* v. *Municipal Board of Mussoorie*. (Authority to act in all cases or in a class of cases is included within the expression "authorised.")

written at the request of the latter, the acknowledgment is made by an agent *specially* authorised in this behalf.[3] But, where the authority is not confined to a particular case, it will be a general authority. Such authority also will be within the section. Thus, an agent under a general power of attorney may acknowledge debts due by the principal.[4]

The authority of an agent under this section may be express or implied[5] and may be presumed from attendant circumstances.[6] Hence, the question whether in any case there is authority to acknowledge depends on the facts and circumstances of that case.[7]

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3. ('41) 28 AIR 1941 Oudh 254 (255, 256) : 192 Ind Cas 885 (DB), *Deputy Commissioner, Kheri* v. *Ram Kumar Saxena.* (A letter written by a mukhtar at the instructions of the debtor is valid acknowledgment.)

('40) 27 AIR 1940 Pat 6 (7) : 18 Pat 715 : 186 Ind Cas 225 (DB), *Ramjan Ali* v. *Khawja Meer Ahmed.* (Letter of acknowledgment written by person at instance of debtor — Debtor posting that letter to creditor's address — Person can be inferred to have been duly authorized to make acknowledgment.)

('29) 16 AIR 1929 Oudh 479 (480) : 5 Luck 510 : 120 Ind Cas 825 (DB), *Narain Das* v. *Chandrawati Kuar.* (Letter written and signed by general agent under instructions of debtor.)

('27) 14 AIR 1927 Oudh 613 (613) : 100 Ind Cas 784 (DB), *Ram Prasad* v. *Sant Din.* (Do.)

4. ('25) 12 AIR 1925 Mad 1260 (1262) : 91 Ind Cas 338 (DB), *Arunachallam Chetti* v. *Raja Rajeswara Sethupathi.*

5. ('40) 27 AIR 1940 Nag 354 (355) (DB), *Gajadhar Prasad Ramlal* v. *Udaichand Kapurchand.*

('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath* v. *Maharani Kunwar.*

('31) 18 AIR 1931 All 398 (399, 400) : 133 Ind Cas 155 (DB), *Kamta Rai* v. *Rani Jaduraj Kunwari.* (Pleader's admission in course of his business may amount to acknowledgment.)

('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivilliputtur Municipal Council* v. *Arunachala Nadar.*

('19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal* v. *Kunhamma.*

6. ('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath* v. *Maharani Kunwar.*

('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivilliputtur Municipal Council* v. *Arunachala Nadar.*

('25) 12 AIR 1925 All 176 (178): 85 Ind Cas 633, *Ganga Ram* v. *Lachman Singh.*

7. ('09) 4 Ind Cas 38 (41) : 32 Mad 284 (DB), *Seshan Pattar* v. *Veera Raghava Pattar.* (Resolution whereby the members of a village community empower certain members to bind them by the latter's actions includes an authority to make acknowledgment.)

('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath* v. *Maharani Kunwar.* (Letter written by general agent and manager may be presumed to be authorized.)

('29) 16 AIR 1929 Cal 155 (155) : 115 Ind Cas 177, *Amulya Charan* v. *Coral Engineering Works Ltd.* (There were three directors—One of them was manager — Acknowledgment given by him is sufficient.)

('24) 11 AIR 1924 Mad 96 (97), *Mahalakshmi* v. *Venkam Setti.* (Private debt of father of Hindu family—Acknowledgment by undivided son—No presumption that the son is agent for the father.)

Thus, an authority to settle and pay claims includes authority to acknowledge such claims.[8] Similarly, an authority to borrow implies authority to acknowledge debts.[9] So also, an authority to buy goods and pay for them implies authority to acknowledge liability for the price of the goods bought.[10] Where the business of a firm was being carried on by a *gumastha* who generally managed all its affairs and he was always allowed to write letters on behalf of the

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('36) 23 AIR 1936 Oudh 332 (333, 334) : 162 Ind Cas 448, *Deputy Commissioner Kheri* v. *Jagdamba Prasad.* (Where a mukhtarnama in favour of a person only authorizes him to look after the case-work connected with an estate, he has no power to acknowledge liability by issuing cheque on his own responsibility.)

('80) 6 Cal L R 101 (106) : 7 Ind App 8 : 4 Sar 112 : 3 Suther 111 (PC), *Dinomoye Debi* v. *Roy Luchmiput Singh.* (Though at one time the man might have held a general power of attorney from the defendant, there being nothing to show that he was continuing as the agent of the defendant at the date of the acknowledgment in question, an acknowledgment by such a person is not sufficient.)

('22) 9 AIR 1922 All 230 (231) : 44 All 546 : 66 Ind Cas 394 (DB), *Narain Rao Kalia* v. *Mt. Manni Kuar.* (It cannot be assumed that a Mukhtar-am has power to acknowledge liability.)

('25) 12 AIR 1925 All 176 (178) : 85 Ind Cas 633, *Gangaram* v. *Lachman Singh.* [*See* ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din* v. *Sri Kishen.* (*Held* in the circumstances of the case that the cosharer who had signed on behalf of others could not be presumed to be acting under their authority.)]

[8] ('16) 3 AIR 1916 Mad 235 (237) : 30 Ind Cas 675 (DB), *Muthuswami Nadan* v. *Sankara Lingam Chetty.* (Ex-partner authorized to collect the outstandings and pay all the debts of the partnership—Such authority includes the lesser power of acknowledging debts.)

[9] ('39) 26 AIR 1939 Mad 414 (421) : 184 Ind Cas 735 (DB), *Margaret Lornie* v. *Abu Backer Sait.* (Guardian having authority to borrow can keep debt alive by acknowledgment.)

('09) 4 Ind Cas 708 (709) : 32 All 51 (DB), *Lalta Parshad* v. *Babu Parshad.* (Managing partner of firm can borrow and so can acknowledge in course of management.)

[*See also* ('26) 13 AIR 1926 Mad 452 (453) : 92 Ind Cas 626 (DB), *Kesavaramayya* v. *Venkataratnam.*]

[10] ('19) 6 AIR 1919 P C 120 (121) : 55 Ind Cas 543 (PC), *Braja Sunder Deb* v. *Bhola Nath.* (Authority to purchase and pay for all things required for the use of the principal and his household.)

('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivalliputtur Municipal Council* v. *Arunachala Nadar.* (President of Local Emergency Committee appointed by Municipality to purchase rice can acknowledge liability with reference to price of rice purchased.)

('10) 6 Ind Cas 948 (951) : 1910 Pun Re No. 55 (DB), *Firm of Sheru Mal Chaina Mal* v. *Von Goldstein.* (Where *A* authorizes *B* to receive goods from *C* on *A*'s account, the authority includes the authority to give an acknowledgment of receipt — It does not make a difference that the acknowledgment is given in a consolidated form for a number of supplies together instead of at the time of each supply.)

[But see ('11) 11 Ind Cas 332 (333) : 35 Mad 142 (DB), *Sheik Mohideen* v. *The Official Assignee.* (*A* and *B* were partners and obtained goods on credit from *C* — *A* was entrusted with a branch of the business at *X* — *B* wrote to *C* that "the letters you may write to this place hereafter should be addressed to my brother *A*; you should also purchase and send such goods as he may write to you for" — Afterwards *A* wrote to *C* acknowledging a debt — It was held that letter by *B* to *C* was not an express authority to give an acknowledgment.)]

firm which were never repudiated, it was held that he could also acknowledge debts on behalf of the firm.[11] But, an authority which is confined to dealings with lands does not empower the agent to acknowledge liability for personal debts not charged on lands.[12] So also, the mere fact that an agent used to write letters on behalf of his principal is not sufficient to enable the Court to infer that he was authorised to make acknowledgment of liability on behalf of the principal.[13]

The authority of an agent under this section need not be the outcome of a *contractual* arrangement between the parties. The authority may be the outcome of an order of Court or it may arise as a matter of *law* from the position occupied by the parties with regard to each other. The fact that S. 21 specifies certain cases in which one person can acknowledge liabilities on behalf of another though the latter has not *appointed* him an agent, does not imply that in *other* instances one person cannot acknowledge on behalf of another unless he has been *appointed* by the latter as his agent.[14] Thus, a Court of Wards in charge of the estate of a ward is an agent authorized under the *statute* to make acknowledgments on behalf of the ward. (See Note 58.) So also, the authority of an executor (see Note 56) to give acknowledgments on behalf of the estate is based on his position under the *law* and is not the result of any contractual arrangement. A receiver derives his authority from the *order of the Court* and if the order authorizes him to acknowledge debts, he may do so. (See Note 52.)

The onus of proving that the person, by whom an acknowledgment of liability has been made on behalf of another, was duly authorized to do so is on the plaintiff.[15]

An acknowledgment of liability by an agent necessarily implies that the agent acknowledges the liability of the principal in favour of a *third* party. Hence, where, for certain ulterior purposes, A asks B to state that the latter is entitled to a certain right against the former and B makes such statement, the statement is not an acknowledgment of liability by B on A's behalf.[16]

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[11] ('11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim* v. *Chunnilal.*

[12] ('95) 17 All 198 (207, 208) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*

[13] ('24) 11 AIR 1924 All 855 (855) : 46 All 892 : 80 Ind Cas 6 (DB), *Uma Sankar* v. *Gobind Narain.*

[14] ('19) 6 AIR 1919 Mad 816 (816, 817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty* v. *Sadayappa Chetty.* (Receiver appointed by Court to do all things necessary for preservation of firm can acknowledge.)

('34) 21 AIR 1934 Rang 282 (284) : 12 Rang 610 : 153 Ind Cas 957, *U Po Yin* v. *U Ba Chit.* (Authority need not be the result of contractual relationship but may be derived by operation of law or by a legal duty having been cast upon the agent in the performance of which it was necessary for him to make the acknowledgment in question.)

('19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal* v. *Kunhamma.*

[15] ('37) 1937 Mad W N 1312 (1313), *Narayana Iyer* v. *Narayana Iyer.*

('08) 1908 Pun W R No. 164, p. 578 : 1908 Pun Re No. 102, *Shankar Das* v. *Jasodhan.*

('25) 12 AIR 1925 Mad 134 (135) : 80 Ind Cas 940, *Krishnayya* v. *Vekatappayya.*

See also Notes under sections 20 and 21.

51. Acknowledgment of liability by pleader on behalf of client.—An admission made by a pleader in the course of his duties on behalf of his client may bind the latter as an acknowledgment of liability under this section. The pleader will, in such cases, be the duly authorized agent of the client within the meaning of this section.[1] Thus, a petition by a vakil on behalf of a client and signed by the vakil, praying for additional time for the payment of the amount due under the decree passed against the client, will be an acknowledgment of liability under this section.[2] Similarly, an admission by a vakil in the course of a letter by him on behalf of his client will bind the client.[3]

52. Acknowledgment by receiver. — It has been seen in Note 50, that the authority of a person to make an acknowledgment of liability on behalf of another may arise out of an *order of Court.* Thus, a receiver appointed by a Court can make an acknowledgment under this section on behalf of the party of whose property he is a receiver, if such acknowledgment falls within the scope of the authority conferred on him by the Court.[1] In the undermentioned case,[2] however, it was held that a receiver is an agent of the *Court* and not of the *party* and so, cannot acknowledge liability under this section. It is submitted that in view of the fact that an agent under this section need not be one appointed by the *party* (see Note 50), the decision is not correct.

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[16] ('35) 22 AIR 1935 Mad 947 (952) : 158 Ind Cas 854, *Venkata Krishnayya* v. *Venkataratnam.* (Where a claim order, by which the Court recognised the title of the petitioner to the property sought to be attached in execution by a decree-holder of the transferor of the petitioner, was signed only by the petitioner who was the benamidar of the transferor and was not signed by the transferor it was held that it could not operate as acknowledgment against the transferor.)

Note 51

[1] ('34) 21 AIR 1934 Bom 186 (187, 188) : 151 Ind Cas 376 (DB), *Chhaganlal Shivlal* v. *Bonderbai Rup Chand.* (Admission in purshis signed and given by the pleader in the previous suit amounts to acknowledgment.)

('98) 22 Bom 722 (727) (DB), *Trimbak* v. *Kashinath.*

('96) 23 Cal 374 (387) (DB), *Narendra Nath Pahari* v. *Bhupendra Narain Roy.*

('19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir* v. *Rajman Gir.*

('28) 15 AIR 1928 Mad 713 (719) : 109 Ind Cas 872 (FB), *Thimmanayanim* v. *Venkatappa Nayanim.*

('96) 18 All 384 (387) : 1896 All W N 101 (DB), *Hingan Lal* v. *Mansa Ram.* (But it is doubtful whether an advocate or vakil can make a signed acknowledgment so as to bind his client, if the acknowledgment relied on is unnecessary for the purpose for which the advocate or vakil has been retained.)

('31) 18 AIR 1931 All 398 (399, 400) : 133 Ind Cas 155 (DB), *Kamta Rai* v. *Rani Jaduraj Kunwari.* (Admission by a pleader in petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors or guardian for minors.)

[2] ('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed* v. *Mahomed Mabood Bux.*

('82) 8 Cal 716 (717, 718) : 10 Cal L R 613 (DB), *Ram Kumar Kur* v. *Zaker Ali.*

('80) 3 All 247 (249, 250) (FB), *Ramhit Rai* v. *Satgur Rai.*

[3] ('20) 7 AIR 1920 Mad 742 (742) : 59 Ind Cas 898, *Arumuga Chettiar* v. *Ramanadhan.*

Where, in a suit for the dissolution of a firm, a receiver has been appointed for the purpose of collecting outstandings and doing all things necessary for the preservation of the assets, there is a conflict of decisions as to whether the receiver can acknowledge liability for debts due by the firm. The Madras High Court[3] has held that the power to do all things necessary for the preservation of the assets of the firm will include the power to acknowledge debts due by the firm where such acknowledgment is necessary for the above purpose. But the Chief Court of Lower Burma[4] has held that the words "things necessary for the preservation of the assets" of the firm cannot cover the making of an acknowledgment of liability.

A receiver of the assets of a firm who has been given power to *pay debts* due by the firm can give acknowledgments so as to prevent the bar of limitation.[5]

53. Acknowledgment of liability by Official Assignee — Effect. — In a suit against the Official Assignee of the estate of an insolvent to enforce a mortgage executed by the insolvent, an acknowledgment made by the Official Assignee may be relied on as saving limitation. The reason is that the estate of the insolvent vests in the Official Assignee and he is the "party against whom the right is claimed in the suit."[1]

But, in a suit against the debtor after the termination of the insolvency, can a previous acknowledgment by the Official Assignee

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Note 52

1. ('19) 6 AIR 1919 Mad 816 (817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty* v. *Sadayappa Chetty.*

2. ('06) 10 Cal W N 959 (961), *Baij Nath Ram Goenka* v. *Hem Chunder Bose.* (But admission by receiver in presence of party held in this case to operate as acknowledgment by agent.)

3. ('19) 6 AIR 1919 Mad 816 (817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty* v. *Sadayappa Chetty.*

4. ('15) 2 AIR 1915 Low Bur 63 (64) : 29 Ind Cas 27 : 8 Low Bur Rul 159 (DB) *S. M. A. Chetty Firm* v. *M. L. R. M. A. Chetty Firm.* (But power to *manage* would include power to give acknowledgment.)

5. ('37) 24 AIR 1937 Mad 764 (766) : 174 Ind Cas 22, *Krishnayya* v. *Seetharamayya.*

Note 53

1. ('18) 5 AIR 1918 Mad 1122 (1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai* v. *Aristotle Chakona.* (Per Phillips, J.)

be relied on as saving limitation? In such a case, it is clear that the Official Assignee will not be a party against whom the right is claimed.[2] The Bombay High Court has held that the Official Assignee was not also an agent of the debtor so as to bind him by his acknowledgment in such cases.[3] But, in the undermentioned case[4] decided by the Madras High Court where an Official Receiver filed a petition to the Court asking for permission to bring the insolvent's property to sale and in the course of the petition admitted the existence of a mortgage on the property, it was held by one of the learned Judges that in the circumstances of the case it must be considered that the Official Assignee had acted as the duly authorized agent of the debtor in making the admission.

54. Acknowledgment by one of several co-judgment-debtors. — Where a joint decree is passed against several persons, an acknowledgment of liability by one of them will not save limitation as against the others.[1] But, such acknowledgment will save limitation as against the judgment-debtor who makes the acknowledgment.[2]

55. Acknowledgment of liability by administrator. — An administrator of the estate of a deceased person derives his title solely from the letters of administration. Hence, before such letters are granted, he cannot bind the estate by an acknowledgment of liability made by him in respect of a debt due by the estate. But, where letters of administration are granted to the *heir* of the deceased an acknowledgment of liability by such heir would be binding on him though made before the grant of such letters.[1]

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[2] ('33) 20 AIR 1933 Bom 91 (92) : 143 Ind Cas 698 : 58 Bom 505 (DB), *Currimbhai Abdulhusain* v. *Ahmedali Lukmanji.*

[3] ('33) 20 AIR 1933 Bom 91 (91, 92) : 143 Ind Cas 698 : 58 Bom 505 (DB), *Currimbhai Abdulhusain* v. *Ahmedali Lukmanji.*

[4] ('18) 5 AIR 1918 Mad 1122 (1123, 1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai* v. *Aristotle Chakona.* (Per Oldfield, J.)

Note 54

[1] ('05) 27 All 575 (579) : 1905 All W N 108 : 2 All L Jour 287 (DB), *Ashan-ul-lah* v. *Dakkhinidin.*

('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nanda Lal Marwari* v. *Rampal Singh.*

('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar* v. *Ram Din.*

('17) 4 AIR 1917 Cal 422 (424) : 37 Ind Cas 738 (DB), *Jogendra Prosad* v. *Asutosh Goswami.*

('08) 1908 Pun L R No. 87, p. 244 : 1908 Pun Re No. 54 : 1908 Pun W R No. 40, *Bhagwan Singh* v. *Mohanlal.*

See also Section 21 Note 17.

[2] ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar* v. *Ram Din.*

('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nandlal Marwari* v. *Rampal Singh.*

('14) 1 AIR 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behari Kapur* v. *Jnanendranath Ghosh.*

Note 55

[1] ('30) 17 AIR 1930 Mad 218 (220) : 122 Ind Cas 504 : 53 Mad 480 (DB), *Raja Rama* v. *Fakuruddin Sahib.*

56. Acknowledgment by executor. — An acknowledgment of liability by the executor of a will is binding on the estate.[1] Unlike an administrator who derives his authority solely from the letters of administration granted to him, an executor derives his title and authority from the *will* under which he has been appointed executor, and so, he represents the estate even before the grant of probate. Hence, an acknowledgment of liability by him, though made before the grant of probate, will be binding on the estate.[2]

57. Acknowledgment, if may be made by Court. — A statement in a judgment of Court that certain persons are mortgagees cannot be used as an acknowledgment of liability against them.[1] The reason is that in such cases, the Judge is not an agent authorized to give acknowledgments on behalf of the parties. Even where the judgment purports to record an admission made by or on behalf of a party, the judgment cannot operate as an acknowledgment of liability under this section, because it is not *signed* by the party or his agent and the Judge cannot be considered as the agent of the party for such purpose.[2]

See also Notes 48 and 50.

58. Acknowledgment by Court of Wards. — The general power of the Court of Wards to manage the estate of the ward includes the power to make acknowledgments on behalf of the ward. Hence, such acknowledgments will save limitation under this section.[1]

See also section 21 Note 5.

Note 56

[1] ('24) 11 AIR 1924 Mad 286 (287, 290) : 77 Ind Cas 740 (DB), *Official Assignee of Madras* v. *Subramania Ayyar.*
See also Section 21 Note 15.

[2] ('30) 17 AIR 1930 Mad 218 (219) : 122 Ind Cas 504 : 53 Mad 480 (DB), *Raja Rama* v. *Fakuruddin Sahib.*

Note 57

[1] ('09) 4 Ind Cas 579 (581) (All), *Jaigopal Misir* v. *Sheo Sagar Singh.*

[2] ('37) 24 AIR 1937 Mad 760 (763) : 174 Ind Cas 28, *Appaji* v. *Govindasami.* [*See also* ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din* v. *Sri Kishen.* (A note of the revenue officer in his report that a mortgagee made an oral statement of an acknowledgment of the mortgage does not extend limitation.)]

Note 58

[1] ('39) 26 AIR 1939 Bom 237 (248) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.* (A report made by the Collector admitting a claim on a mortgage under S. 16 of the Bombay Court of Wards Act is an acknowledgment.)
('38) 25 AIR 1938 All 217 (218) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal* v. *Rana Lal Singh.* (Property of executant of promissory note under supervision of Court of Wards—Collector is agent of executant competent to acknowledge.)
('94) 17 All 198 (208): 22 Ind App 31: 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*

59. Acknowledgment by one of several co-heirs, if binds others. — See Note 8 under Section 21.

60. Acknowledgment on behalf of Hindu joint family. — See Notes under Section 21.

61. Acknowledgment by manager of Malabar tarwad. — See Note 21 under Section 21.

62. Husband and wife — Authority to acknowledge on each other's behalf. — A husband is not authorized, as such, to acknowledge debts due by his wife.[1] So also, the wife has no authority, as such, to acknowledge the husband's debts.[2]

63. Applicability of section to applications for execution. —The corresponding sections in the Acts of 1859 and 1871 applied only to debts and legacies. Under those sections there was a conflict of decisions as to whether the sections would apply to applications for execution. It was held in some cases that the expression "debt" would not include "*judgment-debt*" and that therefore the provisions as to acknowledgment did not apply to execution proceedings.[1] But, in other decisions it was held that where the judgment-debtor had admitted his liability, the decree-holder would be entitled to a fresh period of limitation.[2]

('10) 6 Ind Cas 407 (408) : 34 Mad 221 (DB), *Linga Reddi* v. *Sarvarayudu.* (Acknowledgment by the Collector as the agent of the Court of Wards, is equally binding.)

('16) 3 AIR 1916 Cal 107 (108) : 43 Cal 211 : 34 Ind Cas 205 (DB), *Rashbehari Lal* v. *Anand Ram.*

('37) 24 AIR 1937 Oudh 26 (28) : 165 Ind Cas 269 : 12 Luck 531 (DB), *Sukhnandan Prasad* v. *Ahmad Ali Khan.*

('88) 1888 All W N 187 (189) (DB), *Kamla Kuar* v. *Har Sahai.*

Note 62

[1] ('26) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba* v. *Gopi.*

[2] ('33) 20 AIR 1933 Mad 686 (687, 688) : 56 Mad 964 : 146 Ind Cas 49 (DB), *Gomathi Ammal* v. *Avu Ammal.* (Admission, by wife of a lunatic, of debt in her petition for appointment of guardian — Husband dying before appointment — *Held* that her admission was not valid acknowledgment.)

Note 63

[1] ('67) 7 Suth W R 79 (79) (DB), *Mt. Luchmun Koonwar* v. *Luchmun Bhukut.*

('79) 4 Cal 708 (709) (DB), *Mungol Prashad Dichit* v. *Shama Kanto Lahory.* (Debt applies only to a liability for which a suit may be brought.)

('77) 2 Cal 468 (469, 470) (DB), *Kally Prosonno Hazra* v. *Heera Lal Mundle.* (Do.)

('79) 3 Cal L R 572 (573) (DB), *Ishana Dabia* v. *Grija Kant Lahiry.* (Do.)

('75) 24 Suth W R 282 (284) (DB), *Heera Lall Mookerjee* v. *Dhunput Singh.*

[2] ('66) 5 Suth W R Misc 12 (13) (DB), *Luchmee Narain* v. *Shudasheo Singh.*

('66) 5 Suth W R Misc 31 (31) (DB), *Prosunno Coomar Roy* v. *Kashee Kant Bhuttacharjee.*

('66) 6 Suth W R Misc 115 (115) (DB), *Joteeram Doss* v. *Shaikh Huruf.*

(1865) 3 Suth W R Misc 27 (27) (DB), *Digamburee Debia* v. *Sharoda Pershad Roy.*

The scope of the section was widened in the Act of 1877 by making it applicable to all suits or applications in respect of *any* property or right. But, nevertheless, there was still a conflict of decisions as to the applicability of the section to execution proceedings. According to the High Courts of Allahabad,[3] Bombay,[4] Calcutta,[5] the Punjab Chief Court[6] and the Nagpur Judicial Commissioner's Court,[7] the expression "application in respect of a right" would include applications for execution and so the section was applicable to such applications. But the Madras High Court took a contrary view.[8] The amendment of the section in 1908 by the addition of explanation III gives effect to the former view,[9] so that the Madras view is no longer good law.

64. Promissory note for pre-existing debt, if can be used as acknowledgment of liability in suit on original cause of action. — Where a promissory note is executed in lieu of a *pre-existing debt* and such promissory note becomes unenforceable for any reason, a suit can be brought on the original cause of action. The reason is that in such cases the original right must be deemed as agreed to be given up only on condition of the latter arrangement being enforceable.[1] Where a suit is brought on the original cause of action, the period of limitation commences to run from the date of such cause of action. The question arises if the promissory note which has become unenforceable can be used as an acknowledgment of liability in such suit. The question may be considered under the following heads with reference to the cause which has made the promissory note unenforceable:

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[3] ('81) 3 All 247 (249, 250) (FB), *Ramhit Rai* v. *Satgur Rai.*

('96) 18 All 384 (387) : 1896 All W N 101 (DB), *Hingan Lal* v. *Mansa Ram.*

('94) 16 All 228 (231) : 1894 All W N 55, *Muhammad Said* v. *Payag Sahu.*

('85) 7 All 424 (428, 430) : 1885 All W N 76 (DB), *Fateh Muhammad* v. *Gopal Das.*

('82) 5 All 201 (205, 206) : 1882 All W N 221 (DB), *Janki Prasad* v. *Ghulam Ali.* (Tyrrell, J. expressed his personal doubt as to whether this section can be applied to affect the limitation for the execution of decrees.)

[4] ('08) 32 Bom 296 (298, 299) : 10 Bom L R 374 (DB), *Srinivas Krishna* v. *Narhar.*

('98) 22 Bom 998 (1000, 1001) (DB), *Jeddi Subraya* v. *Ram Rao.*

('98) 22 Bom 722 (727) (DB), *Trimbak Bapuji* v. *Kashinath Vidyadhar.*

('86) 10 Bom 108 (111) (DB), *Venkatrav Bapu* v. *Bijesing Vithalsing.*

[5] ('10) 6 Ind Cas 366 (367) (DB) (Cal), *Mt. Bindeswari Koer* v. *Awadh Behari.*

('04) 8 Cal W N 470 (471, 472) (DB), *Bhagabuty Charan* v. *Ashutosh Chatopadhya.*

('07) 6 Cal L Jour 141 (142) (DB), *Brojonath Shaha* v. *Gaya Sundari Dassya.*

('06) 3 Cal L Jour 347 (348) (DB), *Rakhal Chandra Tewari* v. *Hemangini Debi.* (Execution of rent decree under Bengal Tenancy Act.)

('96) 23 Cal 374 (387) (DB), *Norendra Nath Pahari* v. *Bhupendra Narain Roy.*

('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed* v. *Mohamed Mabood.*

('82) 8 Cal 716 (718, 719) : 10 Cal L R 613 (DB), *Ram Kumar Kur* v. *Zaker Ali.*

[6] ('09) 2 Ind Cas 102 (105) : 1909 Pun Re No. 52 (DB), *Peachey* v. *Punjab Banking Co. Ltd., Lahore.*

('85) 1885 Pun Re No. 28, *Bhagat Ram* v. *Chint Ram.*

[7] ('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal* v. *Gopal Rao.*

[8] ('15) 2 AIR 1915 Mad 749 (749): 26 Ind Cas 368 (DB), *Akkamma* v. *Rangappa.* (Case under 1877 Act.)

('05) 28 Mad 40 (41) (DB), *Srinivasa Chariar* v. *Ponnuswamy Nadar.*

('82) 5 Mad 171 (173) (FB), *Rama* v. *Venkatesa.*

[9] ('25) 12 AIR 1925 Pat 197 (198) : 79 Ind Cas 897 (DB), *Reshma Kuari* v. *Rameshwar.*

('14) 1 AIR 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behari Kapur* v. *Jnanendranath Ghose.*

(1) *Promissory note inadmissible for want of sufficient stamp.* — A promissory note which is not sufficiently stamped is inadmissible in evidence for any purpose under S. 35 of the Stamp Act. Hence, such a promissory note cannot be relied on even for the purpose of serving as an acknowledgment of liability in a suit on the original cause of action.[2] But under S. 36 of the same Act,

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Note 64

[1] ('26) 13 AIR 1926 Mad 1148 (1150) : 98 Ind Cas 75, *Gopala* v. *Rajagopal.*
('27) 14 AIR 1927 Nag 241 (242) : 104 Ind Cas 470, *Udaram Magniram* v. *Laxman.*
[*See* ('40) 27 AIR 1940 Nag 214 (215) : 190 Ind Cas 818, *Jawanmal* v. *Akaji Anand.* (Promissory note executed in lieu of bond, insufficiently stamped—Suit on promissory note—Plaint allowed to be amended so as to base the claim on the original bond.)
('39) 26 AIR 1939 Mad 34 (35, 36) : 183 Ind Cas 882, *Kondamma* v. *Venkatarayudu.* (Promissory note executed in renewal of old note, insufficiently stamped—Suit on new promissory note—Plaintiff praying for amendment so as to base his suit on original note—*Held* that the amendment could be granted as the amendment did not introduce any new cause of action and did not prejudice the defendant in putting forward the plea of limitation.)]
[*See also* ('68) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co.* v. *Koylas Chunder.*]

[2] ('40) 27 AIR 1940 Nag 214 (214, 215): 190 Ind Cas 818, *Jawanmal* v. *Akaji.*
('39) 26 AIR 1939 Mad 34 (36) : 183 Ind Cas 882, *Kondamma* v. *Venkatarayudu.* (But an endorsement on the back of the promissory note can be admitted in evidence to prove an acknowledgment.)
('36) 63 Cal 813 (816, 818) : 40 Cal W N 399, *Jogendra Chandra Banerjee* v. *Sacheendra Kumar Seal.*
('38) 25 AIR 1938 Mad 75 (77) : I L R (1938) Mad 210 : 175 Ind Cas 24 (DB), *Nageswara Rao* v. *Narayanamurthi.*
('37) 24 AIR 1937 Mad 364 (365) : 169 Ind Cas 692, *Ramanatha Ayyar* v. *Narayanaswami Ayyar.*
('33) 20 AIR 1933 Lah 240 (240) : 141 Ind Cas 569, *Rup Chand* v. *Beli Ram.*
('37) 24 AIR 1937 Rang 408 (411, 412) : 1937 Rang L R 127 : 173 Ind Cas 604, *J. N. Ezekiel* v. *Mordecai.* (Pronote invalid under Section 12, Stamp Act — Such pronote cannot be used as acknowledgment of liability by promisor so as to bring within time suit based on original consideration — Distinction between collateral purpose and collateral matter stated.)
('33) 20 AIR 1933 Nag 391 (391) : 147 Ind Cas 981, *Govinda* v. *Hari Bhaoo.*
('28) 15 AIR 1928 Oudh 408 (409) : 112 Ind Cas 247, *Bishunath Singh* v. *Ishri Dayal.* (The contention, that the only effect of the pronote not being sufficiently stamped as a pronote is that the instrument cannot be admitted in evidence as a pronote but that it can be used as an acknowledgment, if accepted the result will be to make the words 'for any purpose' in Section 35 of Stamp Act quite superfluous—Distinguishing 3 All 581 (FB).)

where such promissory note has once been admitted in evidence, such admission cannot be questioned at any stage of the same suit or proceeding.[3] Further, where in addition to the promissory note there is some other document executed as part of the same arrangement, such as a receipt which is admissible in evidence and which contains an admission of liability in regard to the original debt, such document can be used as an acknowledgment in the suit on the original cause of action notwithstanding the inadmissibility of the promissory note.[4] It has also been held that where the document includes not only a promissory note but also other matters which amount to an acknowledgment of a pre-existing liability, the prohibition contained in S. 35 of the Stamp Act does not apply to the matters other than the promissory note and hence, notwithstanding the inadmissibility of the document to prove the promissory note, it can be used to prove the acknowledgment of liability contained in it.[5]

[See however ('38) 25 AIR 1938 Nag 294 (295, 296) : 177 Ind Cas 678, *Sudamsa Arjunsa* v. *Kisanrao.* (Insufficiently stamped promissory note is not admissible as an acknowledgment of a debt *for the purpose of supplying evidence of such debt*, such acknowledgment coming under Article 1, Stamp Act — But such promissory note is admissible to prove fact of admission made by debtor of his existing liability and can extend period of limitation — It can also be treated as agreement chargeable with duty under Article 5 (c), Schedule I, Stamp Act, and is admissible in evidence on payment of requisite duty and penalty.)

('21) 8 AIR 1921 Pat 317 (318) : 60 Ind Cas 385 (DB), *Ram Narain Sahu* v. *Lachmi Prasad Sahu.* (A hundi which does not comply with the provisions of Section 13 of the Stamp Act though not admissible as a hundi can be admitted in evidence as an acknowledgment.)]

[But see ('27) 14 AIR 1927 Nag 241 (242) : 104 Ind Cas 470, *Udaram Magniram* v. *Laxman Marwari.*]

[3] ('35) 22 AIR 1935 Pat 375 (375) : 14 Pat 233 : 158 Ind Cas 962 (DB), *Tribhuan Ojha* v. *Ramchandra.*

('33) 20 AIR 1933 Lah 240 (240) : 141 Ind Cas 569, *Rup Chand* v. *Beli Ram.*

('34) 21 AIR 1934 All 951 (951) : 153 Ind Cas 551, *Randhir Singh* v. *Thaman Lal.*

('26) 13 AIR 1926 Mad 1148 (1149) : 98 Ind Cas 75, *Gopala Padayachi* v. *Rajagopal Naidu.*

[4] ('30) 17 AIR 1930 All 368 (369) : 126 Ind Cas 353, *Jagan Nath* v. *Girwar Singh.*

('33) 20 AIR 1933 Oudh 80 (81) : 141 Ind Cas 298 : 8 Luck 195, *Ram Chaube* v. *Sheo Harakh Tewari.*

('37) 24 AIR 1937 Oudh 387 (388, 389) : 13 Luck 376 : 168 Ind Cas 927 (DB), *Ambika Singh* v. *Jagdeo Upadhaya.* (A I R 1935 All 129 not followed.)

('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram* v. *Radhay Shiam.* (Endorsement on prior note admitting liability, as well as new note — New note inadmissible in evidence — Endorsement on prior note can be used as acknowledgment of liability in suit on prior note.)

[*See also* ('29) 16 AIR 1929 All 980 (981, 983) : 52 All 169 : 121 Ind Cas 108, *Govind Singh* v. *Bijay Bahadur.* (In this case the receipt is treated as itself constituting a new cause of action.)]

[5] ('39) 26 AIR 1939 Mad 34 (36) : 183 Ind Cas 882, *Kondamma* v. *Venkatarayudu.* (New promissory note executed in lieu of old note—New promissory note inadmissible in evidence being insufficiently stamped—Endorsement of payment appearing on it can be availed of as acknowledgment of liability of original note.)

(2) *Promissory note failing as contravening section 26 of the Paper Currency Act.* — Where a promissory note is made payable to bearer and as such is unenforceable under S. 26 of the Paper Currency Act, the promissory note can be used as an acknowledgment of liability in a suit on the original cause of action where such promissory note has been executed in lieu of a prior debt.[6]

(3) *Promissory note unenforceable under section 28 (now repealed by section 6 of Act XXI of 1926) of the Legal Practitioners Act.* — It was held in the case noted below[7] that where a promissory note was incapable of being sued on under S. 28 of the Legal Practitioners Act, (now repealed) it could nevertheless be used as an acknowledgment of liability in a suit on the original cause of action.

(4) *Promissory note invalid on other grounds.* — Though a promissory note executed in favour of a dead person is incapable of being sued on as a promissory note it can nevertheless be used as an acknowledgment of liability in a suit on the original cause of action.[8]

The giving of a promissory note for an old debt need not necessarily mean that the old debt is intended to be given up and replaced by the new obligation. The intention of the parties may simply be that the promissory note should serve as an acknowledgment of liability for the old debt so as to extend the period of limitation for a suit for such debt. In such cases, clearly, the promissory note can be used as an acknowledgment under this section, in a suit on the old debt.[9]

See also Note 29.

65. Admission of liability by person in adverse possession. — An admission by a person who is in possession of property adversely against another, that he is liable to return the property to

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('33) 20 AIR 1933 Mad 251 (252) : 141 Ind Cas 169, ***Vancheswara Sastri* v. *Narayana Ayyar.***

('30) 17 AIR 1930 Mad 485 (486) : 124 Ind Cas 53, ***Rakkappan Ambalam* v. *Suppiah Ambalam.*** **(The reason given is that what is shut out by Section 35 of Stamp Act is the instrument and not collateral matters connected with the instrument.)**

[6] **('18) 5 AIR 1918 Mad 634 (635) : 42 Ind Cas 706 (DB),** ***Nachimuthu Chetty* v. *Andiappa Pillai.***

('26) 13 AIR 1926 Mad 452 (453) : 92 Ind Cas 626 (DB), ***Kesavaramayya* v. *Venkataratnam.***

('22) 9 AIR 1922 Mad 181 (183) : 45 Mad 778 : 69 Ind Cas 939 (DB), ***Natarajulu Naicker* v. *Subramanian Chettiar.***

[7] **('15) 2 AIR 1915 Mad 688 (689) : 27 Ind Cas 116,** ***Natesa Mooppan* v. *Ramachandra Iyer.***

[8] **('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB),** ***Amrit Narayan Singh* v. *Baijnath Pandey.***

[9] **('28) 15 AIR 1928 Sind 17 (19, 20) : 22 Sind L R 222 : 105 Ind Cas 765,** ***Punjab National Bank Ltd.* v. *Mulji Morarji.***

the latter, will not interrupt the continuity of the adverse possession. But, if such admission is in writing and signed by the person in adverse possession, it will serve to furnish a fresh period of limitation as an acknowledgment of liability under this section.[1] As to what would constitute such an admission, see the undermentioned cases.[2]

66. Acknowledgment contained in letter marked "without prejudice."— Section 23 of the Evidence Act provides as follows:

> "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

In view of the above provision, the question arises whether an acknowledgment of liability contained in a letter marked "without prejudice" is admissible in evidence. In *Madhavrav* v. *Gulabbhai*,[1] the above question arose in connexion with a post-card written by a debtor to his creditor and marked "without prejudice." The question was left open by Farran, C. J. Candy, J., who sat with him observed as follows:

> "I doubt whether the post-card was inadmissible in evidence. To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should not be used in evidence against the writer. In England, apparently, the card would have been admissible. The remarks of Vaughan Williams, J., in *In re Daintrey;*

Note 65

1. ('33) 20 AIR 1933 Cal 414 (415) : 60 Cal 404 : 144 Ind Cas 177, *Nutbihari Das* v. *Bishweshwari Debee.*

('97) 1 Cal W N 569 (572) (DB), *Jagabandhu Bhattacharjee* v. *Hari Mohan Roy.*

(1900) 2 Bom L R 407 (409) (DB), *Sitaram Raghunath* v. *Naro Govind.*

('25) 12 AIR 1925 Cal 193 (193) : 84 Ind Cas 657 (DB), *Golam Nazar* v. *Abbas Molla.*

('29) 16 AIR 1929 Pat 117 (121) : 8 Pat 549 : 115 Ind Cas 699 (DB), *Bageswari Charan Singh* v. *Jagarnath Kuari.* (Reversed in A I R 1932 P C 55 on another point.)

2. ('14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan Saha* v. *Surendra Krishna Roy.* (Where a person admits that land of which he is in possession at the time is the property of another, he admits that he is liable to restore it to that other.)

(1900) 2 Bom L R 407 (409) (DB), *Sitaram Raghunath* v. *Naro Govind.* (Suit for possession — Offer by defendant to *purchase* the land from the plaintiff does not amount to an admission of title.)

('24) 79 Ind Cas 279 (280) (Lah), *Balmokand* v. *Wazir Chand.* (Cosharers — Adverse possession by one—Post-card by the adverse possessor in which plaintiff was called upon to pay his share of the moneys expended on repairs or to surrender his interest in the house amounted to an acknowledgment of the plaintiff's title.)

Note 66

1. ('99) 23 Bom 177 (179, 180) (DB).

> *Ex parte Holt,*[2] which the Subordinate Judge in the Court of first instance quoted are not, as the Subordinate Judge supposes, mere *obiter dicta.* They state the fact that the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation."

The above decision may also be consulted for an *interpretation* of the words "without prejudice" occurring in a document, *assuming* that such document is *admissible* in evidence.

In the undermentioned case,[3] the late Nagpur Judicial Commissioner's Court held that a suggestion made "without prejudice" that the matter might be settled could not operate to extend limitation. The decision, however, seems to proceed on the ground that the words used do not mean an admission of liability, rather than on the ground of the inadmissibility in evidence of the statement.

67. Material alteration of document containing acknowledgment.—It is a general principle of law that a material alteration of a document by a party to it, after its execution without the consent of the other party, renders it void. But this principle only applies to a document which is the foundation of the plaintiff's claim. The principle does not apply to a written acknowledgment which is intended only to serve as evidence and to save the bar of limitation and not to give a right of action. Hence, notwithstanding a material alteration in a document containing an acknowledgment of liability after it is given, the document can be relied on as saving limitation under this section.[1]

68. Acknowledgment contained in document thirty years old. — Under S. 90 of the Evidence Act, documents which are thirty years old and which are produced from proper custody may be presumed to have been signed, executed or attested by the persons by whom they purport to be signed, executed or attested. This presumption applies also to documents which contain an acknowledgment of liability.[1] Where the signature of the executant of the document purports to have been written by another person under the former's authority, the presumption of execution under S. 90 will include the presumption that the person affixing the signature of the executant had his authority to do so.[2] It was held by the Oudh Chief Court in the case cited below[3] that the presumption applies not only where the *original* is produced but also where a copy is produced as secondary evidence. But this must be considered as no longer good law in view of the Privy Council decision in *Basant Singh* v. *Brij Raj Saran*[4] in which it was held that when a *copy* is produced no presumption as to the genuineness of the *original* can be drawn under S. 90 of the Evidence Act. The presumption under S. 90 applies only to handwriting, execution and attestation. So, where a document more than thirty years old purports to be signed by an agent on behalf of a principal, no presumption arises as to the agent's authority, which must be proved.[5]

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[2] (1893) L R 2 Q B 116 (119, 120) : 41 W R (Eng) 590 : 62 L J Q B 511 : 5 R 414 : 69 L T 257 : 10 Morrell 158.

[3] ('26) 13 AIR 1926 Nag 57 (59) : 90 Ind Cas 135 (DB), *G. I. P. Railway Company* v. *Radhakisan Jaikisan.*

Note 67

[1] ('80) 5 Cal 215 (217) : 4 Cal L R 361 : 4 Ind Jur 625 (DB), *Nundu Kishore Lal* v. *Mt. Ramsookhe Kooer.* (Material alteration of date of document.)

('01) 25 Bom 616 (622, 623) : 3 Bom L R 213 (DB), *Atmaram* v. *Umedram.* (Do.)

('05) 9 Cal W N 695 (696) (DB), *Harendra Lal Roy Chowdhry* v. *Uma Charan Ghosh.* (Defendant acknowledged certain sum in hatchita—It was found that entry relating to interest was interpolated at a subsequent date — In a suit to recover the amount acknowledged plaintiff put the hatchita in evidence but no reliance was placed on the entry relating to interest, it was held that hatchita was put in merely as an acknowledgment of defendant's liability and that the plaintiff was entitled to a decree.)

[*See also* ('06) 33 Cal 812 (815, 819) : 3 Cal L Jour 363 : 10 Cal W N 788 (DB), *Gour Chandra Das* v. *Prasanna Kumar Chanda.*]

69. Acknowledgment under circumstances that would vitiate contract. — In *Dharma Vithal* v. *Govind Sadvalkar*,[1] West, J., of the Bombay High Court observed as follows :

> "The intention of the law is manifestly to make an admission in writing of an existing jural relation of the kind specified equivalent for the purposes of limitation to a new *contract*; but, for this purpose, the consciousness and intention must be as clear as they would be in a contract itself . . . ."

Thus, it is clear that although an acknowledgment under this section is *distinct* from a contract, yet, the acknowledgment, quite as much as a contract, must be the *voluntary* act of a person who is fully conscious of what he is about. An acknowledgment obtained by threat or intimidation cannot be used under this section.[2] An

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Note 68

[1] ('19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir* v. *Rajman Gir.*
('01) 1901 Pun Re No. 59, *Anis-ul-Rehman Khan* v. *Beni Ram.*

[2] ('33) 20 AIR 1933 All 99 (99, 100) : 142 Ind Cas 784 (DB), *Md. Rafi* v. *Kripa Ramji.*

[3] ('29) 16 AIR 1929 Oudh 483 (486) : 5 Luck 424 : 121 Ind Cas 273, *Brij Kishore* v. *Beni Pershad.*

[4] ('35) 22 AIR 1935 P C 132 (136) : 57 All 494 : 62 Ind App 180 : 156 Ind Cas 864 (PC).

[5] ('78) 3 Cal 557 (559) (DB), *Ubilack Rai* v. *Dallial Rai.*
('81) 6 Cal 209 (211, 212) (DB), *Uggrakant Chowdhry* v. *Hurro Chunder Shickdar.*

Note 69

[1] ('84) 8 Bom 99 (102) : 8 Ind Jur 261 (DB).
[*See also* ('93) 16 Mad 220 (227, 228) : 3 Mad L Jour 35 (DB), *Venkata* v. *Parthasaradhi.* (Per Wilkinson, J.)]

[2] ('21) 8 AIR 1921 Lah 362 (363) : 59 Ind Cas 781, *Bis Ram* v. *Kewal Ram.*

acknowledgment by a minor will not be available against him.[3]

See also the undermentioned case.[4]

70. Acknowledgment made in official confidence. — Where a person applies to the Collector setting forth the state of his financial position and requesting that his estate may be taken over by the Court of Wards, the communication is one made in official confidence within the meaning of S. 124 of the Evidence Act and hence, its production cannot be compelled by the Court for proving an acknowledgment of liability by the person who made the application.[1]

See also the undermentioned case.[2]

71. Mortgage invalid under tenancy laws, if can operate as acknowledgment of liability. — Where a mortgage of tenancy rights was executed in lieu of certain old debts but was invalid under the Oudh tenancy law, it was held that it could be used as an acknowledgment of liability in a suit on the original cause of action.[1]

72. Offer of Collector under Section 16 of the Bombay Court of Wards Act, if acknowledgment. — Although an offer made by the Collector under S. 16 of the Bombay Court of Wards Act (I of 1905), cannot be proved in a suit by the claimant, for the purpose of substantiating and establishing his claim, yet, such offer can be used as an *acknowledgment of liability* so as to save limitation.[1]

73. Agreement to extend time for performance of contract.—Under S. 63 of the Contract Act, the promisee under a contract

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('73) 1873 Pun Re No. 62, *Hamilton & Co.* v. *Showers.* (Threat to put the matter into Court and apply for arrest before judgment.)

[3] ('01) 1901 Pun Re No. 59, *Anis-ul-Rehman Khan* v. *Beni Ram.*

[4] ('33) 20 AIR 1933 All 175 (176) : 144 Ind Cas 1005, *Mani Ram* v. *Badri Das Behari Lal.* (Where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional.)

Note 70

[1] ('22) 9 AIR 1922 All 37 (41) : 44 All 360 : 66 Ind Cas 171 (DB), *Collector of Jaunpur* v. *Jamna Prasad.*

[2] ('39) 26 AIR 1939 Bom 237 (245) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.* (In this case it was held that the privilege under S. 124 of the Evidence Act could not be claimed as the Collector to whom the statements were made in official confidence did not claim privilege on the ground that public interest would be affected by the disclosure.)

Note 71

[1] ('25) 12 AIR 1925 Oudh 401 (402) : 89 Ind Cas 175, *Umrao* v. *Narain.*

Note 72

[1] ('20) 7 AIR 1920 Bom 137 (138, 139) : 58 Ind Cas 319 : 44 Bom 871 (DB), *Shivajirao Narayan Rao Thorat* v. *Hari Narayan Tagre.*

may extend the time for the performance of the promise. Where time is so extended, limitation for a suit on the contract will only run from the date to which the time has been extended.[1]

73a. **Suit based on default clause in mortgage deed, etc.** — Where a mortgage deed contains a provision that in default of the payment of the annual interest the mortgagee should be entitled to possession of the mortgaged property and default is made, but subsequently the mortgagor executes a second mortgage in favour of the mortgagee for all the arrears of interest up-to-date, the cause of action which the mortgagee got for a suit for possession on the occurrence of the first default is satisfied by the execution of the second mortgage and there is no question of the period of limitation for a suit based on such default being extended by the acknowledgment contained in the second mortgage deed. In such a case, limitation for a suit for possession by the mortgagee will run from the next default.[1] See also S. 20 Note 36.

74. **Stamp.** — An acknowledgment of liability under this section need not be stamped in every case.[1] But, if it is an acknowledgment of a debt and otherwise falls within the provisions of Art. 1, Sch. I of the Stamp Act, it is liable to a stamp duty of one anna. If it is not duly stamped, it cannot be relied on for any purpose including that of saving limitation under the section.[2] In order to see whether an acknowledgment is liable to stamp duty under Art. 1, Schedule I of the Stamp Act it must be seen whether it is given with the dominant

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Note 73

1. ('02) 4 Bom L R 50 (51, 52) (DB), *Srinivas* v. *Raghunath.*
('02) 12 Mad L Jour 351 (353) (DB), *Suggappa* v. *Govindappa.*

Note 73a

1. ('39) 26 AIR 1939 Lah 212 (215), *Abdullah* v. *Ishaq Mohammad.*

Note 74

1. ('36) 63 Cal 813 (815) : 40 Cal W N 399, *Jogendra Chandra* v. *Shacheendra Kumar Seal.*
('38) 25 AIR 1938 Nag 51 (51) : ILR (1939) Nag 695 : 172 Ind Cas 880, *Tilakchand* v. *Ram Kisan.* (A document is not an acknowledgment within the terms of Art. 1 of Sch. I, Stamp Act, unless it is given with the dominant intent to supply evidence of debt.)

2. ('97) 21 Bom 201 (204) : Chitty's S C C R 482 (FB), *Mulji Lalla* v. *Lingu Makaji.* (Overruling 18 Bom 614.)
('19) 6 AIR 1919 Nag 141 (142) : 50 Ind Cas 781, *Sitaram* v. *Thakur Das.*
('23) 10 AIR 1923 All 297 (297, 298) : 45 All 374 : 71 Ind Cas 1027 (DB), *Ram Das* v. *Inayatulla.*
('34) 21 AIR 1934 Nag 273 (274) : 153 Ind Cas 255 : 31 Nag L R 105, *Ram Chandra Bachharaj* v. *Muka Gujan.*
('21) 8 AIR 1921 Pat 292 (292), *Rakhal Chandra Chakraverty* v. *Ram Chandra.*
[*See also* ('28) 15 AIR 1928 All 666 (667) : 115 Ind Cas 423, *Ali Mohammed* v. *Jagannath Prasad.* (Acknowledgment executed in Gwalior State and stamped with one anna Gwalior stamp — Account book produced in British India subsequently but not stamped within three months since—*Held* that acknowledgment was inadmissible.)]

intent to supply evidence of the debt and the Court has to apply its mind to the question looking at the document and the surrounding circumstances as to what was the intention with which it was given.[3] Where, however, an acknowledgment has once been admitted in evidence, although it is not duly stamped, its admissibility cannot be questioned subsequently, under section 36 of the Stamp Act.[4]

The inadmissibility of the acknowledgment of a debt for want of stamp does not, however, preclude the *debt* acknowledged from being proved by parol evidence.[5]

75. Registration.—A document whereby a person acknowledges his liability in respect of a right to or in immovable property of the value of Rs. 100 or more is not a document which purports to "declare" any right, title or interest in such immovable property within the meaning of S. 17 of the Registration Act, and hence is not compulsorily registrable under that section. The reason is that an acknowledgment of liability merely constitutes a statement of an existing fact while the expression "declare" in section 17 of the Registration Act indicates something more than a mere statement of an existing fact and implies a declaration of *will* to cause a change of legal relationship in respect of the property concerned.[1]

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[3] ('38) 25 AIR 1938 Nag 51 (51) : ILR (1939) Nag 695 : 172 Ind Cas 880, *Tilakchand* v. *Ramkisan*. (*Held* that the letter reciting settlement of account did not require stamp as there was no intention to supply it as evidence of debt.)

('38) 25 AIR 1938 Pat 139 (140) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bishunath Ojha*.

('24) 11 AIR 1924 Mad 352 (353, 354) : 46 Mad 948 : 74 Ind Cas 1029 (DB), *Surjimull Murlidhar* v. *Ananta Lal*. (Acknowledgment not for purpose of supplying evidence of debt—Article 1, Stamp Act, not applicable.)

('03) 30 Cal 687 (688, 689) (DB), *Ambica Dat* v. *Nityanand Singh*. (Do.)

('92) 15 All 56 (58) : 1892 All W N 234 (DB), *Bishambar Nath* v. *Nand Kishore*. (Do.)

('26) 92 Ind Cas 1046 (1046) (Mad), *Ramaswami Ayyangar* v. *Raghava Aiyangar* (Do.)

('36) 23 AIR 1936 Mad 939 (939) : 166 Ind Cas 750, *Subbaroyadu* v. *Narasimha Reddi*. (Acknowledgment of correctness of account does not necessarily require stamp.)

('12) 15 Ind Cas 279 (280, 282) : 39 Cal 789 (DB), *J. C. Galstaun* v. *Hutchinson*. (A balance-sheet prepared and signed by the debtor and showing a balance, errors and omissions excepted, due from him was held, having regard to the circumstances of the case, not an acknowledgment within Article 1 Schedule I.)

[4] ('35) 22 AIR 1935 Rang 160 (160) : 13 Rang 322 : 156 Ind Cas 589, *Vellayappa* v. *Somasundaram*.

('25) 12 AIR 1925 Mad 1215 (1215, 1216) : 91 Ind Cas 494 (DB), *Nagappa Chetty* v. *V. A. A. R. Firm*.

('15) 2 AIR 1915 Cal 280 (281) : 22 Ind Cas 858 (DB), *Sitaram* v. *Ram Prosad Ram*.

[5] ('82) 8 Cal 282 (284) : 6 Ind Jur 415 (DB), *Binga Ram* v. *Rajmohun Roy*. (Suit for price of goods sold and delivered—Written admission of the defendant that the goods had been supplied to him — Inadmissibility for want of stamp — Oral evidence to prove delivery of goods sold and their value admissible.)

('23) 10 AIR 1923 Lah 301 (301) : 74 Ind Cas 939 (939), *Tikkan Ram* v. *Lal*.

Where an acknowledgment of liability is contained in a document which is compulsorily registrable but which is not registered, although the document is not admissible in evidence for the purpose of proving the transaction which it is designed to effect, yet, it is admissible for proving the acknowledgment of liability contained in it.[2]

76. Onus of proof. — The onus of proving that a suit is saved from the bar of limitation on account of an acknowledgment of liability is on the plaintiff. The reason is that the onus of proving that a suit is within time is on the plaintiff and consequently, the onus of proving that a suit which is on the face of it barred by limitation is saved from such bar on account of some exception to the statute is also on the plaintiff. (See Note 38 to S. 3.) The plaintiff must give cogent proof of his allegations in order to sustain the plea of acknowledgment raised by him.[1]

Note 75

[1] ('32) 19 AIR 1932 PC 55 (57) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bageshwari Charan Singh* v. *Jagarnah Kuari.* (Overruling 4 Bom 590.)

('32) 19 AIR 1932 Lah 154 (156, 157): 136 Ind Cas 14 (DB), *Radha Kishen Singh* v. *Hukam Chand.* (Document executed by mortgagor stating that some of the mortgage debt was paid and land was to remain mortgaged for balance — Document held not to require registration as it made no legal change in relation to the property charged.)

('32) 19 AIR 1932 Lah 592 (594, 595) : 140 Ind Cas 387, *Karam Singh* v. *Mt. Maya Wanti.* (Document purporting to be a mortgage deed and containing recital as to existence of prior existing mortgage—It was held that the reference to the earlier mortgage was a mere recital of a pre-existing fact and therefore it was exempt from registration.)

('81) 5 Bom 232 (236, 237), *Sakharam Krishnaji* v. *Madan Krishnaji.*

[*See also* ('23) 10 AIR 1923 Mad 621 (622) : 72 Ind Cas 456 (DB), *Ranganayaki Ammal* v. *Virupakshee Rao Naidu.*]

[2] ('38) 25 AIR 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar* v. *Dowlat Singjee.*

('81) 3 All 523 (526) : 1881 All W N 19 (DB), *Khushalo* v. *Behari Lal.*

('99) 26 Cal 334 (336), *Mugniram* v. *Gurmukh Roy.*

('80) 5 Cal 215 (217) : 4 Cal L R 361 : 4 Ind Jur 625 (DB), *Nundo Kishore Lall* v. *Mt. Ramsookhe Kooer.*

('36) 23 AIR 1936 Lah 276 (277) : 162 Ind Cas 306, *Shantilal* v. *Lyallpur Bank Ltd.*

('32) 19 AIR 1932 Lah 592 (594, 595) : 140 Ind Cas 387, *Karam Singh* v. *Mt. Maya Wanti.*

('32) 19 AIR 1932 Lah 400 (400) : 137 Ind Cas 155, *Baru Mal* v. *Daulat Ram.*

('32) 19 AIR 1932 Lah 154 (156, 157): 136 Ind Cas 14 (DB), *Radha Kishen Singh* v. *Hukamchand.*

('30) 17 AIR 1930 Lah 985 (989, 990) : 12 Lah 239 : 129 Ind Cas 281 (DB), *Davindar Singh* v. *Mt. Lachhmi Devi.*

('80) 1880 Pun Re No. 88, *Sayad Muhammad Khan* v. *Jaisukh.*

[*See also* ('81) 1881 Pun Re No. 17, *Chuhar* v. *Wazira.*

Note 76

[1] ('22) 9 AIR 1922 All 37 (41) : 66 Ind Cas 171 : 44 All 360 (DB), *Collector of Jaunpur* v. *Jamna Prasad.*

Section 19
Note 76

Onus of proving that acknowledgment was made before expiry of limitation. — There is a conflict of decisions on the question as to whether the burden of proving that an acknowledgment under this section was made before the expiry of the period of limitation is on the plaintiff, or whether the onus is on the defendant to prove that the acknowledgment was made after the expiry of the period of limitation. One view is that the onus is on the defendant to show that the acknowledgment was made after the expiry of the period of limitation.[1a] This view is based on the fact that an acknowledgment which is sufficient for the purposes of this section necessarily implies the admission of a *subsisting* liability. In other words, an acknowledgment under this section implies in itself an admission that at the time when it is made the liability admitted is not barred by limitation. Hence, the burden of proving that the fact admitted is not true is on the party making the admission, viz., the defendant. The other view is that the burden of proving that the acknowledgment was made before the expiry of the period of limitation is on the plaintiff.[2] This view seems to be based on the fact that an acknowledgment of liability does not necessarily imply an admission that the liability is not *barred by limitation*,[3] inasmuch as the question of limitation may not be present to the mind of the person making the admission at all. But, even according to this view, there may be peculiar circumstances in a case which necessitate the placing of the onus of proof on the defendant to show that the acknowledgment was made after the period of limitation.[4]

[1a] (04) 26 All 313 (316) : 1904 All W N 38 : 1 All L Jour 1 (DB), *Dip Singh* v. *Girand Singh.*
('29) 16 AIR 1929 All 209 (210) : 115 Ind Cas 451, *Mihi Lal* v. *Soni Ram.*
('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahamad Haji* v. *Mayan.*

[2] ('32) 19 AIR 1932 All 555 (557) : 137 Ind Cas 193 (DB), *Makkhan Lal* v. *Mt. Sardar Kunwar.*
('32) 19 AIR 1932 All 461 (464) : 54 All 506 : 140 Ind Cas 783 (DB), *Girdhari Lal* v. *Firm Bishnu Chand.* (Reversed in A I R 1934 P C 147 on another point.)
('32) 19 AIR 1932 All 199 (207) : 53 All 963 : 137 Ind Cas 243 (DB), *Abdul Rafiq* v. *Bhajan.*
('26) 13 AIR 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram* v. *Lachman Prasad.*
('99) 1 Bom L R 2 (4) (DB), *Chotiram Lal Chand* v. *Bhau.*
('35) 22 AIR 1935 Lah 515 (516) : 155 Ind Cas 576 (DB), *Sher Mohammad* v. *Karamchand.* (Letters Patent appeal from A I R 1934 Lah 121.)
('34) 21 AIR 1934 Lah 121 (122) : 154 Ind Cas 773, *Gian Chand* v. *Sher Mahomed.*
('30) 17 AIR 1930 Lah 985 (990) : 129 Ind Cas 281 : 12 Lah 239 (DB), *Davindar Singh* v. *Mt. Lachhmi Devi.*

[3] ('32) 19 AIR 1932 All 555 (557) : 137 Ind Cas 193 (DB), *Makkhan Lal* v. *Mt. Sardar Kunwar.*
('29) 16 AIR 1929 All 209 (209) : 115 Ind Cas 451, *Mihi Lal* v. *Soni Ram.*
('35) 22 AIR 1935 Lah 515 (516) : 155 Ind Cas 576 (DB), *Sher Mohammed* v. *Karam Chand.*
('04) 1 Bom L R 2 (4) (DB), *Chotiram Lal Chand* v. *Bhau.*

[4] ('19) 6 AIR 1919 All 227 (228) : 51 Ind Cas 283 (DB), *Kamla Devi* v. *Gurdayal.*

Section 19
Note 77

77. Pleading. — Under O. 7 R. 6 of the Civil Procedure Code where the plaint is *prima facie* barred by limitation, it must state the ground on which exemption from the bar is claimed. Accordingly, where on the face of the plaint a suit is barred by limitation, but an acknowledgment of liability is relied on to save the suit from the bar of limitation, the fact that such acknowledgment is relied on must be stated in the plaint.[1] But, this rule only applies where the suit is barred on the face of the plaint. The rule does not apply where the presumption of the bar of limitation does not arise on the face of *the plaint*.[2]

A plaint can, in the discretion of the Court, be allowed to be amended by the inclusion of an allegation of acknowledgment of liability.[3]

('29) 16 AIR 1929 All 209 (210) : 115 Ind Cas 451, *Mihi Lal* v. *Soni Ram*. (Acknowledgment of a mortgage by mortgagee—Acknowledgment itself clearly admitting that on the date on which it was made the mortgagor had a *subsisting* right—*Held* it was not necessary for mortgagor to prove by evidence *aliunde* that the acknowledgment was made within limitation.)

('20) 7 AIR 1920 All 92 (94) : 42 All 575 : 56 Ind Cas 986 (FB), *Anup Singh* v. *Fateh Chand*. (Acknowledgment by mortgagee that mortgage existed—It is *prima facie* evidence that at the time of the acknowledgment the mortgage had not become time barred.)

[*See* ('16) 3 AIR 1916 All 201 (205) : 38 All 540 : 36 Ind Cas 452 (DB), *Khiali Ram* v. *Taik Ram*. (In this case the burden of proof was on the plaintiff.)]

Note 77

[1] ('41) 28 AIR 1941 Pat 147 (151) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain* v. *Ram Lochan*.

('37) 24 AIR 1937 Mad 826 (828) : 176 Ind Cas 939, *Madappayya* v. *Mahabala Rao*.

('19) 6 AIR 1919 Mad 332 (333) : 52 Ind Cas 243, *Marudai Muthirian* v. *Chinnakannu Muthirian*.

('22) 9 AIR 1922 Lah 39 (40) : 3 Lah 233 : 69 Ind Cas 419 (DB), *Uttam Chand* v. *Mt. Thakar Devi*.

('28) 15 AIR 1928 Sind 17 (20) : 105 Ind Cas 765 : 22 Sind L R 222, *Punjab National Bank Ltd.* v. *Mulji Morarji Sundarji*.

('33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri* v. *Kalu*.

[*See also* ('34) 21 AIR 1934 Lah 753 (756) : 155 Ind Cas 819 (DB), *Secretary of State* v. *Akbar Shah*. (Suit *prima facie* barred by limitation—Plaintiff relying on acknowledgment at late stage in course of arguments—Question depending on facts—Plaintiff cannot be allowed to rely on plea.)

('86) 10 Bom 461 (467, 468) : 13 Ind App 66 : 4 Sar 719 : 10 Ind Jur 310 (PC), *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet*.]

[2] ('19) 6 AIR 1919 All 227 (228) : 51 Ind Cas 283 (DB), *Kamala Devi* v. *Gur Dayal*.

('19) 6 AIR 1919 Lah 20 (21) : 1 Lah 89 : 51 Ind Cas 956, *Khandu Lal* v. *Fasal*.

('20) 7 AIR 1920 Oudh 236 (237) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh* v. *Bir Ram*.

('22) 9 AIR 1922 Oudh 135 (137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar* v. *Beni Singh*.

[3] ('35) 22 AIR 1935 Mad 158 (159, 160) : 154 Ind Cas 707, *Muthammal* v. *Gurusami Nayakkan*. (As no new relief was prayed nor fresh cause of action added, the amendment was allowed.)

Where a plaint complies with the requirements of Order 7 Rule 6 by stating the ground on which exemption from the bar of limitation is claimed, it has been held that the plaintiff can rely, at the hearing, on a different ground of exemption.[4]

Where a plaint contains a definite allegation of acknowledgment of liability as saving limitation, the allegation will be deemed as admitted by the defendant if it is not specifically denied in the written statement. The mere plea that the suit is barred by limitation will not be sufficient to constitute a specific denial of the allegation in the plaint for this purpose.[5]

78. Acknowledgment, whether question of law or fact. — See the Authors' Commentary on the Civil Procedure Code, 3rd Edition, section 100, Note 29.

Effect of payment of interest as such or of part payment of principal.

20.* *(1)* Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or

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* **Act of 1877 : S. 20.**

Effect of payment of interest as such.

20. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

Effect of part-payment of principal.

or when a part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

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('34) 21 AIR 1934 Lah 753 (756) : 155 Ind Cas 819 (DB), *Secretary of State* v. *Akbarshah.* (Plea not allowed to be taken up at late stage, as it was unfair to the defendant.)

[4] ('22) 9 AIR 1922 Lah 230 (232) : 2 Lah 13 : 60 Ind Cas 772 (DB), *Parmeshari Das* v. *Fakiria.*
('22) 9 AIR 1922 Lah 39 (40) : 3 Lah 233 : 69 Ind Cas 419 (DB), *Uttam Chand* v. *Mt. Thakar Devi.* (In this case as no ground of exemption was stated in the plaint, acknowledgment as a ground of exemption could not be allowed to be set up in appeal.)
('37) 24 AIR 1937 Oudh 391 (392) : 13 Luck 334 : 168 Ind Cas 799 (DB), *Satgur Nath* v. *Brahma Dat.*
[But see ('14) 1 AIR 1914 Lah 337 (338) : 1914 Pun Re No. 83 : 26 Ind Cas 441 (DB), *Govinda Mal* v. *Santa.*
('24) 11 AIR 1924 Pat 806 (806) : 78 Ind Cas 919 (DB), *Chhater Dhari Mahto* v. *Nasib Singh.*]

[5] ('16) 3 AIR 1916 Pat 39 (41) : 38 Ind Cas 85 : 2 Pat L Jour 24 (DB), *Balukchand* v. *Nathunni Singh.* (But petition for leave to execute a decree is not a pleading and hence this rule does not apply to such petition.)

Section 20

legacy, or by his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Effect of receipt of produce of mortgaged land.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of subsection *(1)*.

Explanation. — Debt includes money payable under a decree or order of Court.

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a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Effect of receipt of produce of mortgaged land.

Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.

Act of 1871 : S. 21.

Effect of payment of interest as such.

21. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

Effect of part-payment of principal.

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

Act of 1859.

No corresponding provision.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Distinction between Section 19 and Section 20. See Note 5 to Section 19.
4. Section applies only to debts and legacies.
5. Distinction between paying interest and paying principal.
6. Intention of debtor to pay interest or principal, how ascertained.
    7. "Interest" includes part of interest due.
    8. Payment expressed to be made for principal and interest generally.
    9. Payment "without prejudice."
10. "Before the expiration of the prescribed period."
11. "Paid," meaning of.
    12. Money need not belong to the person paying.
13. Who must make the payment — General.
14. Person liable to pay the debt or legacy.

14a. Debtor—Meaning of. See Note 13.
    15. Principal and surety. See Note 12 to Section 21.
    16. Payment by one of several joint debtors. See Notes to Section 21.
    17. Payment by one of several Muhammadan coheirs. See Note 10 to Section 21.

18. "Agent duly authorised in this behalf."
    19. Payment by Court. See Note 18.
    20. Payment by husband or wife. See Note 18.
    21. Payment by pleader.
    22. Payment by receiver.
23. "Fresh period" — Computation of.
24. Proviso — "Appears in the handwriting of, or in a writing signed by."
    25. Payment and writing need not be simultaneous.
    26. Signature must have reference to the acknowledgment of payment.
27. Proviso — "Person making the payment."
28. Sub-section (2) — Mortgagee in possession.
29. Explanation.
    30. Decree debt — Payment — Certification.
31. Nature of liability affected by payment.
32. Question, what a sum of money was paid for, is one of fact.
33. Second appeal.
34. Unregistered endorsement of payments.
35. Burden of proof.
36. Article 75 and this section.
37. Distinction between Sections 19 and 20 and Article 183.

Other Topics (miscellaneous)

Addition of interest to principal—Whether payment. See Note 11.

Adjustment of accounts. See Note 11.

Authority to pay includes authority to endorse. See Note 18.

Court—Whether can be agent of party. See Note 18.

"Decree" includes preliminary decree for sale. See Note 29.

Formal or express authorisation not necessary. See Note 18.

Illiterate person touching pen. See Note 24.

Mark of illiterate person. See Note 24.

Only payment and not appropriation to be in writing. See Note 24.

Part payment and endorsement by judgment-debtor on decree. See Note 24.

Payment and not acknowledgment to be within time. See Note 25.

Payment by cheque—Whether payment. See Note 11.

Payment by labour. See Note 11.

Payment in kind. See Note 11.

Payment under compulsion of Court. See Note 11.

Period under S. 48, C. P. Code — Not "prescribed period." See Note 10.

Recovery by levying execution. See Note 11.

Section applies to all debts, secured or unsecured. See Note 4.

Writing in money-order coupon or signing of cheque whether sufficient. See Note 24.

1. Legislative changes.

(1) There was no section corresponding to this section in the Act of 1859, and a part payment of a debt or payment of interest did not operate to extend time.[1] By the rules promulgated under Circular Order 104 of 1860 (which were modifications of the Punjab Code) which were in force in certain provinces to which the Act of 1859 did not apply, it was, however, provided that a fresh period of limitation would be available where there was a "partial satisfaction of demand."[2]

(2) The rule that payments of interest and part payments of principal should, under specified circumstances, operate to start a fresh period of limitation, was borrowed from English law and first became a part of the limitation law of this country on the passing of Act IX of 1871, in S. 21 of which it was incorporated.[3] In that section, however,

- (a) the words "generally or specially authorized" were used instead of the words "duly authorized";
- (b) the proviso applied only to cases where the debt arose from a *contract in writing*[4] and the writing evidencing the fact of payment had to be *on the instrument* or *in the books* of the debtor or of the creditor.

(3) Section 20 of the Act of 1877, substituted the words "duly authorized" for the words "generally or specially authorized" and deleted the requirement in the proviso that the debt should arise from a contract in writing and that the writing should be in particular places.

Section 20 — Note 1

[1] ('71) 8 Bom H C R A C 6 (7) (DB), *Mulchand Gulabchand* v. *Girdhar Madhav*.
(1864) 2 Mad H C R 79 (80) (DB), *Md. Janula* v. *Venkatarayar*. (Though evidenced by writing.)
(1864) 2 Mad H C R 84 (85), *Raja Isvara Das* v. *Richardson*.
[*See* ('76) 1 Mad 228 (234) : 1 Ind Jur 231 : 1 Mad L R 351 (DB), *Valia Tambaratti* v. *Vira Rayan*. (Section 21 of Act of 1871 saves actions barred under old Act.)
('77) 1 Mad 264 (265, 266) : 1 Ind Jur 310 (DB), *Teagaraya Mudali* v. *Mariappa Pillai*. (Do.)]

[2] ('66) 5 Suth W R P C 18 (21) : 10 Moo Ind App 362 (P C), *Mukkun Lall* v. *Imtiaz-ood-Dowlah*. (But it must be a payment according to continuous and regular course of dealing.)

[3] ('94) 1894 Pun Re No. 124, p. 477, *Diwan Buya Singh* v. *Hukam Chand*.

[4] ('79) 3 Bom 198 (200) (DB), *Hanmantmal Motichand* v. *Rambabai*. (An entry of an account stated, made by a debtor in a creditor's books, is not a contract in writing within the meaning of S. 21.)
('73) 10 Bom H C R 375 (377) (DB), *Amritlal* v. *Maniklal*. (Do.)
('81) 1881 Pun Re No. 62, *Gobind Rai* v. *Chajju Mal*. (In this case there was no contract in writing. *Held also* that a debt barred under Act of 1871 is not revived by S. 20 of Act of 1877.)

A provision corresponding to sub-s. (2) of the present section was newly inserted.

(4) The Act of 1908 repeated the section as it was enacted in 1877 with the addition of an explanation.

(5) By the Limitation (Amendment) Act I of 1927, the proviso in its present form was substituted for the old proviso.

2. Scope of the section.—This section provides that a payment of interest as such, or a part payment of the principal, in respect of a debt shall give a fresh period of limitation to the creditor for enforcing the debt. In the undermentioned cases[1] it was held that the principle underlying this provision is that such payment implies an admission of a right and an acknowledgment of a corresponding liability. This view, based on English law, has since been overruled by the decision of the Privy Council in *Rama Shah* v. *Lal Chand*.[2] In that case, their Lordships of the Privy Council observed as follows :

> "Their Lordships cannot agree that the section is to be read as governed by any such principle as is suggested familiar though it be in the law of England. They can discover no sufficient reason for the assumption that the section is an expression of any single principle. In English law effect was first given to acknowledgments and payments by reason of general principles of exception applied by the Courts to the Statute of Limitation (1623) which did not contain express exceptions in these respects, and though the exceptions were in the end made statutory they retained much of their original character. In the Limitation Act, section 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise: and it is difficult to see why s. 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable."

Note 2

[1] **('35) 22 AIR 1935 All 946 (956) : 58 All 261 : 159 Ind Cas 387 (FB),** ***Udeypal Singh* v. *Lakshmi Chand.***

('35) 22 AIR 1935 Mad 871 (872) : 157 Ind Cas 259, ***Appasami Pillai* v. *Morangam Muthirian.***

('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), ***Chokkalingam Chetty* v. *Annamalai Chetty.***

('17) 4 AIR 1917 Oudh 124 (125, 126) : 42 Ind Cas 119, ***Didar Husain* v. *Gaya Prasad.***

('94) 1894 Pun Re No. 124, p. 477, ***Diwan Buta Singh* v. *Hukum Chand.***

[2] **('40) 27 AIR 1940 P C 63 (67) : I L R (1940) Lah 470 : I L R (1940) Kar (P C) 184 : 67 Ind App 160 : 187 Ind Cas 233 (P C).**

The section is also not based on any fiction of an implied *promise to pay*, and a payment of interest or part payment of the principal accompanied by a *refusal* to pay the balance may still give a fresh starting point of limitation for recovering the debt.[3]

3. **Distinction between Section 19 and Section 20.** — See Note 5 to Section 19.

4. **Section applies only to debts and legacies.** — The section is restricted to suits for *debts* and *legacies*.[1] Thus, it has no application to the following cases :

(1) Suit for redemption.[2]

(2) Suit for possession of property.[3]

(3) Suit for a share of mortgage money received by the defendant mortgagor on the allegation that the mortgaged property was undivided ancestral property in which plaintiff had a right.[4]

The section contemplates debts of *all* kinds whether secured or unsecured.[5] A claim to recover the mortgage amount under S. 68 of the Transfer of Property Act is a suit for the recovery of mortgage debt and is, therefore, for the recovery of a "debt".[6]

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[3] ('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahiman* v. *Upendra Nath.*

('21) 8 AIR 1921 Mad 704 (706) : 44 Mad 971 : 68 Ind Cas 100 (DB), *Govindasami Pillai* v. *Desai Goundan.*

Note 4

[1] ('39) 26 AIR 1939 Lah 212 (214), *Abdullah* v. *Ishaq Mohammad.* (Also applies to case of mortgage with possession.)

[2] ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din* v. *Sri Kishen.*

('24) 11 AIR 1924 Lah 484 (485) : 78 Ind Cas 617, *Firoze Khan* v. *Kanhaiya Ram.*

('28) 110 Ind Cas 560 (560) (DB) (All), *Markunday* v. *Mahabir Pandey.*

('03) 26 All 167 (170) : 1903 All W N 223 (DB), *Anwar Hussain* v. *Lalmir Khan.*

('96) 18 All 295 (297) : 1896 All W N 68, *Kallu* v. *Halki.* (See critical note on this case in 6 Mad L Jour 458 (Jour).)

('17) 4 AIR 1917 Oudh 124 (125, 126) : 42 Ind Cas 119, *Didar Hussain* v. *Gaya Prasad.*

[*See* ('93) 1893 Bom P J 318 (DB), *Ganu* v. *Krishnaji.* (Only acknowledgment can extend the period.)

('22) 9 AIR 1922 Bom 356 (357) : 46 Bom 1000 : 70 Ind Cas 906 (DB), *Bhagwan Ganpat* v. *Madhav Shankar.*

('93) 1893 Bom P J 346 (DB), *Chinto Vinayak* v. *Balkrishna Narhar.*]

[3] ('10) 7 Ind Cas 567 (567) : 13 Oudh Cas 179, *Kanhaya Bakhsh Pande* v. *Sheonandan Singh.*

('09) 4 Ind Cas 921 (921) : 1908 Pun Re No. 91, *Bishen Lal* v. *Kaushali.* (Suit by mortgagee for possession.)

[4] ('13) 22 Ind Cas 959 (959) : (1913) 1 Upp Bur Rul 178, *Nga Ya Baw* v. *Nga Bya.* (Such suit is not maintainable.)

[5] ('41) 28 AIR 1941 Mad 6 (14) (DB), *Thinnappa Chettiar* v. *Krishna Rao.*

('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahaman* v. *Upendra Nath.* (It is not necessary to import the doctrine of implied promise.)

[6] ('22) 9 AIR 1922 Oudh 102 (104) : 65 Ind Cas 408, *Mahadeo Tewari* v. *Silla Baksh Singh.*

In *Pangudaya* v. *Uthandiya*,[7] the Madras High Court expressed the opinion that the joint liability of the members of an undivided Hindu family for a family debt is not a "debt" within the meaning of this section. It is submitted that this view is obviously wrong as it leads to the result that limitation cannot be extended by means of a part payment or payment of interest in respect of a joint family debt.

5. Distinction between paying interest and paying principal. — The section makes a distinction between a payment of interest and a payment of principal. In order that a payment of interest may give a fresh period of limitation, the payment must be a payment for interest *as such*.[1] A payment for principal need not be a payment *as such*,[2] but it is necessary that it should be a payment of *part* only of the principal.

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7. ('38) 25 AIR 1938 Mad 774 (778) : I L R (1938) Mad 968 : 178 Ind Cas 243 (DB). (The question in this case was whether after partition in a joint family, the senior member can extend limitation for a pre-partition debt by means of a part payment—It was contended that though in such a case the senior member may not be the manager for the time being under S. 21 (3) (b), yet, the members of the family are co-debtors and as under S. 20, a payment by one co-debtor will save limitation against all, (see S. 21 Note 6) the payment by the senior member would extend limitation against all the members of the family apart from S. 21 (3) (b)—In negativing this contention, their Lordships expressed the opinion that the debt due by a Hindu joint family is not a debt within the meaning of this section and that the members of the family are not co-debtors in respect of the debt—It is submitted that though the decision is correct the reason is not — The true reason for holding that the principle that payment by one co-debtor extends limitation against all does not apply to the members of a joint Hindu family with regard to a joint family debt is that S. 21 (3) (b) is a *special* provision which prevails over the general provisions of this section.)

Note 5

1. ('40) 27 AIR 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.*

('37) 24 AIR 1937 Pat 410 (413) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Bagha Co-operative Society* v. *Debi Mangal Prasad.*

('34) 21 AIR 1934 Mad 656 (656) : 153 Ind Cas 462 (DB), *Failesatha Banu* v. *Md. Rashidhuddin.*

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin* v. *U Tun Si.* (A I R 1929 Rang 339 referred to.)

('15) 2 AIR 1915 Cal 459 (460) : 20 Ind Cas 857 (DB), *Bitariram* v. *Kunji Singh.* (There must be express or implied intention by debtor.)

('34) 21 AIR 1934 Pat 244 (245) : 146 Ind Cas 1033, *Rajmani Bibi* v. *Baldeo Das.* [*See* ('10) 6 Ind Cas 16 (17) (DB) (Cal), *Rai Mohan Shaha* v. *Lakshu Karikar.*]

2. ('40) 27 AIR 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

('37) 24 AIR 1937 Pat 410 (413) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Bagha Co-operative Society* v. *Debi Mangal Prasad.*

('30) 17 AIR 1930 All 392 (394, 395) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co.* v. *Sircar & Co.* (AIR 1921 All 335 relied on.)

Section 20
Note 5

The words "as such" used in relation to the payment of interest have reference to the *intention of the debtor* in paying it. An amount may be paid by the debtor to the creditor without any specification by the former whether it is to be appropriated for the interest or for the principal of the debt. In such cases the creditor will, under Ss. 59 and 60 of the Contract Act, be entitled to appropriate the money either for the interest due or for principal, at his option.[3] Where he appropriates the amount for interest, it may be regarded *in law* as a payment of interest. But it cannot be said that the debtor *intended* to pay it for interest and consequently it cannot be said that the interest was paid "as such."[4] The section, therefore, would not apply to cases where a debtor makes a payment without any specification and the creditor appropriates it, as he is entitled to do under the law, towards interest.[5]

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[3] ('40) 27 AIR 1940 P C 63 (68) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.* (There is no obligation upon creditor to make appropriation at once.)

('81) 1881 All W N 119 (120) (DB), *Nirpat* v. *Shadi.*

[4] ('40) 27 AIR 1940 P C 63 (67) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

[5] ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand* v. *Surajpal Singh.*

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

('39) 26 AIR 1939 Oudh 141 (142) : 14 Luck 588 : 180 Ind Cas 15 (DB), *Zamen Khan* v. *Ram Asre.* (Words "paid as such" in the section are not superfluous.)

('37) 24 AIR 1937 Pat 583 (584) : 167 Ind Cas 244, *Idan Sadagar* v. *Firm Premsukdas Ramchandra.*

('25) 12 AIR 1925 Cal 1030 (1030) : 87 Ind Cas 746 (DB), *Muhammad Kamel* v. *Ahmad Ali.*

('29) 16 AIR 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnasamy* v. *Periathambi.* (Mere appropriation by creditor is not indication that payment was made towards interest.)

('26) 13 AIR 1926 Mad 902 (902) : 97 Ind Cas 384, *Musal Naidu* v. *Viraswamy Reddi.* (Words of this section are mandatory.)

('27) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna* v. *Chendrammao.* (Intention of debtor to pay towards interest must be proved — Appropriation by creditor not sufficient.)

('28) 15 AIR 1928 Mad 509 (512) : 51 Mad 549 : 111 Ind Cas 210 (DB), *Ammaluamma* v. *Narayanan Nair.*

('27) 14 AIR 1927 Mad 284 (285) : 99 Ind Cas 694 (DB), *Perraju* v. *Bapireddi.* (In this case however there was a covenant that any payment made should first be appropriated towards interest due—Hence this section was applied.)

('35) 22 AIR 1935 All 946 (964) : 159 Ind Cas 387 : 58 All 261 (FB), *Udeypal Singh* v. *Lakshmi Chand.*

('29) 16 AIR 1929 Oudh 479 (480) : 120 Ind Cas 825 : 5 Luck 510 (DB), *Narain Das* v. *Chandrawati Kuer.* (Payment on general account — Not payment for interest—Ordinary law of appropriation does not apply.)

('79) 3 Bom 198 (200) (DB), *Hanmantmal Motichand* v. *Ramba Bai.* (There was no intimation by the defendant that any payment made by him was to be appropriated towards interest.)

('03) 5 Bom L R 350 (352, 353), *Damodar* v. *Jankibai.* (Payment towards the debt without specifying the mode of appropriation—4 Bom L R 231 dissented from.)

The High Court of Patna has, however, held in the cases noted below[6] that a payment by the debtor without any specification and appropriated by the creditor towards interest would amount to a payment of interest as such. The ground on which this view proceeds is that the words "as such" are redundant since the amendment of this section by the amending Act of 1927, in respect of payments made after 1st January 1928 and that these words are material only when the Court has to consider a payment made before that date. But this view has been rejected by the Privy Council in *Rama Shah* v. *Lal Chand*[7] where it was held that in the absence of an intention on the part of the debtor a payment does not amount to a payment of interest as such by reason of the rule that it is the right of the creditor to have payments treated in account as liquidating the interest before the

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('15) 2 AIR 1915 Lah 275 (276) : 31 Ind Cas 782, *Muinuddin* v. *Muhammad Ahmad.* (Payment made in reduction of a general balance of account but without intimating that it is to be appropriated towards interest is not payment towards interest and does not save limitation.)

('27) 14 AIR 1927 Sind 268 (268) : 101 Ind Cas 796 (DB), *Khimanmal* v. *Asa Mal.* (General payment towards debt.)

('29) 16 AIR 1929 Rang 339 (340) : 7 Rang 522 : 120 Ind Cas 897, *U Ba Gyi* v. *U Than Kyauk.* (Appropriation of payments by creditor in particular manner —Act of judgment-debtor necessary to save limitation.)

('30) 17 AIR 1930 Oudh 287 (288) : 6 Luck 7 : 128 Ind Cas 276 (DB), *Lalji* v. *Ghashi Ram.* (Payment towards general account—No appropriation by debtor — Payment not towards interest as such.)

('02) 15 C P L R 29 (33), *Gopalrao* v. *Chindhu.*

('92-96) 2 Upp Bur Rul 466 (468, 469), *Maung Hlaing* v. *Maung Et Gyi.*

('07) 1 Sind L R 252 (254) (DB), *Jethanand Topandas* v. *Lalamal Sitalmal.* (A general payment is not sufficient.)

('10) 7 Ind Cas 7 (8) (DB) (Cal), *Maheswar Panda* v. *Baidya Nath Jana.*

('09) 2 Ind Cas 379 (379, 380) : 31 All 495, *Muhammad Abdullah Khan* v. *Bank Instalment Co.*

('37) 24 AIR 1937 Lah 820 (822) : 172 Ind Cas 455 (DB), *Lal Chand* v. *Raman Shah.* (Conceded.)

[*See* ('94) 1894 Pun Re No. 124, p. 477, *Diwan Buta Singh* v. *Hukam Chand.*
('70) 1870 Pun Re No. 75, *Gyan Chand* v. *Kurm Bhaggun.*]

[But see ('19) 6 AIR 1919 Mad 100 (100) : 51 Ind Cas 240, *Sankaram Aiyar* v. *Thiraviya Nadan.* (Following 14 Ind Cas 580 and 8 Ind Cas 81.)

('36) 23 AIR 1936 Mad 616 (617) : 163 Ind Cas 803, *Chandukutti Nambiyar* v. *Kunhi Kalandan.* (Payment without indicating whether it is towards interest or principal—Such payment can be taken as payment of interest as such—*Obiter.*)]

6. ('39) 26 AIR 1939 Pat 389 (389 to 391) : 18 Pat 253 : 183 Ind Cas 330 (DB), *Santa Prasad* v. *Harkishore Prasad.*

('38) 25 AIR 1938 Pat 183 (184, 185) : 16 Pat 294 : 174 Ind Cas 1005 (DB), *Bankanidhi* v. *Godipatna Co-operative Society.*

[*See also* ('37) 24 AIR 1937 Pat 410 (411, 412) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Bagha Co-operative Society* v. *Debi Mangal Prasad.* (Debtor has the first option to state whether the deposit is to be appropriated towards payment of interest or principal and if he does not exercise the option and creditor appropriates it towards interest the debtor must be presumed to have consented to such appropriation and the payment is one on account of interest and can be held to have been paid as such within the meaning of Section 20.)]

7. ('40) 27 AIR 1940 P C 63 (66, 67) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC).

principal. As regards the effect of the amending Act of 1927 their Lordships in the same case observed :

> "The words 'as such' had long been given a settled meaning importing the intention of the debtor that his payment should go towards interest as distinct from principal. Though the amendment raised in a pointed manner the question whether the words 'as such' should be retained, it is clear that the Legislature decided to retain them; and it is not reasonable as a matter of construction of a statute to suggest that they can be ignored: or that their meaning has changed; or that they can be given their meaning but only as regards payments made before 1st January 1928."

In view of the Privy Council decision the above Patna cases are no longer good law. The payment of interest must thus be viewed from the standpoint of the debtor and the determining factor is the intention of the debtor in making the payment and not that of the creditor in appropriating it.[8] A made a payment to B of a sum of money without any specification. B appropriated it, as he was entitled to do, for interest. It was held by the Full Bench, in *Udeypal Singh* v. *Lakshmi Chand*,[9] that the payment was not for interest as such inasmuch as A never intended to pay it as interest, though under the law it could be treated by B as a payment for interest. It was also held that it could not be treated as a payment for principal inasmuch as the sum was actually appropriated by B for interest and, therefore, could not be regarded as a payment for principal. The reason is that where once a creditor appropriates a payment by the debtor either to the principal or to the interest and communicates it to the debtor, he has no right to appropriate it otherwise.[10] See also the undermentioned cases to the same effect.[11]

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[8] ('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram* v. *Sitaram Lalman.*

('27) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna* v. *Chendramma.* (2 Ind Cas 379 followed.)

('15) 2 AIR 1915 Upp Bur 11 (11) : 2 Upp Bur Rul 80 : 31 Ind Cas 101, *Nga Twe* v. *Nga Ba.* (Do.)

('29) 16 AIR 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnasamy Kavirayar* v. *Periathambi Butler.* (The debtor must have paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention; mere appropriation by the creditor is not such an indication.)

('37) 24 AIR 1937 Nag 165 (167, 168) : 169 Ind Cas 513 : ILR (1937) Nag 360, *Lakhanlal Ramsaran* v. *Sitaram Gulabchand.* (Intention of debtor and not particular formula of words is material.)

('13) 20 Ind Cas 857 (858) (DB) (Cal), *Bitari Ram* v. *Kunji Singh.* (There must be some express or implied declaration by debtor.)

[9] ('35) 22 AIR 1935 All 946 (954, 957, 958, 964) : 159 Ind Cas 387 : 58 All 261 (FB). (AIR 1933 All 453 and A I R 1935 All 47, relied on.)

[10] ('40) 27 AIR 1940 P C 63 (68) : ILR (1940) Lah 470 : ILR 1940 Kar (PC) 134 : 67 Ind App 160 : 187 Ind Cas 233 (P C), *Rama Shah* v. *Lal Chand.*

[11] ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.* (If the appropriation is once made by the creditor towards interest, he cannot transfer it subsequently towards principal.)

A payment for principal, in order to save limitation, need not, as has been seen already, be a payment *as such* but it must be of a *part* of the principal. Does this mean that in making the payment the debtor must have *intended* to pay it as a *part* or is it sufficient that irrespective of the intention of the debtor, the amount paid happens to be a part of the amount due to the creditor and the creditor appropriates it for principal? There was a conflict of decisions on the point and several views were expressed.

The *first* view was that it was necessary that the debtor should have *intended* to pay the amount as *part* payment of the principal amount due.[12] Thus, where a payment for principal which happened to be only a part of the amount due was made by the debtor accompanied by a statement that the payment was in *full discharge* of the debt, it was held that the payment would not save limitation under this section as there was no implied admission of any debt outstanding.[13] Similarly, where a payment was made by the debtor to the creditor to whom he owed several debts and the creditor appropriated it to a part of the principal of one of them, it was held that it could not be considered to be a payment for *that* debt, as the intention of the debtor in making the payment is the guiding test even in regard to the part payment of the principal.[14] Thus, according to this view a payment under this section whether for interest or for part of principal must be a *conscious* act on the part of the debtor,[15] i. e., it must be an appropriation by the *debtor*.

The *second* view was that, independent of the intention of the debtor, where the creditor appropriated a payment without specification towards the principal by virtue of his right under Ss. 59 and 60 of the Contract Act, such appropriation would make the payment a part payment within the meaning of this section so as to extend the time in favour of the creditor.[16] Thus, where a payment was made

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('38) 25 AIR 1938 Bom 467 (468) : 178 Ind Cas 844 (DB), *Havabu Bai* v. *Isuf Musa Patil.* (Payment made by debtor without specifying whether it is towards interest or principal — Creditor appropriating it towards interest — There is neither payment of interest as such nor part payment of principal.)

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin* v. *U Tun Si.*

[12] ('94) 1894 Pun Re No. 124, p. 477, *Diwan Buta Singh* v. *Hukam Chand.* (Appropriation must be by the debtor—If it is made by the creditor no admission of liability on the part of the debtor can be implied.)

[13] ('35) 22 AIR 1935 Mad 371 (372) : 157 Ind Cas 259, *Appasamy Pillai* v. *Morangam Muthirian.*

[14] ('29) 16 AIR 1929 Lah 288(289) : 10 Lah 750:119 Ind Cas 549 (DB), *Pannalal* v. *Ram Singh.* (Payment is viewed from standpoint of debtor.)

[15] ('18) 5 AIR 1918 Mad 1332 (1334) : 37 Ind Cas 756 (DB), *Athan* v. *Sutarjanam.* (Per Ayling, J.)

[16] ('40) 27 AIR 1940 All 338 (339) : 189 Ind Cas 686, *Girdhari Lal* v. *Kishore Lal.* (Payment not towards interest as such — It does not follow that it was towards principal.)

('40) 27 AIR 1940 Lah 106 (107) : 189 Ind Cas 264 (DB), *Bur Singh* v. *Sikri Brothers.*

without specification and there were several debts due, the creditor was held entitled in law to appropriate it for the principal of all the debts so as to save limitation for all.[17] Similarly, where the debtor sent to his bank a cheque for Rs. 600 to be placed to the credit of his loan account, and the bank thereafter charged interest on the principal sum less Rs. 600, it was held that the payment of Rs. 600 operated as a part payment of the principal debt.[18]

The *third* view was that, no appropriation, either by the debtor or by the creditor, was necessary. Thus, where money was paid by the debtor without any specification and there was no other indication as to the intention with which the amount was paid, and the creditor did not also make any appropriation for principal or interest, it was held that the payment must be regarded as a part payment of principal which would save time.[19] On similar facts it was held in the undermentioned cases[20] that, since there was a writing, it made no difference if the

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('35) 22 AIR 1935 All 946 (957) : 159 Ind Cas 387 : 58 All 261 (F B), *Udeypal Singh* v. *Lakshmi Chand.* (The words "as such" do not occur in second paragraph of the section.)

('37) 24 AIR 1937 Lah 820 (822) : 172 Ind Cas 455, *Lal Chand* v. *Raman Shah.* (Conceded.)

[17] ('25) 12 AIR 1925 Cal 937 (939) : 87 Ind Cas 508, *Maurice Mayahas* v. *W. Morley.*

[18] ('96) 23 Cal 592 (598), *In re Ambrose Summers.*

[19] ('38) 25 AIR 1938 Rang 280 (280) : 1938 Rang L R 591 : 176 Ind Cas 865 (DB), *Khan Sahib* v. *Uchil Ahmed Lebbay.*

('38) 25 AIR 1938 Lah 347 (348) : 181 Ind Cas 82, *Jawahar* v. *Ghulam Hassan.*

('30) 17 AIR 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co.* v. *Sircar & Co.* (This view is opposed to the Privy Council decision in A I R 1922 P C 233 where it was held that the amount must be appropriated for interest and not for principal.)

('18) 5 AIR 1918 Cal 891 (891, 892) : 44 Cal 567 : 35 Ind Cas 638 (DB), *Hemchandra Biswas* v. *Purnachandra Mukerjee.*

[*See* ('40) 27 AIR 1940 Oudh 179 (180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal* v. *Bhagawati.* (Payments whether made in respect of interest not known—Court can find out on evidence for what purpose payments were made.)]

[*See also* ('12) 14 Ind Cas 580 (582) (DB) (Mad), *Sowmia Narayana* v. *Alagiri Swami.* (It might be taken either towards interest or towards principal.)

('10) 8 Ind Cas 81 (86) (DB) (Cal), *Hingu Miya* v. *Heramba Chandra.* (Where there is more than one debt and a payment has been made without specification, such payment can save all the debts from limitation, where the attendant circumstances are such that the amount paid by way of interet is sufficient to pay up in full all the interest due, except one, and when the balance of the amount paid as interest partially discharges the last interest due.)

('81) 3 Mad 61 (63) : 4 Ind Jur 557 (DB), *Sri Raja Satracherla Jogi Razu* v. *Sri Raja Setarama Razu.* (Payment not made either on account of principal or of interest *expressly*—Creditor not appropriating it to either—It must be taken as a payment on account of both.)]

[20] ('39) 26 AIR 1939 Nag 156 (158) : ILR (1939) Nag 235 : 182 Ind Cas 573 (DB), *Narain Chouthmal* v. *Rama Jago.* (Once payment is shown to be towards debt it is not necessary to show whether it is towards principal or interest.)

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payment was for interest or for principal or for both.

This conflict has now been set at rest by their Lordships of the Privy Council in *Rama Shah* v. *Lal Chand*[21] upholding the second view. Their Lordships in that case observed as follows :

> "On the other hand, it remains true that the section when dealing with part payment of principal contains no similar stipulation as to the debtor's intention. The words "as such" are not repeated and the contrast between the two classes of payments is too marked to be mistaken or overlooked. Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or e.g., by the fact that the amount of the payment exceeded the interest then due. But the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. . . . . In numerous cases it has been held that a payment made without appropriation by the debtor will if it be appropriated by the creditor towards the principal debt be sufficient to give rise to a fresh period of limitation. Their Lordships cannot accept the contention of learned counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands. . . . . . . "

As regards the first view stated above, their Lordships pointed out that it is not necessary that the payment should be made of part as such inasmuch as the section does not prescribe that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section.

Their Lordships also rejected the third view, namely, that a payment on general account, i.e., an "open payment" is either a payment of interest as such or a part payment of principal. In this connexion they pointed out four possibilities as to the debtor's intention —

(1) intention that the sum paid should go against interest,
(2) that it should go against principal,
(3) that it should go against both interest and principal,
(4) no intention of appropriation as between interest and principal.

('35) 22 AIR 1935 Mad 101 (104) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu* v. *Gunnamma.* (A I R 1918 Cal 891 and 14 Ind Cas 580 followed.)

('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), *Chokkalingam* v. *Annamalai.* (14 Ind Cas 580 relied on.)

[21] ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC). (To evidence a definite appropriation to the principal debt made by the creditor within the prescribed period, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient.)

See also the undermentioned cases[22] which follow the Privy Council decision referred to above.

If the debtor at the time of payment specifies that the payment is towards the principal, there is clearly a part payment of the principal and limitation will be saved under this section.[23] Where neither the debtor specifies that the payment is towards the principal, nor the creditor appropriates it, within limitation, towards the principal, the payment cannot save limitation.[24]

Where no interest is payable under a document and the payment by the debtor does not refer to any interest, the payment cannot be regarded as one made for interest but must be regarded as part payment of the principal.[25]

6. Intention of debtor to pay interest or principal, how ascertained. — Where the debtor *expressly* states at the time of the payment that it is for interest, or that it is for part of the principal and interest, there is, of course, no difficulty in finding that he paid interest as such within the meaning of this section.[1] But it is not necessary that the debtor should expressly make any such statement at the time of payment.[2] In *National Bank of Upper India* v. *Bansidhar*,[3] a case decided by the Privy Council, A had to make payments for interest on 31st December 1917 in respect of several accounts with a Bank X. It was the practice of the Bank to send out notices of the interest that would be due on particular accounts at the end of each half year, and there was nothing to rebut the presumption that A also had received such notice. A paid a lump sum of Rs. 6000 to X on the 23rd December 1917 and X allocated different portions thereof to the interest due on the different accounts and communicated the allocations to A who ratified them by entering the same in his own account books. It was held by their Lordships that, under the circumstances the amount of Rs. 6000 was paid by A as and for interest which was due, and that such payment saved limitation under the section. The principle that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may appear from the circumstances of the case, has again been affirmed by the Privy Council in *Rama Shah* v. *Lal Chand*.[3a] It was also pointed out in that case that the change in the proviso (under the amending Act of 1927) from "the fact of the payment appears" to "an acknowledgment of the payment appears" does not mean that the character of the payment as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment. The undermentioned decisions,[3b] in so far as they hold that, in order to constitute

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[22] ('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram* v. *Sitaram Lalman.* (The execution of a sarkhat by the debtor in the creditor's books of account, maintained on katauti system, on the credit side amounts to a part payment of principal within the meaning of S. 20.)
('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

[23] ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

[24] ('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.* (The appropriation by the creditor need not be immediate but it must be within limitation—But it need not be communicated to the debtor within limitation—Manner in which the payment has been dealt with in creditor's own books will be sufficient to show appropriation towards principal.)
(40) 27 AIR 1940 All 338 (339) : 189 Ind Cas 686, *Girdhari Lal* v. *Kishore Lal.*

[25] ('40) 27 AIR 1940 Lah 442 (446) : 191 Ind Cas 817, *Kesar Singh* v. *Wazir.*
('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*
('35) 22 AIR 1935 All 605 (606) : 156 Ind Cas 748 (FB), *Nageshar Misir* v. *Mt. Batuka Kunwari.*
('29) 16 AIR 1929 Cal 432 (432) : 122 Ind Cas 294, *Kali Kumar Poddar* v. *Pranballav Banikya.* (But the payment must be in the handwriting of or signed by the person making it.)
('18) 5 AIR 1918 Cal 982 (983) : 35 Ind Cas 177 (DB), *Harendra Chandra* v. *Gagan Chandra.* (Do.)

Note 6

[1] ('35) 22 AIR 1935 Rang 473 (475) : 160 Ind Cas 314, *U Sin* v. *U Tun Si.*
('02) 4 Bom L R 231 (232), *Subraya* v. *Pakaya.* (In a case arising under Act of 1877, the payments were evidenced by endorsements signed (but not written) by the defendant. The endorsement ran thus : "I paid Rs. 4 out of the entire amount payable on account of principal and interest in respect of this bond." It was held that there had been a payment of interest as such by the person liable.)
[*See also* ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.* (Debtor specifying at time of payment that it is towards principal —Limitation is saved.)]

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2. ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram*.

('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa*. (There must either be express intimation or proof of existence of circumstances showing that payment was on account of interest.)

('38) 25 AIR 1938 Rang 401 (402) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung* v. *L Ah Choy*. (Per Mackney, J. in his Order of Reference—The trend of the order suggests that according to his Lordship a payment without any specification as to its application would be one either towards interest as such or towards principal.)

('27) 14 AIR 1927 Mad 284 (286) : 99 Ind Cas 694 (DB), *Perraju* v. *Bapireddi*. (Per Venkatsubba Rao, J.)

('37) 24 AIR 1937 Pat 583 (584) : 167 Ind Cas 244, *Idan Sadagar* v. *Premsukdas Ramchandra*. (It is not necessary to state each time explicitly that payment is towards interest—It is sufficient if circumstances warrant it.)

('18) 5 AIR 1918 Cal 477 (479) : 43 Ind Cas 812 (DB), *Charu Chandra* v. *Karam Bux Sikhdar*. (Do.)

[*See also* ('24) 11 AIR 1924 Lah 611 (613) : 5 Lah 317 : 82 Ind Cas 96 (DB), *Thakur Das* v. *Mt. Putli*.]

3. ('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (PC).

3a. ('40) 27 AIR 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 184 : 67 Ind App 160 : 187 Ind Cas 233 (PC). (31 All 285 and A I R 1918 Cal 477 approved.)

3b. ('40) 27 AIR 1940 Oudh 179 (179, 180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal* v. *Bhagwati*. (No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on a payment, a payment for interest as such, it is necessary that the debtor must *expressly* specify at the time of payment that it was for interest, are, in view of the Privy Council decisions referred to above, not good law.

The question whether a payment was intended to be for interest, and therefore a payment of interest as such, is thus a question of fact which may be determined from the facts and circumstances of the particular case[4] and not only by statements made by the debtor at the time of payment.[4a] Evidence *aliunde* may be let in to show what the intention of the debtor was when he made the payment. The facts that interest was due and owing and that the amount paid was less than the interest, may be a circumstance showing that the debtor must

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account of interest but it is not necessary that the payment of interest "as such" must be mentioned in the endorsements themselves.)

('39) 26 AIR 1939 Oudh 141 (142) : 14 Luck 588 : 180 Ind Cas 15 (DB), *Zaman Khan* v. *Ram Asre.*

('35) 22 AIR 1935 All 58 (59) : 154 Ind Cas 1070 (DB), *Rambohor Misir* v. *Chaturghun Rai.*

('30) 17 AIR 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co.* v. *Sircar & Co.* (Interest when paid without writing must be *avowedly* paid as such.)

('26) 13 AIR 1926 Bom 423 (424) : 96 Ind Cas 311 (DB), *Hormasji Bezonji* v. *Hajrat Yarkhan.* (The words "as such" mean that there must be at the time of payment some mention that the payment is wholly or partly for interest.)

('25) 12 AIR 1925 Cal 1030 (1030) : 87 Ind Cas 746 (DB), *Mahomed Kamel* v. *Ahmad Ali.*

[4] ('40) 27 AIR 1940 Oudh 179 (180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal* v. *Bhagwati.*

('26) 13 AIR 1926 All 329 (330) : 93 Ind Cas 295 (DB), *Bandhu Singh* v. *Kayastha Trading and Banking Corporation, Gorakhpur.*

('26) 13 AIR 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari* v. *Doman Sundari.* (Court can find on evidence whether payment made was for principal or interest.)

('34) 21 AIR 1934 Mad 45 (46) : 148 Ind Cas 126, *Janaki Ammal* v. *Srinivasan.*

('27) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna* v. *Mudragada Chendramma.* (A I R 1918 Cal 891 followed.)

('21) 8 AIR 1921 Mad 102 (103) : 44 Mad 544 : 62 Ind Cas 393 (DB), *Askaram Sowcar* v. *Venkataswami Naidu.* (It cannot be raised in second appeal.)

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709, *Jago* v. *Mahadeo.*

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali* v. *Gopinath.*

('19) 6 AIR 1919 Cal 1028 (1028) : 46 Ind Cas 532 (DB), *Siva Kumar Debi* v. *Biswambar Roy.*

('18) 5 AIR 1918 Cal 477 (479) : 43 Ind Cas 812 (DB), *Charu Chandra* v. *Karam Buxa Sikdar.*

('15) 2 AIR 1915 Cal 459 (460) : 20 Ind Cas 857 (DB), *Bitari Ram* v. *Kunji Singh.*

('09) 1 Ind Cas 137 (139) : 31 All 285 (DB), *Gopi Nath Singh* v. *Hardeo Singh.*

[*See* ('95) 19 Bom 663 (668) (DB), *Venkaji Babaji Naik* v. *Shidramapa Balapa.*]

[4a] ('40) 27 AIR 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

have intended to pay the amount for interest.[5] But there must be something to indicate that the debtor had such intention. The mere fact that the creditor appropriated the amount for interest is not sufficient to show the intention.[6] Either some acknowledgment must be given by the payer that the money paid is intended by him to be towards a payment of interest or part principal, or there must be sufficient evidence from which it can be inferred that the debtor *intended* that the amount should be appropriated in a particular manner.[7] The mere fact that the money paid is less than the interest due, though relevant, is not sufficient by itself alone to make it a payment of interest *as such*.[8] The contrary view[9] is not correct. Where the method of appropriation is determined at the outset by *express contract*, the law does not require a specific appropriation on the occasion of each payment.[10] Thus, where a mortgage document provides

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5. ('35) 22 AIR 1935 Rang 473 (476): 160 Ind Cas 314, *U Sin* v. *U Tun Si*. (Fact that the payment made was less than the interest due is a relevant fact — The fact that the creditor appropriated it towards interest is not relevant.)

[*See* ('26) 13 AIR 1926 All 329 (330) : 93 Ind Cas 295 (DB), *Bandhu Singh* v. *Kayastha Trading and Banking Corporation, Gorakhpur*.]

6. ('09) 2 Ind Cas 379 (379, 380) : 31 All 495 (DB), *Mahammad Abdullah Khan* v. *Bank Instalment Co. Ltd.*

('15) 2 AIR 1915 Upp Bur 11 (11) : 2 Upp Bur Rul 80 : 31 Ind Cas 101, *Nga Twe* v. *Nga Ba*.

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709, *Jago* v. *Mahadeo*. (Mere fact that interest was due at the time of payment is not such an indication.)

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin* v. *U Tun Si*. (Evidence of intention necessary.)

('13) 19 Ind Cas 849 (849) : 9 Nag L R 78, *Gopal* v. *Govind*. (In this case there was express contract determining method of appropriation.)

('13) 19 Ind Cas 825 (826) (Oudh), *Chunder Pal Kunwar* v. *Dunia Pershad*.

7. ('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa*.

('38) 25 AIR 1938 Bom 467 (469) : 178 Ind Cas 844 (DB), *Havabu Bai* v. *Isup Musa Patil*. (Payment made by debtor to creditor appropriated by latter towards interest and consented to by debtor—It is payment on account of interest as such.)

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin* v. *U Tun Si*.

('37) 24 AIR 1937 Pat 410 (412, 413) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Liquidator Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha*. (Payment made by debtor to creditor appropriated by the latter towards interest and consented to by debtor—It is payment on account of interest as such.)

[*See* ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand* v. *Surajpal Singh*. (It must be shown that payment was made towards principal or appropriated by creditor towards principal.)]

8. ('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin* v. *U Tun Si*.

[*See also* ('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (709), *Jago* v. *Mahadeo*. (Mere fact that interest was due is not sufficient.)]

9. ('38) 25 AIR 1938 Rang 401 (402) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung* v. *L Ah Choy*. (Per Mackney, J. in the Order of Reference.)

('34) 21 AIR 1934 Mad 45 (46) : 148 Ind Cas 126, *Janaki Ammal* v. *Srinivasan*.

10. ('13) 19 Ind Cas 849 (849, 850) : 9 Nag L R 78, *Gopal* v. *Govind*.

('14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 138, *Maung Kyan* v. *Maung Po*. (Suit by the plaintiff for a debt for the interest of which, he was put in possession of that any money paid by the mortgagor should first be credited for the interest due and the balance for the principal, and a payment is made without specification, at a time when interest is actually due, it may be inferred that the parties must, when making and receiving the payment, have intended that the payment was to be treated as interest, and that therefore the interest was paid as such.[11] Where, however, such contract is required to be registered and is not registered, it cannot be admitted in evidence, and the mere payment of the amount would be insufficient to prove a payment of interest.[12] In the undermentioned case,[13] the decretal amount was made payable by instalments under terms of a compromise. The first instalment of Rs. 13,000 was to be paid on 27th January 1929 with one year's interest ending on that date. The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid on 15th February 1929. It was held that the payment was necessarily made in respect of principal and interest and was, therefore, a payment of interest as such.

Where no interest is payable at all under a document, a payment by the debtor without specification cannot be regarded as one for interest,[14] though, if there is an agreement between the parties subsequent to such document for payment of interest, and the payment is made for interest, such payment would extend time.[15]

Where the sum paid in discharge of the debt is more than the principal amount, the excess over the principal must be held to have been paid by the debtor for interest as such.[16]

Conversely, where a payment is made of a sum larger than the

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land by the defendants — The taking of the profits by the plaintiff amounted to payment of interest under S. 20 of the Act.)

('09) 1 Ind Cas 137 (138) : 31 All 285 (DB), *Gopinath Singh* v. *Hardeo Singh.* (Express agreement that any payment by debtor would first go to interest.)

[*See* ('33) 20 AIR 1933 Cal 90 (93) : 141 Ind Cas 716 (DB), *Wazed Ali Khan* v. *Brojendra Kumar.* (Money sent upon admitted obligation to meet interest and with knowledge that the creditor would apply it for interest.)]

[11] ('27) 14 AIR 1927 Mad 284 (285) : 99 Ind Cas 694 (DB), *Perraju* v. *Bapireddi.* (1 Ind Cas 137 distinguished.)

[12] ('13) 21 Ind Cas 281 (282) : 9 Nag L R 140, *Balaprasad* v. *Bhola Nath.* (Receipt of produce of land held under a deed of mortgage required to be registered, but not registered, cannot be deemed to be a payment of interest for the purpose of S. 20, Limitation Act.)

[13] ('37) 172 Ind Cas 999 (1002) : 32 Sind L R 415 (PC), *Firm Het Ram-Bodh Raj* v. *Firm Aya Ram-Tola Ram.*

[14] ('35) 22 AIR 1935 All 605 (606) : 156 Ind Cas 748 (FB), *Nageshar Misir* v. *Mt. Batuka Kunwari.*

[15] ('33) 20 AIR 1933 Mad 251 (252) : 141 Ind Cas 169, *Vancheswara Sastri* v. *Narayana Aiyar.*

[16] ('26) 96 Ind Cas 309 (309) (Mad), *Sobhanadri* v. *Venkanna.*

('40) 27 AIR 1940 P C 63 (65) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

amount due as interest at the time of the payment, a part of it must necessarily be presumed to have been made towards the principal.[17]

7. "Interest" includes part of interest due. — The word "interest" in this section means interest or any *part* of the interest due. Where the lower Court had held that a suit on a mortgage was barred holding that the payment of a *part* of the interest due could not operate to extend time, it was held by the Allahabad High Court that a part payment of interest will operate to save limitation in the same manner as the payment of the whole of the interest.[1]

8. Payment expressed to be made for principal and interest generally. — A payment expressed to be made for principal and interest generally without specifying what part of it is to be appropriated in satisfaction of interest or of principal, is a payment of interest 'as such' and operates to extend the period of limitation under the section.[1] In other words, when the debtor pays an amount with the intention that part of it is to be in payment of interest, the requirements of the section are satisfied. It is not necessary that the *exact amount* of the interest should be specified.

9. "Payment without prejudice." — Where a payment for part principal or for interest as such appears in the handwriting of the person liable to pay, it will save limitation, even though the words "without prejudice" were added. Such words cannot override the words of the statute that a part payment of principal shall extend limitation.[1]

10. "Before the expiration of the prescribed period."— It has been held that the words "prescribed period" refer to the period prescribed by the *Limitation Act* and not to the period fixed by other enactments such as S. 48 of the Civil Procedure Code.[1] A period fixed by the contract between the parties is not a period prescribed within the meaning of this section as refers to a period of limitation prescribed by law.[1a] The period within which a suit or application may be filed by reference to S. 4 of the Act is not a "prescribed period" within this section as S. 4 does not *extend* the period fixed by the schedule but merely enables a suit to be filed notwithstanding the expiry of the limitation period.[2] See also Notes 12 to 15 under S. 19.

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[17] ('40) 27 AIR 1940 P C 63 (65): ILR (1940) Lah 470: ILR (1940) Kar P C 134: 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand.*
('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram.*

Note 7

[1] ('13) 20 Ind Cas 258 (258) : 35 All 378 (DB), *Abdul Ahad v. Mahatab Bibi.*

Note 8

[1] ('02) 4 Bom L R 231 (232) (DB), *Subrayya Kamati v. Pakaya Narayan.*
('10) 6 Ind Cas 16 (17) (DB) (Cal), *Mohan Shaha v. Lakshu Karikar.* (3 Bom 198 and 5 Bom L R 350 distinguished.)
('24) 11 AIR 1924 Mad 123 (124) : 74 Ind Cas 777, *Ramakrishna Annavi v. Pichandi Chettiar.*

Note 9

[1] ('36) 23 AIR 1936 Lah 629 (636) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee Amritsar v. Ralia Ram.*

Note 10

[1] ('22) 9 AIR 1922 Mad 268 (271) : 70 Ind Cas 396 : 45 Mad 785 (DB), *Subbarayan v. Natarajan.*

The payment must be before the expiry of the "prescribed period."[3] A payment made after such period will not avail to save limitation.[4]

As has been seen in Note 5, a payment without specification may be appropriated by the creditor as a part payment towards the principal. But, in order that such payment may extend the time in favour of the creditor, he must in the exercise of his right of appropriation do, within the prescribed period, something which treats the

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('34) 21 AIR 1934 Oudh 465 (471) : 10 Luck 208 : 151 Ind Cas 541 (DB), *Narendra Bahadur Singh* v. *Oudh Commercial Bank Ltd.* (Sections 19 and 20 of the Limitation Act cannot be applied to S. 48, Civil Procedure Code, because that would render the provisions of S. 48 nugatory.)

See also Note 6a under Section 29.

[1a] ('81) 6 Cal 815 (826) : 8 Cal L R 457 (DB), *Ramsebuk* v. *Ramlal Koondoo.* (It does not mean period prescribed for payment of debt.)

('83) 12 Cal L R 277 (279), *Mongola Koiburto* v. *Annoda Ram.* (5 Bom 688 followed.)

('88) 11 Mad 218 (219) : 12 Ind Jur 176 (DB), *Venkataratnam* v. *Kamayya.*

[2] ('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji* v. *Yadao Raghoba.* (AIR 1928 Nag 192 held no longer good law.)

('39) 26 AIR 1939 All 252 (252) : 181 Ind Cas 899 (DB), *Mt. Shayam Peare* v. *Ram Autar Singh.*

('38) 25 AIR 1938 All 606 (609) : ILR (1938) All 861 : 178 Ind Cas 668 (DB), *Puran Chand* v. *Abdullah.* (Endorsement of payment after limitation but during holidays of Court does not give fresh start of limitation.)

('38) 25 AIR 1938 Mad 683 (683): 177 Ind Cas 759, *Pattabhiramayya* v. *Krishna.*

('29) 16 AIR 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendra Nath Roy* v. *Kartic Prasad Das.* (Considerations of S. 4 cannot be brought in wording of Ss. 19 and 20.)

('31) 18 AIR 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmad* v. *Kalipada Roy Chowdhury.* (Case under Section 19.)

[*See* ('81) 5 Bom 688 (689) (DB), *Chunilal Ichharam* v. *Tribhovan Laldas.* ("Prescribed period" means period prescribed by the then Limitation Act.)]

See also Note 8 to Section 4 and Note 12 to Section 19.

[3] ('41) 28 AIR 1941 Oudh 56 (58) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand* v. *Surajpal Singh.*

('40) 27 AIR 1940 Oudh 340 (342) : 15 Luck 573 : 189 Ind Cas 481 (FB), *Rishi Kishan* v. *Krishno Kumar.*

('31) 18 AIR 1931 All 375 (376) : 131 Ind Cas 867 (DB), *Ganesh* v. *Mallu Mal Girdhar Das.*

[*See* ('78) 2 Cal L R 346 (347) (DB), *Tariney Churn Nundy* v. *Shaikh Abdur Rohoman.*]

[4] ('35) 22 AIR 1935 Bom 213 (214) : 156 Ind Cas 531, *Percy F. Fisher* v. *Ardeshir Hormasji.*

('92-96) 2 Upp Bur Rul 466 (469), *Maung Hlaing* v. *Maung Et Gyi.*

payment as made on account of the principal.[5] It is, however, not necessary to show that the fact of appropriation should also be communicated to the debtor within the prescribed period.[6] The fact that a definite appropriation has been made within the period prescribed may ordinarily be gathered from the account books of the creditor.[7] If, however, until after the expiry of the prescribed period the creditor treats the sum as paid on account of interest or does nothing to treat it as paid on account of principal, the payment cannot be regarded as part payment of principal.[8]

11. **"Paid," meaning of.** — In order to constitute a payment it is not necessary that it should be in *cash or currency*.[1] It may be made in any form.[2] But it is necessary that there must be something which is tantamount to payment.[3] A fictitious entry of payment in

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5. ('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram* v. *Sitaram Lalman.*

('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

('40) 27 AIR 1940 Oudh 340 (342) : 15 Luck 573 : 189 Ind Cas 481 (FB), *Rishi Kishan* v. *Krishno Kumar.*

6. ('40) 27 AIR 1940 PC 63 (69) : ILR (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 233 : ILR (1940) Kar (PC) 134 (PC), *Rama Shah* v. *Lal Chand.*

7. ('41) 28 AIR 1941 All 132 (133, 134) : 193 Ind Cas 854 (DB), *Sitaram Baburam* v. *Sitaram Lalman.*

('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar (P C) 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

8. ('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar (P C) 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

Note 11

1. ('38) 25 AIR 1938 Cal 538 (539) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath.*

('38) 25 AIR 1938 Mad 579 (580) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar* v. *Ekambara.*

('26) 13 AIR 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath* v. *Shashimukhi.* (Per Page, J.)

('25) 12 AIR 1925 Sind 144 (146) : 81 Ind Cas 834 : 20 Sind L R 335, *Kishindas Pursumal* v. *Menghraj Khaildas.* (It may be made by settlement of accounts between the parties.)

2. ('38) 25 AIR 1938 Mad 601 (601) : ILR (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar* v. *Thevammal.* (Payment may be made either in cash or by execution of promissory note.)

('36) 23 AIR 1936 Mad 848 (849) : 165 Ind Cas 225, *Kandaswami* v. *Thevammal.* (Pronote can be given by way of payment.)

('98) 25 Cal 844 (852) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (PC), *Sukhamoni Chowdharani* v. *Ishan Chunder Roy.* (Section does not specify any particular mode or form of payment.)

3. ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar* v. *Joti Prasad.* (Merely entering fictitious payment does not amount to payment.)

(1900) 24 Bom 493 (496) : 2 Bom L R 378 (DB), *Kariyappa* v. *Rachappa.* (In order to satisfy the requirements of S. 20, the payment need not be in money but may be in goods or even by a settlement of accounts between the parties, provided

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the handwriting of the debtor is not a payment and cannot operate to save time under this section.[4] Where a creditor receives money for the debt due to him not from the debtor or his agent but from a source which is *independent of the volition of the debtor*, it cannot be said that the debtor has made any payment. Thus, where a pledgee of jewels sells the jewels and appropriates the amount to the debt, it cannot be said that the pledgor made any payment either for interest or for principal.[5] Similarly, where the creditor levies execution against the debtor and recovers money, it would not amount to a payment within this section.[6] So also, where a payment is made by the judgment-debtor in obedience to the order of the Court.[7]

Payment in kind. — A payment may be made in kind.[8] But the party alleging such payment must prove that there was an agreement between the parties that the payment should be in that manner.[9]

Payment by cheque. — The giving of a cheque and its receipt by the creditor does not necessarily constitute a payment, though it may amount to a payment; it depends upon the facts of each case whether it was accepted as a payment or not.[10] If it is delivered by way of

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the payment must be of such a nature that it would be a sufficient answer to a suit. While the forms of payment may differ, the payment must be one made as interest by the debtor to the creditor.)

('36) 23 AIR 1936 Pat 386 (387) : 163 Ind Cas 915, *Maheshwar Charan* v. *Dineshwari Charan*. (In this case there was an attempt to adjust. However, it was held that there was no payment.)

('16) 3 AIR 1916 Pat 411 (415) : 36 Ind Cas 77 (DB), *Bhagela Koer* v. *Abdul Rahman*. (Setting off of decrees by mutual consent.)

[4] ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar* v. *Joti Prasad*.

[5] ('34) 21 AIR 1934 Mad 549 (551) : 152 Ind Cas 299 (DB), *Valliappa Chettiar* v. *Maruda Pandian Pillai*.

[6] ('75) 24 Suth W R 20 (20) (DB), *Raghoonath Doss Cookman* v. *Shiromonee Pat Mohadebee*.

('82) 6 Bom 626 (627, 628) (DB), *Ram Chandra Ganesh* v. *Devba*.

[7] ('12) 14 Ind Cas 335 (339) (Lah), *Ram Das* v. *Kanshi Ram*.

[8] ('26) 13 AIR 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath Deb* v. *Shashimukhi*.

('06) 29 Mad 234 (235) : 16 Mad L Jour 99 (DB), *Mylan* v. *Annavi Madan*. (19 Mad 340 followed.)

('35) 22 AIR 1935 Rang 473 (475) : 160 Ind Cas 314, *U Sin* v. *U Tun Si*.

[*See also* ('11) 12 Ind Cas 23 (23) (Low Bur), *Maung Aung Do* v. *Esoof Ali*.]

[9] ('26) 13 AIR 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath Deb* v. *Shashimukhi*. (Per Page, J.)

(1900) 24 Bom 619 (621) : 2 Bom L R 452 (DB), *Ragho* v. *Hari*. ((1835) 43 R R 306 followed.)

[10] ('30) 17 AIR 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co.* v. *Sircar & Co.*

('33) 20 AIR 1933 Lah 741 (742) : 144 Ind Cas 641 (DB), *Dial Singh* v. *Davindar Singh*. (Cheque signed by debtor and accepted by creditor duly honoured — Payment is sufficient for purposes of Section 20.)

('97) 1897 Pun Re No. 1, *Sardar Bachittar Singh* v. *Jagannath*. (A cheque is a mere order for payment and not a payment itself.)

Section 20
Note 11

payment and is received as such by the creditor, it will operate as a payment, but not if it is received by the creditor without regarding it as a payment.[11] Where it *is* received as a payment, the date of the payment for the purpose of giving a fresh period of limitation is the date on which the cheque is given and not the date on which the cheque is cashed.[12]

Payment by giving promissory note. — A promissory note may be given by way of payment.[13]

Payment by labour. — The continuance in service of a servant to whom wages have been advanced may amount to a payment of interest. Thus, in a suit to recover balance of wages advanced to a servant under an agreement executed more than three years before the date of suit, it was held that his continuance in service within three years before suit was a payment of interest as such contemplated by this section.[14]

Addition of interest to principal. — The addition of the interest to the principal in the accounts of the debtor is not necessarily a payment for interest : it will be a payment where both parties agree to wipe out the previous balance and add the amount of the interest

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('31) 18 AIR 1931 Sind 28 (29, 30) : 25 Sind L R 360 : 129 Ind Cas 909, *Chotirmal* v. *Rupchand*. (Cheque delivered to payee by way of payment and received as such—AIR 1916 Cal 580 followed.)

[11] **('38) 25 AIR 1938 Cal 538 (539, 540) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath*.**

('25) 12 AIR 1925 Cal 937 (940) : 87 Ind Cas 508, *Maurice Mayahas* v. *W. Morley*.

('16) 3 AIR 1916 Cal 580 (580) : 42 Cal 1043 : 31 Ind Cas 626 (DB), *Kedar Nath Mitter* v. *Denobhandhu Saha*.

('33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611 (DB), *Jagtu Mal Sadasukh Rai* v. *Charanji Lal Fakir Chand*.

('33) 20 AIR 1933 Lah 741 (742) : 144 Ind Cas 641, *Dial Singh* v. *Davindar Singh*. (9 Mad 271 and 19 All 307 dissenting from.)

('37) 24 AIR 1937 Sind 95 (96) : 31 Sind L R 68 : 168 Ind Cas 820 (DB), *Firm Hariram Dowlatram* v. *Firm Ram Singh Gopal Singh*. (AIR 1930 All 392 relied on.)

[12] **('25) 12 AIR 1925 Cal 937 (940) : 87 Ind Cas 508, *Mourice Mayahas* v. *W. Morley*.**

('33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611 (DB), *Jagtu Mal Sadasukh Rai* v. *Charanji Lal Fakir Chand*. (Cheque accepted by creditor before expiry of limitation but cashed subsequently—Limitation extended.)

[13] **('38) 25 AIR 1938 Mad 601 (601) : ILR (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar* v. *Thevammal*.**

('36) 23 AIR 1936 Mad 848 (849) : 165 Ind Cas 225, *Kandasamy* v. *Thevammal*.

[14] **('17) 4 AIR 1917 Mad 542 (542) : 33 Ind Cas 134, *Muthukrishna Iyer* v. *Pakkiri Voikaran*. (29 Mad 234 and 24 Bom 493 followed.)**

('17) 4 AIR 1917 Mad 658 (658) : 35 Ind Cas 480, *Swaminatha Pillai* v. *Mondaiyan*. (29 Mad 234 followed.)

[*See also* ('18) 5 AIR 1918 Mad 917 (918) : 40 Ind Cas 235, *Soari Aiyangar* v. *Subbarayyar*. (Assumed.)]

to the principal so as to make it a new debt,[15] in other words, the addition must be the result of an agreement between the parties on the date of the payment.[15a] The mere fact that the debtor or the creditor goes on adding interest to the principal in his own books is not a payment,[16] even if it has been in pursuance of an *original* agreement between the parties to calculate compound interest.[17]

Payment by adjustment of accounts. — It would follow that it is not necessary to constitute a payment that money should actually pass;[18] if the parties agree that an amount due previously by the

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15. ('30) 17 AIR 1930 All 467 (468, 469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao* v. *Ram Sarup.*

('16) 3 AIR 1916 Mad 697 (697) : 30 Ind Cas 777 (DB), *Subramaniam Chettiar* v. *Somasundaram Chettiar.* (29 Mad 234 relied on.)

15a. (1900) 24 Bom 493 (496) : 2 Bom L R 378 (DB), *Kariyappa* v. *Rachappa.* (Where a debtor consents that some money due by him for interest should be credited to the account of the principal in favour of the creditor, and the interest balance reduced to that amount, such a consent is tantamount to a payment of interest—Where all the parties agree to such a settlement, the adjustment operates as a payment of interest under Section 20.)

('06) 9 Oudh Cas 221 (224), *Mohan Lal* v. *Lachman Das.*

('11) 11 Ind Cas 552 (553) (Bom), *In re Tricumdas Mills Co. Ltd.*

('30) 17 AIR 1930 All 467 (468, 469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao* v. *Ram Sarup.*

16. ('30) 17 AIR 1930 All 467 (469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao* v. *Ram Sarup.*

('88) 13 Bom 338 (343) (DB), *Ichha Dhanji* v. *Natha.* (The mere carrying forward of the amount of a loan with the interest due thereon in the debtor's books, though such entry of interest is made in the presence of the creditor does not amount to a payment of interest.)

('15) 2 AIR 1915 Lah 275 (276) : 31 Ind Cas 782 (DB), *Muin-ud-din* v. *Muhammad Ahmed.* (Mere debiting of interest in the books of the creditor without express agreement cannot be regarded as payment of interest.)

('16) 3 AIR 1916 Mad 1213 (1214) : 29 Ind Cas 422 (DB), *Nagappa* v. *Ramanathan.* (Creditor's books.)

('07) 29 All 773 (779) : 4 All L Jour 628 : 1907 All W N 263 (DB), *Dharam Das* v. *Genga Devi.* (Do.)

('06) 1906 All W N 212 (212) (DB), *Prag Das* v. *Baldeo Pershad.* (Entry of balance due for principal and interest in creditor's book.)

('80) 6 Bom 103 (106), *Narronji Bhimji* v. *Mugniram Chandaji.* (Defendant credited with surplus proceeds of goods and of a hundi.)

('34) 21 AIR 1934 Nag 219 (221) : 152 Ind Cas 319, *Yadosa* v. *Narayansa.* (Interest credited in defendants accounts.)

('96) 19 Mad 340 (342) : 6 Mad L Jour 177 (DB), *Pullamma* v. *Tatayya.*

('18) 5 AIR 1918 Mad 238 (239) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa* v. *Veerappa.*

17. ('30) 17 AIR 1930 All 467 (469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao* v. *Ram Sarup.*

18. ('38) 25 AIR 1938 Mad 579 (580) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar* v. *Ekambera.* (Any facts which would prove plea of payment of interest would be payment sufficient to bar statute.)

('38) 25 AIR 1938 Pat 139 (140) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bishunath Ojha.*

creditor to the debtor shall be treated as amount paid by the latter to the former, it is in substance identical with a transaction where the debtor receives actual payment and pays the amount back to the creditor.[19]

The payment must be for an *admitted debt*; a payment made as a matter of grace and not towards any admitted debt does not save limitation.[20] The payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount.[21]

12. Money need not belong to the person paying. — The section does not say anything about the origin or source of the money with which the payment is made. Where A and B are co-debtors, and A authorises B to make a payment on behalf of both A and B, and B makes such payment, it does not matter that the money paid does not belong to A but belongs to B.[1]

13. Who must make the payment — General. — With reference to the payment of interest, the section uses the words "person liable to pay the debt or legacy" (or his duly authorised agent) in describing the person by whom the payment is to be made and with reference to the payment of part of the principal of a debt, the person by whom the payment is required to be made is described as the "debtor." But no distinction is intended between payment of interest and that of part of the principal as regards the person by whom it is to be paid. In either case, the payment is to be made by a person liable to pay the money. This expression will include the legal representatives of the person who contracted the debt and in the case of money charged on land the person who has derived title from him. In other words, the liability need not be personal in the sense of being liable to be

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('29) 16 AIR 1929 Mad 432 (439) : 117 Ind Cas 124 (DB), *Marina Ammayi* v. *Sundayya.*

('23) 10 AIR 1923 Cal 71 (73) : 72 Ind Cas 692 (DB), *Guljar Mandal* v. *Sariman Mandalini.*

(1900) 10 Mad L Jour 25 (26) (DB), *Thesiga Iyengar* v. *Srinivasa Mudaliar.* (Where an endorsement of payment on a bond is sought to save the bond from limitation, it is not necessary that there should be an actual payment of money; it is enough if the transaction embodied in the endorsement has been intended to operate as payment.)

[19] ('38) 25 AIR 1938 Pat 139 (140) : 174 Ind Cas 585, *Ramprabha Ojha* v. *Bishunath Ojha.*

('29) 16 AIR 1929 Mad 432 (439) : 117 Ind Cas 124 (DB), *Marina Ammayi* v. *Sundayya.*

[*See also* ('25) 12 AIR 1925 Sind 144 (146) : 81 Ind Cas 834 : 20 Sind L R 335, *Kishindas Pursumal* v. *Menghraj Khaildas.*]

[20] ('34) 21 AIR 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram* v. *Mt. Mahmudi Begam.*

[21] ('06) 29 Mad 234 (235) : 16 Mad L Jour 99, *Mylan* v. *Annavi Madan.*

Note 12

[1] ('34) 21 AIR 1934 Mad 623 (624) : 151 Ind Cas 1087 (DB), *Narayana Iyer* v. *Official Assignee of Madras.*

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Notes 13–14

arrested: it may be proprietary, that is, a liability in respect of one's property.[1] But the liability must be to the *creditor*. Thus, where A owes a debt to B and C contracts with A to pay the debt to B, a payment by C will not be by a "person liable" within the meaning of this section.[1a] The reason is that C's liability is to A and not to B, the creditor. In this connexion, the following observations of the Lord Chancellor in *Chinnery* v. *Evans*[2] may be quoted:

> "Money paid — that is, money handed over by a stranger to the contract under which it was paid to the individual entitled to receive it — would not have the characteristics and the legal quality of payment. It would be a voluntary render, a gift or donation being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering any part of the money which it is supposed would be so paid."

See also the observations of Brett, L. J., in *Harlock* v. *Ashbury*.[3]

14. Person liable to pay the debt or legacy. — The section does not require that the person paying should be *personally* liable. The expression "person liable" will include persons like purchasers of mortgaged property or puisne mortgagees, whose liability is in respect of property.[1]

Note 13

[1] ('41) 28 AIR 1941 Mad 6 (14) (DB), *Thinnappa Chettiar* v. *Krishna Rao.* (No distinction between "person liable to pay" and "debtor"—The former expression is used with reference to payment of interest apparently for the purpose of having a common expression for both debts and legacies as it would be incongruous to use the expression 'debtor' with reference to a person liable to pay a legacy.)

[See however ('18) 5 AIR 1918 Oudh 323 (324) : 47 Ind Cas 655, *Lachmi Narain* v. *Daya Shankar.* (In this case it was held that the expression "debtor" would only include the person who contracted the debt. It is submitted that the view is not correct.)

[1a] ('41) 28 AIR 1941 Mad 6 (14, 16) (DB), *Thinnappa Chettiar* v. *Krishna Rao.* (*A* mortgaging certain land to *B* and afterwards selling certain *other* land to *C* — *C* undertaking in the contract of sale, to pay off the mortgage of *B* — Payment by *C* is not by person liable and unless *C* can be held to be *A*'s agent authorised to make the payment, it will not save limitation under this section — *Bradshaw* v. *Widdington*, (1902) 2 Ch 430 explained.)

[2] (1864) 145 R R 79 (84) : 11 H L C 115 : 4 N R 520 : 10 Jur (NS) 855 : 11 L T 68 : 13 W R 20.

[3] (1882) 30 W R (Eng.) 327 (328) : 19 Ch D 539 : 46 L T 356 : 51 L J Ch 394.

Note 14

[1] ('26) 13 AIR 1926 Cal 1218 (1219) : 54 Cal 179 : 98 Ind Cas 204 (DB), *Bhuban Mohan* v. *Ramgobind.*

('41) 28 AIR 1941 Mad 6 (15) (DB), *Thinnappa Chettiar* v. *Krishna Rao.*

('38) 25 AIR 1938 Mad 579 (580) : 182 Ind Cas 468 (DB), *Parthasarthi Ayyangar* v. *Ekambara.*

('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendranath.*

A mortgagor who has lost all interest in the mortgaged property and is not personally liable for the debt cannot keep alive the mortgage by a payment under this section.[2]

The expression "person liable to pay the debt or legacy" must be interpreted in the light of S. 21, sub-s. (2). For a full discussion of the subject, see Note 6 to section 21.

14a. Debtor — Meaning of. — See Note 13.

15. Principal and surety. — See Note 12 to Section 21.

16. Payment by one of several joint debtors.— See Notes to Section 21.

17. Payment by one of several Muhammadan co-heirs. — See Note 10 to Section 21.

18. "Agent duly authorised in this behalf." — The question whether the person making the payment is an agent duly authorised by the person liable to pay the debt or legacy is one of fact to be determined on the circumstances of each case.[1] No formal or express authorisation is required under the section.[2]

('21) 8 AIR 1921 Mad 102 (103) : 44 Mad 544 : 62 Ind Cas 393, *Askaram Sowcar* v. *Venkatasami Naidu.* (Purchaser of mortgaged property at a court-auction is a person 'liable to pay the mortgage-debt' within the meaning of this section.)

[2] ('40) 27 AIR 1940 Mad 470 (473) : ILR (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi* v. *Palanivela Goundan.*

Note 18

[1] ('41) 28 AIR 1941 Mad 67 (69) : ILR (1941) Mad 191 (FB), *Ramchandra* v. *Shantarama.*

('34) 21 AIR 1934 Mad 623 (624) : 151 Ind Cas 1087 (DB), *Narayana Aiyar* v. *Official Assignee Madras.* (Co-debtor can be agent.)

('03) 28 Bom 248 (251, 252) : 5 Bom L R 1020 (DB), *Gopal Daji Sathe* v. *Gopal Sonu.* (Payment of interest by the principal debtor is not payment of interest by the agent of surety. The relation of principal and surety does not give rise to any implied authority.)

('11) 11 Ind Cas 858 (858) (DB) (Low Bur), *Muthuveerappa Chetty* v. *Abdul Kadir.* (Burden is on plaintiff to prove authority.)

('10) 5 Ind Cas 539 (545, 546) : 37 Cal 526 (DB), *Sarurjigar Begam* v. *Baroda Kant Mitter.* (A person holding power-of-attorney from his wife and her sister is a duly authorised agent of both for paying interest under this section.)

[*See* ('15) 2 AIR 1915 Mad 307 (307) : 25 Ind Cas 927, *Annamalai Pattar* v. *Natesa Iyar.* (Authority to make payment may be inferred from circumstances or conduct.)]

[2] ('39) 26 AIR 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom.* (But it must be shown that there was at least implied authority.)

('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (PC), *National Bank of Upper India Ltd.* v. *Bansidhar.* (It can be implied.)

('90) 17 Cal 944 (950, 951) (DB), *Brij Mohan Lal* v. *Rudra Perkash Misser.* (Section does not require the agent to be authorised in writing. He may impliedly be so authorised.)

('11) 12 Ind Cas 23 (24) (Low Bur), *Maung Aung Do* v. *Esoof Ali.* (Express authority not necessary.)

[*See* ('31) 18 AIR 1931 All 398 (400) : 133 Ind Cas 155 (DB), *Kamta Rai* v. *Jaduraj Kunwari.* (Authority to agent need not be express.)

Illustrations.

1. A executed a promissory note in favour of X in substitution of a promissory note that had been executed by B in favour of X, the understanding between A, B and X being that B would pay up the principal and interest due under A's note, in accordance with which arrangement A left it to B to make the payment and B made a payment for interest. It was held by their Lordships of the Privy Council that B must be regarded as an agent of A duly authorised to make the payment within the meaning of this section.[3]

2. A Burmese married couple X and Y of the cultivating class worked a land together. Y had to pay rent of the land but was temporarily incapacitated from paying it by his being in jail. X however went on cultivating the land and paid the rent. It was held that X must be taken to have authority to act for both and make payments.[4] A Burmese Buddhist husband is, however, not necessarily the agent of his wife.[4a]

3. One of the properties comprised in a mortgage deed was agreed to be sold by the mortgagor to one P. It was stipulated that out of the purchase money P should pay a certain amount to the mortgagee who in his turn was to release the property sold from the mortgage security. The mortgagee consented to this arrangement. The amount was accordingly paid by P to the mortgagee. It was held that P could be regarded as the mortgagor's duly authorised agent to make the payment.[4b]

But though no formal authorisation is necessary, there must be definite evidence showing that there was some authority on the part of the one to make the payment on behalf of the other.[5] The mere fact that the payment of money by A enures also for the benefit of B, C and D does not constitute an authorisation to A to make the payment on their behalf.[6] Similarly, the mere fact that an elder brother is

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3. ('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (P C), *National Bank of Upper India Ltd.* v. *Bansidhar.*

4. ('11) 12 Ind Cas 23 (24) (Low Bur), *Maung Aung Do* v. *Esoof Ali.*

4a. ('41) 28 AIR 1941 Rang 37 (46) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoof Karwa* v. *Mrs. Niemeyer.*

('39) 26 AIR 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom.*

4b. ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathy Ayyangar* v. *Ekambara.*

5. ('39) 26 AIR 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom.* (It must be shown that there was at least implied authority.)

('33) 20 AIR 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharnidhar Ghose* v. *Indrañarayana Sinha.*

('14) 1 AIR 1914 All 114 (115) : 23 Ind Cas 863, *Ramchandra Singh* v. *Mt. Durga Devi.*

6. ('29) 16 AIR 1929 Mad 881 (882) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayammal* v. *Muthukumaraswamy.*

allowed to a certain extent to act on behalf of the younger brothers in matters of executing mortgages, taking loans, and things of that sort does not necessarily mean that there is authority for the elder brother to make a payment so as to save limitation as against the others.[7] Again, where A, B and C are liable to pay a debt and A makes a payment, the fact that B and C are present at the time of payment does not make the payment necessarily one by A on behalf of B and C.[8] But where they are not only present but sign underneath, authority by them may be presumed.[8a]

A member of a joint Hindu family cannot, by reason of his being such a member, make a payment or an endorsement of payment on behalf of another member of the family. Hence, an endorsement of payment by the father on a pronote executed by the son cannot be presumed to have been made by an agent duly authorized by the son.[8b] Where, however, the debtor sent the amount for payment through his son, it was held that the son must be deemed to be his authorized agent.[8c]

A Mahomedan brother is not as such the agent of his sister even if the sister is a pardanashin lady, in the absence of proof of authority.[8d]

The authority need not be a *special* authority in respect of the particular loan in question; it may be a *general* authority in respect of a number of loans.[9] A general authority to pay the total amount due under a bond, will include authority to pay the interest also due on the bond, or to make part payments[10] though, when the authority is specific only to pay towards principal, the agent has no authority to pay for interest.[11]

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[7] ('33) 20 AIR 1933 Cal 268 (270) : 143 Ind Cas 472 (DB), *Dharanidhar Ghose* v. *Indranarayana Sinha.*

[8] ('35) 22 AIR 1935 Cal 648 (649) : 158 Ind Cas 512, *Annada Charan* v. *Jhatu Charan.*

[8a] *See* ('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devi Chand* v. *Jamshetji Shapurji.*

[8b] ('40) 27 AIR 1940 Mad 954 (955) : 191 Ind Cas 853 (DB), *Kannayya Naidu* v. *Appala Naidu.*

[8c] ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand* v. *Bulaqi Ram.*

[8d] ('41) 28 AIR 1941 Rang 37 (46) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoof Karwa* v. *Mrs. Niemeyer.*

[9] ('33) 20 AIR 1933 Cal 826 (827): 147 Ind Cas 459 (DB), *Jiban Krista* v. *Hari.*

[10] ('25) 12 AIR 1925 Rang 30 (32) : 2 Rang 367 : 84 Ind Cas 391 (DB), *Rala Singh* v. *Bhagwan Singh & Sons.* (A I R 1919 P C 120 followed.)

('98) 25 Cal 844 (852) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (P C), *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy.*

[*See* ('95) 18 Mad 456 (457), *Kailas Padayachi* v. *Ponnukannu.* (*Held* authority to manage affairs included authority to pay interest.)]

[11] ('26) 13 AIR 1926 Mad 1176 (1177) : 98 Ind Cas 162 (DB), *Karuppan Chetti* v. *Maruthanayagam Pillai.*

To constitute a person a duly authorised agent it is not necessary that the exercise of the authority should be obligatory. It is sufficient even if the exercise of it is optional.[12]

A payment made by an agent in *excess* of his authority will not have the effect of extending the time under this section. An agent who can give the creditor the benefit of this section has to act within the terms of his authority; if he exceeds his authority or does something not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of this section.[13] Thus, where A executed a mortgage in favour of B directing him to pay the mortgage amount immediately to X who had obtained a decree against A and to obtain a receipt, but B paid the money into *Court* more than a year thereafter, it was held that the payment was in excess of his authority and did not have the effect of extending the time.[14] Similarly, where A mortgaged his property to B asking him to pay off the debt due by A to C, but B merely paid the interest thereon two years thereafter, it was held that B exceeded his authority and could not be considered as the agent of A for the purpose of making the payment of interest.[15] The same principle would apply where a *vendee* is asked to pay such a debt, and the latter makes only a part payment.[16] The question as to the extent of an agent's authority is a question of fact to be decided on the facts of each case.[16a]

The words "authorised in this behalf" mean "authorised to make the payment." But an authority to pay carries with it the authority

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[*See* ('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar* v. *Subramania Pandia Thevan.* (Mortgagee authorised to pay debt due by mortgagor to third person — Mortgagee paying interest only after two years — *Held* he had no authority.)]

[12] ('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar* v. *Subramania Pandia Thevan.*

[13] ('25) 12 AIR 1925 Mad 703 (705) : 87 Ind Cas 989 (DB), *Balaguruswami Naicken* v. *Guruswami Naicken.* (2 Bing (N C) 241 followed; A I R 1921 Mad 704 distinguished.)
[*See also* ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar* v. *Ekambara.* (Payment made by agent later than warranted by his authorisation would be an act detrimental to his principal, for, the result of such payment is to extend the period of limitation.)]

[14] ('25) 12 AIR 1925 Mad 703 (706) : 87 Ind Cas 989, *Balaguruswami Naicken* v. *Guruswami Naicken.*

[15] ('41) 28 AIR 1941 Mad 67 (69) : I L R (1941) Mad 191 (FB), *Ramachandra* v. *Shantarama.* (A I R 1914 Mad 381 approved—A I R 1929 P C 297 distinguished.)
('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar* v. *Subramania Pandia Thevan.*

[16] ('41) 28 AIR 1941 Mad 6 (8) (DB), *Thinnappa Chettiar* v. *Krishna Rao.* (It was also held that the vendee in such a case is not a 'person liable' to pay within the section.)
('22) 9 AIR 1922 Mad 401 (401) (DB), *Ramachandra Raju* v. *Purushottam.* (AIR 1914 Mad 381 followed.)

[16a] ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathy Ayyangar* v. *Ekambara.*

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to make an endorsement for the payment made. No specific authority to make the endorsement itself is necessary.[17]

The words "agent duly authorised" include authority given by *law* as well as authority given by *act of parties.*[18]

Can a Court be regarded under any circumstances as an agent of the party for the purpose of this section? It has been held in the undermentioned cases[19] that it can be an agent, provided the assets of the party are so placed by his own act or by operation of law that the Court can operate upon the assets and make payments, the volition of the party being immaterial.

The person making the payment must be an agent of the person liable to pay *at the time of the payment.* Under the provisions of S. 201 of the Contract Act, the death of the principal terminates the agency. Therefore, a payment made by the *quondam* agent *after the death* of the principal will not give a fresh start of limitation under this section.[20] Similarly, where an order of adjudication is annulled under S. 37 of the Provincial Insolvency Act, 1920, and an appointee of the insolvent's property is placed in charge of the property, such an appointee is not an agent of the insolvent and therefore a payment made by him does not save limitation.[21]

Where a payment is made by A on behalf of B without the latter's authority but B subsequently ratifies the payment it will have the same effect against him as if it had been made with his authority. Such ratification may be express or implied. But, such ratification cannot affect the rights of third parties. Thus, suppose A executes a mortgage of certain properties to B and then alienates various items of the mortgaged properties to C, D and E. Afterwards F, an unauthorised person makes payments towards the mortgage debt on behalf

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17. **('27) 14 AIR 1927 Mad 959 (959, 960): 105 Ind Cas 475 (DB),** ***Venkateswarlu* v. *Suryaprakasam.***

('07-08) 4 Low Bur Rul 1 (1), ***Babu Chimanbux Bhowsinha* v. *Surju Banniah.***

18. **('19) 6 AIR 1919 Cal 7 (8) : 52 Ind Cas 436 (DB),** ***Chandra Kanta* v. *Behari Lal.***

19. **('21) 8 AIR 1921 Mad 704 (707, 708) : 44 Mad 971 : 68 Ind Cas 100 (DB),** ***Govindasamy Pillai* v. *Desai Goundan.***

('27) 14 AIR 1927 Mad 80 (81) : 98 Ind Cas 571, ***Venkatasubbayya* v. *Seshayya.*** **(But not so when money belongs to debtor's father.)**

('24) 11 AIR 1924 Mad 638 (639): 78 Ind Cas 832, ***Sabapathy Chetty* v. *Shunmugappa Chetty.***

[*See also* ('40) 27 AIR 1940 Nag 354 (357) (DB), ***Gajadharprasad Ramlal* v. *Udaichand Kapurchand.*** **(If the person making the payment is a Judge of the Court, and an acknowledgment of the payment appears in his handwriting or is signed by him, then that is enough.)]**

20. **('80) 1880 Pun Re No. 78,** ***Sirdharini Kishen Koer* v. *Munna Lall.***

21. **('35) 22 AIR 1935 Rang 152 (154) : 156 Ind Cas 783 (DB),** ***Maung Po Gyi* v. *R. K. Banerjee.*** **(Because the insolvent has no control over the property.**

of A who subsequently ratifies his action. Though such ratification will make the payments binding on A and will extend the period of limitation against A, it will not extend the period of limitation against C, D and E.[22]

19. **Payment by Court.** — See Note 18.

20. **Payment by husband or wife.** — See Note 18.

21. **Payment by pleader.** — A payment by a pleader duly authorized to make the payment will give a fresh starting point of limitation.[1]

22. **Payment by receiver.** — In *Chinnery* v. *Evans*,[1] M, who was the owner of three counties, Cork, Kerry and Limerick, mortgaged them to F. Interest having fallen due, F applied and got a receiver appointed in respect of the properties. The receiver took possession of the property in the county of Limerick and from out of the rents received paid F towards the interest on his mortgage. It was held that the receiver must be considered to be the agent of M and that the payment would save limitation against F. The Lord Chancellor observed as follows:

> "Upon that point, I think no reasonable doubt can be entertained that, under the Statute (S. 40, 3 & 4 Will. IV, Chap. 27) the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver *in pursuance of the order* is payment in law by the legal agent of the person liable to pay. I have no doubt, therefore, and I submit to your Lordships that no reasonable doubt can be entertained as to the mortgagee's security affecting all the lands originally comprised in it in those three separate counties of Cork, Kerry and Limerick."

This decision was followed by the Madras High Court in *Venkataramayya* v. *Subramaniyam*.[2] In that case a receiver who was appointed in a suit for partition and administration and who was authorized by the order of appointment to pay interest on debts, made such a payment. It was held that the payment was sufficient to keep the debt alive against all the parties who were bound by the debts. But where a receiver appointed in a suit for a dissolution of partnership was not authorised to keep any debt alive, his powers being limited to collecting outstandings and doing all things necessary for the realisation and preservation of the assets, it was held by the Chief Court of Lower Burma that the receiver had no authority to keep the debt alive by an acknowledgment.[3]

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[22] ('41) 28 AIR 1941 Mad 6 (16) (DB), *Thinnappa Chettiar* v. *Krishna Rao*.

Note 21

[1] ('16) 3 AIR 1916 Cal 173 (174) : 32 Ind Cas 358 (DB), *Basdeo Narain* v. *Bachan Choudhurani*.

Note 22

[1] (1864) 145 R R 79 (85) : 11 H L C 115 : 10 Jour (N S) 855 : 13 W R 20 : 11 L T 68.

[2] ('15) 2 AIR 1915 Mad 137 (143) : 26 Ind Cas 393.

[*See also* ('37) 24 AIR 1937 Mad 764 (765) : 174 Ind Cas 22, *Krishnayya* v. *Seetha Ramayya*. (Receiver appointed in suit for dissolution of partnership — Receiver given authority to pay debts of firm — Part payment by receiver is within his authority.)]

23. "Fresh period"—Computation of.— Since it is the *payment* that saves limitation, the fresh period must be computed from the date of payment and not from the date of the writing evidencing such payment.[1]

24. Proviso — "Appears in the handwriting of, or in a writing signed by." — The proviso requires that the fact of the payment must appear in the handwriting of or in a writing signed by the person making the payment. The object of this requirement is to exclude fraudulent oral testimony as to payment.[1]

Before the Limitation (Amendment) Act I of 1927, the proviso to the section ran as follows:

> "Provided that, in the case of a part payment of a principal of a debt the fact of the payment appears in the handwriting of the person making the same."

A payment of interest as such was not required to be in the handwriting of the person making the payment.[2] Thus, where money was paid by the judgment-debtor to the decree-holder for interest and was certified by the decree-holder, such payment would extend the time even though there was no writing in the handwriting of, or signed by, the judgment-debtor evidencing the payment. As regards a part payment of a principal of a debt, the proviso required the

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[3] ('15) 2 AIR 1915 Low Bur 63 (64) : 29 Ind Cas 27 : 8 Low Bur Rul 159 (DB), *S. M. A. Chetty* v. *M. L. R. M. A. Chetty*.

Note 23

[1] ('10) 8 Ind Cas 349 (349) (DB) (Mad), *Lakshiminarasimham* v. *Bharata*.
[*See* ('29) 16 AIR 1929 Mad 432 (438) : 117 Ind Cas 124 (DB), *Ammayi* v. *Sundayya*.]
[*See also* ('38) 25 AIR 1938 Lah 570 (571) : 178 Ind Cas 597, *Bhagat Ram* v. *Ralla Ram*. (Mortgage bond providing that in case of default of payment of interest for three years, the mortgagee would become entitled to realise the whole amount — Default made for more than three years — Subsequent payment of entire arrears of interest — *Held* there was no waiver of the default clause and that the payment would only give the plaintiff a fresh period of limitation under this section from the date of payment but would not postpone the starting point of limitation till there was again default for three years in payment of interest.)]

Note 24

[1] ('21) 8 AIR 1921 Mad 704 (706) : 68 Ind Cas 100 : 44 Mad 971 (DB), *Govindasamy Pillai* v. *Desai Goundan*.

[2] ('15) 2 AIR 1915 Mad 726 (726) : 26 Ind Cas 507, *Muthu* v. *Sandanam*.
('97) 1 Cal W N ccxxix (ccxxx), *Amrita Shaha* v. *Panchkoni Shaha*.

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fact to appear in the *handwriting* of the person making the payment.[2a] This requirement gave rise to a difference of opinion as to whether, where a payment was written by one person and signed by the person making the payment, it could be said that the fact of payment appeared "in the handwriting of the person making the payment."[3] There was also room for doubt on the question whether in the case of *illiterate* persons who have made their mark below the entry of the fact of payment in the handwriting of a third person, it could be considered to be in the handwriting of the person making the payment, though it was held that it could be so considered.[4]

[2a] ('86) 1886 Pun Re No. 61, *Chajju* v. *Gulab*. (Part payment towards decree debt—No record.)

('80) 6 Bom 103 (106), *Narronji Bhimji* v. *Mugniram Chandaji*. (Defendant credited with surplus proceeds of goods and of a hundi.)

('22) 9 AIR 1922 Pat 446 (447), *Ambika Prasad* v. *Gaya Loan Office Ltd.*

('25) 12 AIR 1925 Pat 806 (807) : 88 Ind Cas 747, *Dansfor* v. *Shaw & Co.*

('12) 14 Ind Cas 335 (339) (Lah), *Ram Das* v. *Kanshi Ram*. (Unsigned deposition alleging part payment—Fact of payment did not appear in the handwriting.)

('23) 10 AIR 1923 Bom 207 (207, 208) : 72 Ind Cas 275 (DB), *Hansraj* v. *Bapu Krishaswami*.

('25) 12 AIR 1925 Oudh 34 (35) : 79 Ind Cas 848 (DB), *Mt. Mohanya* v. *Panna Lal*.

('17) 4 AIR 1917 Cal 12 (12) : 38 Ind Cas 293 (DB), *Kunja Behari* v. *Jogendra*. (35 Ind Cas 177 followed.)

[3] ***No. It did not.***

('15) 2 AIR 1915 Mad 726 (726) : 26 Ind Cas 507, *Muthu Pillai* v. *Sandanam Pillai*.

('18) 5 AIR 1918 Cal 49 (50) : 47 Ind Cas 800 (DB), *Baliram Koch* v. *Sabha*. (There was neither signature nor mark.)

('17) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrisnhiah* v. *Subbrayudu*. (But it may serve as acknowledgment under S. 19.)

('16) 3 AIR 1916 Bom 125 (125) : 41 Bom 166 : 38 Ind Cas 359 (DB), *Nivajkhan Nathakhan* v. *Dadabhai Mussee Valli*.

('30) 17 AIR 1930 Rang 64 (65) : 126 Ind Cas 540 (DB), *Maung Tun Hlaing* v. *U Aung Gyaw*.

('21) 8 AIR 1921 Nag 46 (48) : 17 Nag L R 40 : 62 Ind Cas 297 (DB), *Bisheshwar Das* v. *Madho Rao*.

('08) 35 Cal 813 (818) : 4 Ind Cas 321 (DB), *Santishwar* v. *Lakhikanta*.

('15) 2 AIR 1915 Mad 101 (102, 103) : 21 Ind Cas 302 (305) : 38 Mad 438 (DB), *Lodd Govinda Das Krishna Das* v. *Rukmani*.

('09) 4 Ind Cas 374 (375) : 5 Low Bur Rul 108, *Arunachellam* v. *Ismail*. (1884 Pun Re No. 99 dissented from.)

('96) 23 Cal 546 (552, 553) (FB), *Haji Rahmuttulla* v. *Cooverji Bhuja*.

Yes. It did.

('84) 7 Mad 55 (56) (DB), *Sesha* v. *Seshaya*.

('84) 7 Mad 76 (80) : 7 Ind Jur 596 (DB), *Ellappa* v/ *Annamalai*.

('28) 15 AIR 1928 Bom 417 (418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Harigovind* v. *Gangubai Balwant*.

('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devichand* v. *Jamshedji*. (Two joint debtors—Fact of payment recorded in handwriting of one but signed by both—*Held*, it was sufficient acknowledgment.)

('03) 28 Bom 262 (264) : 5 Bom L R 1031 (DB), *Jamna* v. *Jaga Bhana*.

('30) 17 AIR 1930 Pat 372 (375) : 126 Ind Cas 898 : 9 Pat 851 (DB), *Kesarichand Johr Mull* v. *Mukteswar Trigunait*. (Signature of person making payment on cheque is sufficient compliance with the proviso.)

('17) 4 AIR 1917 All 465 (466) : 35 Ind Cas 199 : 39 All 33 (DB), *Bank of Multan Ltd.* v. *Kamta Prasad*. (Deposition of debtor signed by him is not evidence of part payment so as to save limitation.)

('84) 1884 Pun Re No. 99, *Narasingh Das* v. *Bachatar Singh*. (Proviso is satisfied by attaching signature.)

The amendment of the proviso has now set the matter at rest. Every payment must now appear in the handwriting of, or in a writing signed by, the person making the payment.[4a] Thus, the mere fact that a decree-holder certifies a payment for interest made by the judgment-debtor will not now extend the time in favour of the decree-holder unless the payment is evidenced by a writing or signature as aforesaid.[5] The amendment making it sufficient that the writing should be *signed* by the debtor is, to that extent, in favour of the creditor who is not able to prove the writing of the debtor relating to the fact of payment.[6]

Under S. 3, cl. (52) of the General Clauses Act, 1897 "signature" includes mark and consequently, if a writing evidencing the fact of payment is subscribed to by the mark of an illiterate person making the payment, it would be a writing signed by him within the meaning of this section.[7] It has been held by the High Court of Calcutta that where it is customary for the scribe to write the payment and to sign it also on behalf of the illiterate person making the payment who touches the pen, the writing would be regarded as being signed by him even though not even a mark had been made by the illiterate person.[8] The High Court of Lahore has, however, held that an endorsement by another person at the instance of the person making the payment does not comply with the words of this section.[9] Where S, an illiterate

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[4] ('28) 15 AIR 1928 Bom 417 (417, 418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Gobind* v. *Gangubai Balwant*. (Yes.)

('21) 8 AIR 1921 Pat 476 (477) : 62 Ind Cas 644, *Sri Ram Singh* v. *Kashi Mollah*. (Yes.)

('11) 12 Ind Cas 23 (23, 24) (Low Bur), *Maung Aung Do* v. *Esoof Ali*. (Yes.)

[*See* ('74) 7 Mad H C R 358 (358), *Bheemangowda* v. *Eeranah*. (Yes.)]

[4a] ('34) 21 AIR 1934 Rang 227 (228) : 151 Ind Cas 426, *P. S. A. Alagan* v. *Maung Po Peck*.

[5] ('33) 20 AIR 1933 All 49 (49) : 143 Ind Cas 324 (DB), *Jai Karan* v. *Panchaiti Akhara Chota Naya Udasi Nanak Shahi*.

[6] ('39) 26 AIR 1939 Rang 112 (113) : 181 Ind Cas 393, *U Paw Tint* v. *U Than Daing*. (Creditor writing endorsement and debtor signing it.)

('33) 20 AIR 1933 Lah 341 (342) : 14 Lah 580 : 141 Ind Cas 611, *Jagtu Mal-Sada Sukhrai* v. *Charanji Lal-Fakirchand*.

[7] ('28) 15 AIR 1928 Bom 417 (418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Govind* v. *Gangubai*. (A I R 1916 Bom 125 followed.)

[*See* ('18) 5 AIR 1918 Cal 49 (50) : 44 Ind Cas 516, *Baliram Koch* v. *Sabha Sheikh*. (28 Bom 262 referred to.)]

[8] ('32) 19 AIR 1932 Cal 440 (441) : 137 Ind Cas 788, *Rajani Mandal* v. *Digindra*. (Provision in General Clauses Act that definition of "sign" includes "mark" does not limit the possible ways of signing documents—A I R 1921 Pat 476 followed ; A I R 1918 Cal 49 not followed.)

[9] ('28) 15 AIR 1928 Lah 157 (157) : 108 Ind Cas 727, *Ganga Ram* v. *Nikkasingh*. (A I R 1918 Cal 49 followed ; A I R 1921 Pat 476 not followed.)

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person, touched a pen and passed it to B who wrote "22nd March 1930; S paid rupee one," and then wrote his own signature as scribe but not on behalf of S, it was held by the High Court of Madras that the endorsement could not be considered to be signed by S and did not save limitation.[10]

In the undermentioned case,[10a] it was doubted whether a single signature in regard to endorsements referring to a series of payments made at different times would suffice to comply with the provisions of the proviso.

The same document can be treated as evidence of the fact of payment as well as an acknowledgment of the payment.[11] Thus, where a debtor sends a money order to the creditor and writes in the coupon that the amount should be credited to the debt, the fact of payment can be said to "appear in the handwriting of the person making the payment" within the meaning of this section.[11a] Where a cheque signed by the debtor is given as a payment, it must be deemed that by reason of the signature on the cheque, the fact of payment appears in the handwriting of or signed by the person making the payment.[12] It was, however, held in the undermentioned case[13] that the mere endorsement of a *hundi* by the debtor in favour of the creditor is not sufficient to give a fresh starting point of limitation. But the decision proceeded on the view that it was necessary under the section that the writing must itself show that the payment was *for part* of principal. As has been shown below, this view has generally been dissented from.

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[10] ('35) 22 AIR 1935 Mad 1047 (1048) : 159 Ind Cas 158, *Karuppayya* v. *Subbayya*. (A I R 1932 Cal 440 distinguished.)

[10a] ('39) 26 AIR 1939 Rang 118 (120) : 181 Ind Cas 765, *U Po Nyun* v. *Ma Ah Ma*.

[11] ('38) 25 AIR 1938 Cal 538 (541) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jotindra Nath*. (Cheque may be payment as well as acknowledgment of payment.)

[11a] ('30) 17 AIR 1930 All 123 (124) : 124 Ind Cas 22, *Ram Sarup* v. *Muhammad Ubaidullah Khan*. (A I R 1926 Cal 510 followed.)

('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah* v. *Dakkhini Din*.

[12] ('33) 20 AIR 1933 Lah 741 (742) : 144 Ind Cas 641 (DB), *Dial Singh* v. *Davindar*.

('33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611, *Jagtu Mal-Sada Sukhrai* v. *Charanji Lal-Fakirchand*.

[*See* ('38) 25 AIR 1938 Cal 538 (540) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath*. (Cheque accepted by payee operates as payment as well as acknowledgment of payment in the handwriting of the person making the payment.)

('16) 3 AIR 1916 Cal 580 (580) : 42 Cal 1043 : 31 Ind Cas 626 (DB), *Kedar Nath* v. *Denobhandu Shaha*.]

[13] ('97) 19 All 307 (307) : 1897 All W N 49 (DB), *Ram Chandar* v. *Chandi Prasad*. (9 Mad 271 followed.)

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A part payment made and endorsed by the judgment-debtor on the decree will give a fresh starting point of limitation.[13a]

It is only the fact of *payment* that must appear in the handwriting of, or under the signature of the person making the payment; it is not necessary to state that such payment is towards principal or interest.[14] In *Rama Shah* v. *Lal Chand*,[14a] their Lordships of the Privy Council observed as follows :

> "Stress was laid on the change in the proviso from 'the fact of the payment appears' to 'an acknowledgment of the payment appears,' but neither expression affords, in their Lordships' opinion, any ground for holding that the character of the payment, as intended to go towards interest or towards principal, must appear by the writing. . . ."

Hence, evidence *aliunde* to show that the payment was stated at the time of the payment by the debtor to be for interest or for principal, may be let in and is not prohibited by Ss. 91 and 92 of the Evidence Act.[15] The fact that there was a debt and that such debt

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13a. ('82) 5 All 201 (207) : 1882 All W N 221 (DB), *Janki Prasad* v. *Ghulam Ali.* (7 Cal 56 distinguished.)

14. ('38) 25 AIR 1938 Cal 538 (540) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath.* (Cheque accepted by payee operates as payment as well as acknowledgment of payment in the handwriting of person making payment.)

('38) 25 AIR 1938 Lah 347 (348) : 181 Ind Cas 82, *Jawahir Singh* v. *Ghulam Hassan.*

('38) 25 AIR 1938 Mad 601 (601, 602) : I L R (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar* v. *Thevammal.* (Creditor can show by extrinsic evidence that payment made was payment towards interest as such.)

('83) 6 Mad 281 (283) (DB), *Ankamma* v. *Rama Sastrulu.*

('30) 17 AIR 1930 All 392 (394, 395) : 52 All 459 (DB), *Singh & Co.* v. *Sircar & Co.*

('36) 23 AIR 1936 Mad 848 (851) : 165 Ind Cas 225, *Kandaswamy* v. *Thevammal.*

('21) 8 AIR 1921 All 335 (337) : 43 All 216 : 59 Ind Cas 941 (DB), *Curlendar* v. *Abdul Hamid.* (Only fact of payment should appear in the handwriting.)

('20) 7 AIR 1920 Bom 413 (414) : 44 Bom 392 : 56 Ind Cas 429 (DB), *Sakaram Manchand Gujar* v. *Keval Padmasi Gujar.* (Do.)

('96) 23 Cal 592 (599), *In the matter of Ambrose Summers.* (Do.)

('02) 6 Cal W N 218 (222, 223) (DB), *Mandardar Aitch* v. *Secy. of State.*

('04) 1904 Pun Re No. 84, *Buta* v. *Parama Nand.*

14a. ('40) 27 AIR 1940 P C 63 (67): I L R (1940) Lah 470: I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC).

15. ('37) 24 AIR 1937 All 640 (640) : I L R (1937) All 732 : 171 Ind Cas 422, *Pearey Lal* v. *Muhammad Yusuf.* (Fact that endorsement does not mention what debtor said at the time may be ground for disbelieving such evidence.)

('32) 19 AIR 1932 Lah 212 (213) : 13 Lah 448 : 135 Ind Cas 673 (DB), *Bharat National Bank Ltd.* v. *Bhishan Lal.* (Writing need not show the *character* of the payment.)

('36) 23 AIR 1936 Mad 848 (851) : 165 Ind Cas 225, *Kandaswamy* v. *Thevammal.* (Do.)

exceeded the amount paid may be proved *aliunde* in order to show a part payment of principal.[16]

The undermentioned decisions[17] which held the contrary view, namely that the fact that the payment was a *part payment* or one towards interest should also appear in the handwriting of the person making the payment, are no longer good law in view of the Privy Council decision cited above.

It is only *for the purposes of section 20* that a payment towards a debt should be in the handwriting, etc., of the person making it; the creditor is not debarred from proving by evidence that a payment was made for his debt for other purposes such as that he had waived default of instalments due under an instalment bond.[18]

A part payment of the principal of a debt must appear in the handwriting of the person *making the part payment* and not in that of any other person, however authorised. Thus, where A makes a payment and B, under A's authority, makes an entry of the payment, such entry will not give a fresh starting point of limitation.[19]

[*See* ('38) 25 AIR 1938 Mad 601 (601) : I L R (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar* v. *Thevammal.* (Evidence to prove that payment was towards interest may be oral or documentary.)]

[16] ('36) 23 AIR 1936 Lah 629 (636) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar* v. *Ralia Ram.*

[17] ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand* v. *Surajpal Singh.* (Creditor cannot establish by evidence *aliunde* that payment was made towards interest.)

('39) 26 AIR 1939 Oudh 142 (143) : 14 Luck 456 : 180 Ind Cas 121 (DB), *Zaman Khan* v. *Ganga.* (Oral evidence is not admissible to prove that payment was towards interest.)

('37) 24 AIR 1937 Sind 95 (96) : 31 Sind L R 68 : 168 Ind Cas 820 (DB), *Hariram Dowlatram Firm* v. *Firm Ramsingh Gopal Singh.* (Payment of interest as such must be in writing—But not payment of principal as part principal.)

('86) 9 Mad 271 (273), *Mackenzie* v. *Tiruvengadathan.*

('97) 19 All 307 (307) : 1897 All W N 49 (DB), *Ram Chandar* v. *Chandi Prasad.*

('07) 9 Bom L R 1329 (1331), *Ranchordas* v. *Pestonji.*

('19) 6 AIR 1919 Mad 952 (953) : 43 Ind Cas 20 (DB), *Muthia Chettiar* v. *Kuttayyan.* (Not following 6 Mad 281.)

('94) 1894 Pun Re No. 124, p. 479, *Diwan Bhuta Singh* v. *Hukam Chand.* (Do.)

('97) 1897 Pun Re No. 1, *Sardar Bachattar Singh* v. *Jagan Nath.*

[18] ('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 : 130 Ind Cas 571 (DB), *Probhat Chandra* v. *Mohesh Chandra.* (A.I R 1925 Lah 394 followed.)

('25) 12 AIR 1925 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal* v. *Akki.* (1913 Pun Re No. 35 not followed.)

[19] ('96) 23 Cal 546 (553) (FB), *Mukhi Haji Rahmatulla* v. *Cooverji Bhuja.*

('07) 29 All 773 (779) : 1907 All W N 263 : 4 All L Jour 628 (DB), *Dharam Das* v. *Ganga Devi.*

('16) 3 AIR 1916 Pat 326 (327) : 35 Ind Cas 375 : 1 Pat L Jour 474 (DB), *Bishun Parkhash Narain Singh* v. *Muhammad Sadique.*

('01) 26 Bom 246 (249, 250) : 3 Bom L R 834 (DB), *Bhaishankar* v. *Bai Parvathi.*

Under the proviso, acknowledgment is not of the debt but of the payment. Hence, if once limitation is saved by the part payment made by the debtor, he is liable for any sum which the Court after investigation finds to be due.[20]

The proviso applies only to sub-s. (1) and not to sub-s. (2).[21]

25. Payment and writing need not be simultaneous. — The word "acknowledgment" does not imply that the acknowledgment of the payment must be made *after* the payment — both may be simultaneous.[1] At the same time, it is not necessary that the writing acknowledging the payment *must* be *simultaneous* with the payment. It may be made later.[2] The acknowledgment is a mere matter of evidence[3] and provided it is signed before the suit is commenced, it is sufficient.[4] It is the *payment* and not the acknowledgment that extends the time and, therefore, if the payment is made within the time fixed, it is sufficient to extend time though the acknowledgment is made after such period.[5] But an acknowledgment of a payment in

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('18) 5 AIR 1918 Pat 95 (96) : 48 Ind Cas 728 : 4 Pat L Jour 365 (DB), *Manindra Nath Roy* v. *Kanhairam Marwari.*

('20) 7 AIR 1920 Pat 445 (446) : 54 Ind Cas 802, *Banwari Lal* v. *Ramchandra.* (Part payment by agent must appear in his hand—Principal's writing is not required—Agent's authority to pay must be proved.)

[20] ('38) 25 AIR 1938 Cal 538 (540) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath.*

[21] ('40) 27 AIR 1940 Pat 512 (513) : 187 Ind Cas 484 (DB), *Mathura Singh* v. *Palakdhari Rai.*

Note 25

[1] ('38) 25 AIR 1938 Cal 538 (539) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra* v. *Jatindra Nath.*

[2] ('40) 27 AIR 1940 Oudh 177 (178) : 186 Ind Cas 163, *Mahabali* v. *Ram Das.* (But should be made before the time when an application for execution or a suit is filed.)

('94) 17 Mad 92 (94) (DB), *Venkatasubba* v. *Appasundaram.*

('31) 18 AIR 1931 All 375 (376) : 131 Ind Cas 867 (DB), *Ganesh* v. *Mallu Mal.* (A I R 1923 Nag 117 followed.)

('33) 20 AIR 1933 Bom 252 (253) : 57 Bom 453 : 144 Ind Cas 990 (DB), *Viswanath* v. *Mahadeo.*

('37) 24 AIR 1937 Cal 284 (288) : 172 Ind Cas 362 : ILR (1937) 2 Cal 137 (DB), *Md. Moizuddin* v. *Nalini Bala Devi.*

('29) 16 AIR 1929 Cal 714 (715) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd.* v. *Jatindra Nath Mazumdar.*

[3] ('33) 20 AIR 1933 Bom 252 (253) : 57 Bom 453 : 144 Ind Cas 990 (DB), *Viswanath* v. *Mahadeo.*

[4] ('37) 24 AIR 1937 Cal 284 (288) : 172 Ind Cas 362 : ILR (1937) 2 Cal 137 (DB), *Md. Moizuddin* v. *Nalini Bala Devi.* (A I R 1933 Bom 252 followed.)

[5] ('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah* v. *Lal Chand.*

('40) 27 AIR 1940 Oudh 177 (177) : 186 Ind Cas 163, *Mahabali* v. *Ram Dass.*

('39) 26 AIR 1939 Rang 118 (119) : 181 Ind Cas 765, *U Po Nyun* v. *Ma Ah Ma.*

('37) 24 AIR 1937 Cal 284 (288) : 172 Ind Cas 362 : ILR (1937) 2 Cal 137 (DB), *Md. Moizuddin* v. *Nalini Bala Devi.*

the written statement filed in the suit itself cannot be called in aid for the purpose of this section, the reason being that the suit must be tried on the cause of action as laid in the plaint and an inherent defect, such as the suit being out of time (nothing being said in the plaint as to how it is not barred), cannot be supplied by the written statement.[6]

26. Signature must have reference to the acknowledgment of payment. — It is the *acknowledgment* of the payment that must be signed by the person making the payment. Where therefore a person making a payment signs his name and afterwards, another person, without either consulting the person making the payment or getting his authorisation, writes the endorsement of payment over the signature, such a writing with the signature will not save limitation under the proviso.[1]

27. Proviso—"Person making the payment."—The words "the person making the payment" do not necessarily mean the person who *physically* hands over the money. Thus, where A sends money by his servant or through post to B, it is not the servant or the postman who makes the payment, but A.[1] N was the officer of S and a payment was made towards a debt when the creditor, N and S were all present, and an endorsement was written by N purporting to be by S. It was held that it was needless to investigate whether the money was handed

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('23) 10 AIR 1923 Nag 117 (118) : 71 Ind Cas 17 : 19 Nag L R 6 (DB), *Ram Prasad* v. *Mohan*.

('33) 20 AIR 1933 All 363 (364) : 55 All 280 : 146 Ind Cas 510, *Lal Singh* v. *Gulab Rai*. (A I R 1929 Mad 432; 17 Mad 92 and AIR 1923 Nag 117 followed.)

[*See* ('86) 9 All 108 (111) : 1886 All W N 310 (FB), *Jiwan Ali* v. *Basa Mal*.]

[6] ('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai* v. *Mehta & Co.*

Note 26

[1] ('34) 21 AIR 1934 Rang 287 (288) : 152 Ind Cas 501, *Talok Theingan* v. *Sevugan Chettyar*.

Note 27

[1] ('40) 27 AIR 1940 Mad 691 (693) : ILR (1940) Mad 913 (DB), *Vasireddi Balachandrasekhara* v. *Lakshminarasimham*. (Debtor sending money to his friend for payment to creditor — Friend sending same to creditor through messenger with letter to the effect that amount was sent by debtor for payment to him—Payment operates as acknowledgment within the meaning of S. 20.)

('39) 26 AIR 1939 Rang 118 (119) : 181 Ind Cas 765, *U Po Nyun* v. *Ma Ah Ma*. (But payment made by daughters of promisor not merely as his messengers but as independent persons—To save limitation, endorsements must each be written or signed by that one of them who made each payment.)

('26) 13 AIR 1926 Cal 510 (511) : 53 Cal 163 : 94 Ind Cas 657, *Ramkumar Sewchand* v. *Nanuram Poddar*. (The postman or peon is merely *conduit pipe* through which money passes to creditor.)

('21) 8 AIR 1921 Oudh 29 (30) : 61 Ind Cas 918, *Ram Kishan Das* v. *Shyam Sundar*. (A payment really made by an agent of the debtor does not cease to be made by debtor because the actual handing over of the money was done by some menial servant under his orders.)

('19) 6 AIR 1919 Cal 144 (147) : 50 Ind Cas 862 (DB), *Sarajubala Debi* v. *Saradanath Bhattacharjee*. (Payment through messenger.)

('20) 7 AIR 1920 Mad 352 (353) : 54 Ind Cas 318, *Duraisamy* v. *Krishnier*. (Payment through agent's servant.)

over by S to the creditor, or through the hand of his officer N, and that the payment must be held to have been made in such a manner that the entry might, if necessary, be made by N.[2]

28. Sub-section (2) — Mortgagee in possession. — Under the Act of 1871, there was no provision corresponding to sub-section (2) of the present section and it was held that a receipt of rents and profits by a mortgagee was not a *payment* of interest within the meaning of the section and could not save limitation.[1] Under the present sub-section, it is now provided that a receipt of rents or produce of land by a mortgagee thereof in possession shall be *deemed* to be a payment for the purposes of sub-section (1).[2] This does not mean, however, that such payment is subject to the conditions of sub-section (1) as to handwriting and signature.[3] The reason is that, in fact, there is no person at all making any payment in such a case. In *Erasa Menon* v. *Abdul Rahiman*,[4] their Lordships of the Madras High Court observed as follows:

> "We cannot accept the construction suggested that the receipt of rent mentioned in sub-section (2) is subject to the conditions mentioned in sub-section (1). If the argument put forward were sound, it would follow that if rent or produce received is appropriated towards the principal of the debt, the part

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[2] ('23) 10 AIR 1923 Cal 71 (74) : 72 Ind Cas 692 (DB), *Guljar Mandal* v. *Sariman.*

Note 28

[1] ('74) 1874 Pun Re No. 74, *Ram Kishen* v. *Nawab.* (In this case the produce was *not* received by a mortgagee *as such.*)

('80) 3 Mad 57 (59) : 2 Mad 165 (DB), *Ummer Kutti* v. *Abdul Kadar.* (Payment of rent under agreement independent of original mortgage.)

[See however ('13) 19 Ind Cas 238 (238) : 35 All 270 (DB), *Indrajit* v. *Gajadhar Sahai.* (Mortgage of 1850 — Realization of rents and profits in lieu of interest was treated as equivalent to receipt of interest as such.)]

[2] ('38) 25 AIR 1938 All 188 (191) : ILR (1938) All 218 : 174 Ind Cas 292 (DB), *Ram Kumar* v. *Mahpal Singh.* (Mortgagor in possession as tenant of mortgagee—Receipt of rent by mortgagee amounts to payment of interest as such.)

('22) 9 AIR 1922 Oudh 102 (104) : 65 I C 408, *Mahadev* v. *Sitla Bakhsh.*

('30) 17 AIR 1930 Oudh 178 (182) : 118 Ind Cas 835 : 5 Luck 53 (DB), *Mata Din* v. *Iftikhar Hussain.* (Receipt of rent relating to portion of mortgaged property saves limitation against entire property—AIR 1921 Bom 437 and AIR 1922 Cal 114 relied on.)

('24) 11 AIR 1924 Pat 169 (171) : 72 Ind Cas 492, *Foujdar Singh* v. *Baiju.* (Ijara lease — Ijardar allowed to hold over after expiry of lease and to receive produce in lieu of interest—Limitation is extended.)

[*See also* ('41) 28 AIR 1941 Mad 406 (407), *Kesavan Chettiar* v. *Ramaswami Chettiar.* (Receipt of rent is deemed to be payment because mortgagor himself consents to it in his contract with the mortgagee. It is thus acknowledgment, continually repeated so long as contract is in form, by mortgagor of mortgagee's claim under mortgage.)]

[3] *See* ('40) 27 AIR 1940 Pat 512 (513) : 187 Ind Cas 484 (DB), *Mathura Singh* v. *Palakdhari Rai.* (Proviso to sub-section (1) of this section does not apply to sub-section (2).)

[4] ('26) 13 AIR 1926 Mad 1061 (1064) : 97 Ind Cas 941.

> payment must appear in the handwriting of the person making the payment. Is there a person that makes a payment at all? *Ex hypothesi* there is no such person. Granting that the receipt of the rent by the mortgagee is to be treated as a payment by the mortgagor, is it reasonable to expect that such a payment should appear in the handwriting of the debtor? The object of the section is clearly to benefit the mortgagees in possession who receive the rent or produce from the land. This object will be clearly frustrated by adopting the construction suggested. Sub-section (1) contains four paragraphs and when in sub-section (2) it is said that the receipt shall be deemed to be a payment for the purpose of sub-section (1), it does not follow that the payment referred to must necessarily be that indicated in the first and second paragraphs alone of the first sub-section. We shall be giving effect to the intention of the Legislature by holding that the payment referred to is the payment mentioned in paragraph 3.
>
> "The section really refers to three things: (1) payment of interest on a debt or legacy by the debtor or his agent; (2) part payment of principal of a debt by the debtor or his agent; (3) receipt by mortgagee in possession of the rent or produce on the land. The meaning of the section is that a fresh period of limitation shall be computed from the time of such payment or receipt. This is the effect of the section, but as this idea is expressed in it in a somewhat different order, it has been found necessary to say that the receipt under sub-section (2) shall be deemed to be payment under sub-section (1)."

Where under a usufructuary mortgage the mortgagee is to take the usufruct for interest, the receipt of the usufruct will be deemed to be a payment only in respect of *that* mortgage and not in respect of any other simple mortgage which the mortgagee may have.[5]

Where H was a simple mortgagee and the mortgagor leased the property to G who was a son of H, H and G being members of a joint family, and G was authorised to pay the rents to H, it was held that the lease must be deemed to be in favour of the joint family and that the receipt of rents was tantamount to a payment of interest and principal as provided in the lease.[6]

A executes a usufructuary mortgage in favour of B providing that B shall pay Government revenue on the lands and appropriate the balance of the rents and profits towards interest. B leases it back to A for a certain rent and directs A to pay the Government revenue from out of the rent and pay the balance to him. A makes the payment. It must

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5. ('27) 14 AIR 1927 All 417 (418) : 100 Ind Cas 670 : 49 All 430 (DB), *Mt. Anpurna Kunwar* v. *Ram Padarath.*

6. ('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Pd.* v. *Baburam.*

be held that the revenue paid by A must be treated as rent received by the landlord B within the meaning of sub-section (2).[7]

In order that sub-section (2) may apply, it is not necessary that the mortgage should be a *usufructuary* one. It will apply whenever mortgaged land is, in fact, in the possession of the mortgagee whether the mortgage is a simple one or a usufructuary one,[8] but the receipts of rents and profits must be by "a mortgagee" i.e., by a mortgagee *as such.*

Illustrations.

1. A, the first mortgagee of a property sues on the mortgage without impleading B, the second mortgagee, buys the property at the execution sale which follows and enters into possession. Thereafter, B brings a suit on his mortgage, buys the property in the execution proceedings in such suit and obtains possession of the property. A, on thus being dispossessed, brings a suit for the enforcement of his mortgage against B. On a question of limitation, it was held by a single Judge of the Madras High Court that the rents and profits received by A while in possession were not received by him as a *mortgagee* as he had entered into possession as a purchaser.[9] The learned Judge distinguished this case from that in *Bama Charan* v. *Nimai*[9a] (on which the next illustration is based) on the ground that in that case the sale under which the mortgagee had entered into possession was inoperative. This view was, however, disapproved in a Division Bench ruling of the same High Court in a later case[9b] in which it was held that there was no distinction in principle between the above case and the Calcutta case referred to. Their Lordships seemed to think that both were cases of a mortgagee going into possession as an owner under an invalid title.

2. A, a simple mortgagee, obtains possession from the mortgagor in pursuance of an agreement of sale which is inoperative and invalid in law. In this case, the receipt of rents and profits can only be in the capacity of a mortgagee as such.[10]

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7. ('26) 13 AIR 1926 Mad 1061 (1063) : 97 I. C. 941 (DB), *Eressa Menon* v. *Abdul.* (Receipt of rent in sub-s. (2) is not subject to conditions mentioned in sub-s. (1).)

8. ('22) 9 AIR 1922 Cal 114 (115) : 64 Ind Cas 903 (DB), *Bama Charan* v. *Nimai.* (Sub-s. (2) does not refer expressly to the intention of party receiving the rent or produce.)

9. ('37) 24 AIR 1937 Mad 642 (643, 644) : 172 Ind Cas 576, *Mahomed Yusuf* v. *Narayana Pillai.*

9a. ('22) 9 AIR 1922 Cal 114 (115, 116) : 64 Ind Cas 903 (DB).

9b. ('41) 28 AIR 1941 Mad 475 (476) (DB), *Doraisami Naicken* v. *Peria Karuppan Chettiar.*

10. ('22) 9 AIR 1922 Cal 114 (115) : 64 Ind Cas 903 (DB), *Bama Charan* v. *Nimai.* [*See also* ('41) 28 AIR 1941 Mad 475 (476) (DB), *Doraisami Naicken* v. *Peria Karuppan Chettiar.* (Mortgagee in possession, after preliminary decree, under invalid contract of sale—Receipt of rents and profits saves limitation for application for final decree—This is a Letters Patent Appeal from and reversing AIR 1940 Mad 461.)]

3. A is in possession of land under a deed of usufructuary mortgage which is invalid for want of registration. A is not a mortgagee at all and his receipt of rents and profits is not one in the capacity of a mortgagee.[11]

4. A, a usufructuary mortgagee, receives the rents and profits, after a decree has been passed in his favour for sale of the mortgaged property. He must be taken to have received such profits as a mortgagee.[12]

5. On 21st August 1897 a *vatandar* executed a mortgage of his *vatan* land with possession in lieu of interest for a period of ten years; the mortgage deed contained also a personal covenant to pay the mortgage money. The mortgagor died on 24th February 1912, and in 1914 the mortgagee was dispossessed under the Bombay Hereditary Offices Act. In 1917 the mortgagee brought a suit to recover the money due on the mortgage under the personal covenant from the son of the deceased mortgagor. By virtue of the provisions contained in the Bombay Hereditary Offices Act, 1874, a mortgage of a *vatan* land comes to an end *at the death* of the mortgagor. It was held that the receipt of produce up to February 1912 was by the *mortgagee as such* and gave a fresh start of limitation.[13] But if the mortgagee were to bring his suit for enforcing the personal covenant on a date more than six years from the death of the mortgagor though within a short period of his dispossession, the receipt of the produce by him while he was in possession after the death of the mortgagor *will not give a fresh start of limitation*, as such receipt is not that of a mortgagee but is that of a trespasser.[14]

See also the undermentioned case.[15]

The sub-section applies only when the mortgagee is *in possession* and receives the rents and profits.[16] The mere receipt of the rents and profits by the mortgagee will not give a fresh start of limitation if he is not *in possession*. A mortgage deed provided that possession should be given to the mortgagee and that the mortgagee was to credit towards interest any rent realized from the mortgaged property. He was not given possession, but he received rent from tenants of the mortgaged property. It was held that such receipt did not save limitation under this section, as the condition as to *possession* under the mortgage deed was not satisfied.[17]

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[11] ('84) 7 Mad 539 (540) (DB), *Pichandi* v. *Kandasami*.

[12] ('05) 28 Mad 473 (478) : 15 Mad L Jour 126 (FB), *Vaidhinathasamy Iyer* v. *Somasundaram Pillai*.

('41) 28 AIR 1941 Mad 737 (739), *Ramaswami Chettiar* v. *Kesavan Chettiar*. (After decree, though rights of parties are governed by decree and not by contract, the parties do not cease to be mortgagor and mortgagee till sale or redemption. Reversing on Letters Patent Appeal A I R 1941 Mad 406.)

[13] ('21) 8 AIR 1921 Bom 437 (438) : 45 Bom 1206 : 63 Ind Cas 234 (DB), *Vithoba Mahipati* v. *Balkriskna Sakharam*. (Kulkarni vatan.)

[14] ('20) 7 AIR 1920 Bom 48 (49) : 44 Bom 500 : 57 Ind Cas 76 (DB), *Krishnaji Sakharam* v. *Kashim Mohideen*.

[15] ('40) 27 AIR 1940 Pat 494 (496) : 19 Pat 507 : 187 Ind Cas 266 (DB), *Maksudan Lal Sahu* v. *Niranjan Nath*. (Usufructuary mortgage in violation of S. 46 of Chota Nagpur Tenancy Act is void after five years from execution of mortgage—Possession of mortgagee afterwards is that of *trespasser* and his enjoyment of the rents and profits of the land afterwards is not sufficient to save limitation for suit for money by him.)

[16] *See* ('89) 1889 Bom P J 225 (DB), *Ramji* v. *Vaijanath*.

29. Explanation. — Before the explanation was added to the section in 1908, there was a conflict of opinion as to whether the word "debt" included a decree debt: the Allahabad High Court[1] and the Punjab Chief Court[1a] holding that it did, the High Courts of Calcutta[2] and Madras[3] holding that it did not. The conflict has now been set at rest by the addition of the explanation.

The word "decree" does not mean only a final decree capable of execution; it will include also a *preliminary* decree for sale, and time for an application for final decree may be extended by a payment for interest towards the preliminary decree.[4]

30. Decree-debt — Payment—Certification. — A payment towards a decree-debt, made out of Court, cannot be recognised by an executing Court for any purpose unless such payment has been certified to the Court under the provisions of O. 21 R. 2 of the Civil Procedure Code. Such certification may, however, be made even at the time of the execution petition and consequently the fact that the decree-holder has not certified that payment *earlier* is no obstacle to the application of this section.[1] But a certification cannot be made after the judgment-debtor has raised an objection that the application is barred by limitation.[1a] When certified the date of the payment for purposes of this section is not the date of the certification but the date of the actual payment.[2]

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[17] ('33) 20 AIR 1933 Lah 741 (742) : 144 I.C.641 (DB), *Dial Singh* v. *Davindar.*

Note 29

[1] ('03) 26 All 36 (39) : 1903 All W N 179 (DB), *Roshan Singh* v. *Mata Din.*
[*See* ('80) 3 All 247 (249, 250) (F B). *Rahmit Rai* v. *Satgur Rai.*]

[1a] ('86) 1886 Pun Re No. 61, *Chajju* v. *Gulab.* (Assumed.)

[2] ('79) 4 Cal 708 (709) (DB), *Mungol Prashad Dichit* v. *Shama Kanto Lahory.* (It means liability to pay money for which a suit can be brought.)
('77) 2 Cal 468 (469) (DB), *Kally Prosonno Huzra* v. *Heera Lall Mundle.*
('02) 6 Cal W N 766 (768) (DB), *Kader Baksh Sarkar* v. *Gour Kishore Roy.*

[3] ('04) 28 Mad 40 (41) (DB), *Srinivasachariar* v. *Punnuswamy Nadar.*
('04) 27 Mad 608 (608, 609) (DB), *Kuppusamy Chetty* v. *Rangasamy Pillai.*
[*See* ('02) 25 Mad 431 (442) : 12 Mad L Jour 166 (FB), *Periasamy* v. *Krishna.* (As judgment-creditor is one whose claim has been merged into a judgment against his debtor.)]

[4] ('27) 14 AIR 1927 All 159 (160) : 49 All 147 : 98 Ind Cas 818 (DB), *Baldeo Sahai* v. *Jafar Hussain.*

Note 30

[1] ('21) 8 AIR 1921 Cal 643 (643) : 64 I.C. 72 (DB), *Madan Mohan* v. *Haru Lal.*
('36) 23 AIR 1936 Nag 281 (281) : I L R (1937) Nag 106 : 165 Ind Cas 804, *Baijnath* v. *Kanhaiyalal.*

('25) 12 AIR 1925 Mad 131 (131) : 82 Ind Cas 743, *Narayana* v. *Raman.*

('19) 6 AIR 1919 Cal 677 (677) : 46 Cal 22 : 45 Ind Cas 903 (DB), *Jotindra Kumar Dass* v. *Gagan Chandra Pal.*

('19) 6 AIR 1919 Cal 181 (182) : 50 Ind Cas 242 (DB), *Bahuballav Roy* v. *Jogesh.*

('18) 5 AIR 1918 Cal 982 (983) : 35 Ind Cas 177 (DB), *Harendra* v. *Gagan.*

('16) 3 AIR 1916 Cal 451 (451, 452) : 43 Cal 207 : 34 Ind Cas 606 (DB), *Esuff* v. *Sanchialal.*

('18) 5 AIR 1918 Mad 620 (621,622) : 41 Ind Cas 701 : 41 Mad 251 (DB), *Masilamany Mudaliar* v. *Sethuswami Aiyar.*

('16) 3 AIR 1916 Mad 958 (959) : 31 Ind Cas 318 (DB), *Rajam* v. *Ananthavatnam.*

('15) 2 AIR 1915 Cal 235 (236) : 27 Ind Cas 11 (DB), *Lakhi Narain* v. *Felamani Dasi.*

('19) 6 AIR 1919 Sind 70 (72, 75) : 13 Sind L R 37 : 52 Ind Cas 804 (FB), *Shafi Mohamed* v. *Choithram.*

('20) 7 AIR 1920 Sind 23 (24) : 60 Ind Cas 935 : 14 Sind L R 198 (DB), *Pahlumal Tewanmal* v. *Sidik.* (Instalment decree — Payment of interest as such may be shown in execution application to extend period.)

('24) 11 AIR 1924 Lah 676 (677) : 75 Ind Cas 1029, *Fattu* v. *Nanakchand.* (Part payment of decree amount entered in execution petition amounts to certification.)

[*See also* ('33) 20 AIR 1933 Mad 674 (675) : 147 Ind Cas 586, *Chathukutty* v. *Raman.*

('29) 16 AIR 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnaswamy Kavirayer* v. *Periathambi Butler.* (Avowal by decree-holder in affidavit may be accepted as certificate.)

('15) 2 AIR 1915 Sind 48 (49) : 30 Ind Cas 51 : 9 Sind L R 27, *Narsoomal* v. *Thirathmal.*

('35) 22 AIR 1935 Mad 922 (923) : 159 Ind Cas 38, *Gangayya* v. *Seshagiri Rao.* (Material point is not when payment was certified but when it was made.)

('18) 5 AIR 1918 Oudh 460 (461) : 47 Ind Cas 177 : 21 Oudh Cas 161, *Haider Mirza* v. *Kailash Narain Dar.*

('21) 8 AIR 1921 Bom 411 (412) : 45 Bom 91 : 59 Ind Cas 399 (DB), *Pandurang Balkrishna* v. *Jagya Bhau.*

('19) 6 AIR 1919 Pat 136 (137) : 50 Ind Cas 364 : 4 Pat L Jour 159 (DB), *Elahi Bux* v. *Nawab Lall.*

('27) 14 AIR 1927 Oudh 7 (11) : 29 Oudh Cas 358 : 1 Luck 428 : 98 Ind Cas 353 (DB), *Parkash Singh* v. *Allahabad Bank Ltd.* (There is no limitation for certifying payment by decree-holder.)

('19) 6 AIR 1919 All 211 (212) : 52 Ind Cas 362 (DB), *Qadam Singh* v. *Nathu Singh.*

('16) 3 AIR 1916 Mad 795 (799) : 30 Ind Cas 357, *Lodd Govinda Dass* v. *Rajah of Karvetnagar.* (No particular words are necessary for certification.)]

[But see ('27) 14 AIR 1927 All 827 (828) : 100 Ind Cas 574 (DB), *Jawala Sahai* v. *Bhim Singh.* (Application to certify payment must be made by prior and separate proceeding—Decision to be held not good law after A I R 1928 All 629 (FB).)]

[1a] ('40) 27 AIR 1940 Pat 594 (594, 595):190 Ind Cas 760, *Bhobani Naik* v. *Balaram Dhal.* (A I R 1928 All 629 (FB) followed.)

[2] ('25) 12 AIR 1925 All 802 (804) : 47 All 873 : 89 Ind Cas 415 (DB), *Amar Singh* v. *Mt. Ram Dei.*

A contrary view that a fresh period of limitation would run only from the date of *certification* has been held in the undermentioned case,[3] the reason given being that to take it otherwise would be to recognise an uncertified payment. The certification must in any case be within three years of the date of the *payment* though more than three years after the date of the decree or the last starting point of limitation; the reason is that otherwise the execution application would itself be barred under Art. 182 of the Act.[4] See also Note 3 to Art. 174, Note 18 to Art. 181 and Note 124 to Art. 182.

See also the Authors' Commentary on the Civil Procedure Code, 3rd Edition, Order 21 Rule 2, Note 27.

31. Nature of liability affected by payment.—A payment by a mortgagor towards the mortgage debt keeps alive the *mortgage* itself as against him and not merely his personal liability.[1] A part payment of principal and interest due under a bond will not, however, give a fresh starting point of limitation in respect of a claim for *damages* for non-payment of principal and interest on the due date, inasmuch as the liability for damages forms no part of the original liability under the bond.[2]

32. Question, what a sum of money was paid for, is one of fact.— The question what a particular sum of money is paid

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('28) 15 AIR 1928 All 629 (632) : 51 All 237 : 112 Ind Cas 73 (FB), ***Joti Prasad* v. *Sri Chand.*** **(A I R 1928 All 55 not followed.)**

('35) 22 AIR 1935 Mad 922 (923) : 159 Ind Cas 38, ***Gengayya* v. *Seshagiri Rao.*** **(Material point is not when payment was certified but when it was made.)**

('19) 6 AIR 1919 Sind 70 (72, 75) : 13 Sind L R 37 : 52 Ind Cas 804 (FB), ***Shafi Muhammad* v. *Choithram.***

('31) 18 AIR 1931 Cal 719 (721) : 134 Ind Cas 922 : 59 Cal 760 (FB), ***Amar Krishna* v. *Jagat Bandhu.***

[*See also* ('25) 12 AIR 1925 Cal 1012 (1013) : 86 Ind Cas 1051 : 54 Cal 143 (DB), ***Jalim Chand* v. *Yusufali Choudhury.***

('30) 17 AIR 1930 All 123 (124) : 124 Ind Cas 22, ***Ram Sarup* v. *Mahomed Obaidulla.*]**

3. ('24) 11 AIR 1924 Oudh 392 (392) : 79 Ind Cas 799, ***Janwanti Kuuwar* v. *Mohan Dei.*** **(Certification after three years from date of decree—Section 20 does not apply—A I R 1914 All 235 followed.)**

4. ('25) 12 AIR 1925 Rang 26 (27) : 2 Rang 393, ***Maung Law* v. *Maung Po.*** **(AIR 1915 Cal 285 and A I R 1919 Cal 677, followed.)**

('19) 6 AIR 1919 Cal 181 (182) : 50 Ind Cas 242 (DB), ***Bahuballav* v. *Jogesh Chandra.***

('25) 12 AIR 1925 Cal 1012 (1014) : 54 Cal 143 (DB), ***Jalim* v. *Yusufali.***

('27) 14 AIR 1927 Cal 29 (29) : 98 Ind Cas 825 (DB), ***Rebati Mohan* v. *Alauddin.*** **[*See* ('33) 20 AIR 1933 Sind 365 (366) : 147 Ind Cas 30 (DB),** ***Kaliandas Balchand* v. *Mahomed Khan.*]**

Note 31

1. ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), ***Ghasi Khan* v. *Kishori.*** **(Payment by one of two co-mortgagors.)**

2. ('92) 1892 All W N 239 (239) (DB), ***Gurdayal Singh* v. *Chatarbhuj.***

for is *prima facie* a question of fact and not of law.[1]

33. Second appeal. — The question whether money was paid for interest as such or for part payment of principal necessarily involves the determination of a question of fact and therefore cannot be allowed for the first time in second appeal.[1]

34. Unregistered endorsement of payments. — Endorsements on mortgage documents acknowledging the payment of a part of the mortgage money fall within the scope of S. 17, sub-s. (2), clause (11), Registration Act, and are admissible in evidence to prove the discharge of the mortgage *pro tanto* without registration.[1]

35. Burden of proof.—Where a suit is *prima facie* barred by limitation according to the period fixed in the first schedule, it is for the plaintiff to show that it is not barred by virtue of a payment made under this section.[1] Under O. 7 R. 6 of the Civil Procedure Code, where a suit is *prima facie* barred according to the period prescribed by the first schedule, the plaintiff has to state in his plaint the reasons why

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Note 32

[1] ('28) 15 AIR 1928 P C 243 (245) : 111 Ind Cas 288 : 55 Ind App 380 (PC), *Narendra Nath Datta* v. *Abul Hakim*.

('26) 13 AIR 1926 Mad 183 (183) : 92 Ind Cas 687, *Subbayya* v. *Gangayya*. (Whether payment was made on account of interest.)

('26) 13 AIR 1926 Nag 245 (246): 91 Ind Cas 200 (DB), *Gulam Abbas* v. *Govindrao*. (The finding that certain payments made by the mortgagors must be considered as payments towards interest as such is a question of fact.)

('09) 1 Ind Cas 137 (139) : 31 All 285 (DB), *Gopi Nath Singh* v. *Hardeo Singh*. (5 Bom L R 350 followed.)

[*See* ('82) 4 All 512 (514) (DB), *Surju Prasad Singh* v. *Khwahish Ali*.

('19) 6 AIR 1919 Cal 1028 (1028) : 46 Ind Cas 532 (DB), *Sivakumari* v. *Bishawambar*. (Court can presume from facts whether payments were made towards interest.)]

Note 33

[1] ('23) 10 AIR 1923 Bom 82 (83) : 76 Ind Cas 115 : 47 Bom 128 (DB), *Satappa* v. *Annappa*.

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (709), *Jago* v. *Mahadeo*.

Note 34

[1] ('18) 5 AIR 1918 Mad 645 (645) : 40 Ind Cas 893 (DB), *Bommana* v. *Ankayya*. (A I R 1915 Mad 914 distinguished.)

Note 35

[1] ('34) 21 AIR 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram* v. *Mt. Mahmudi*.

('34) 21 AIR 1934 Mad 549 (550) : 152 Ind Cas 299 (DB), *Valliappa* v. *Maruda*.

('30) 17 AIR 1930 Mad 738 (740) : 127 Ind Cas 641, *Lokanadha* v. *Lokhono*.

('30) 122 Ind Cas 626 (627) (DB) (Cal), *Baradakanta Roy* v. *Jatindra Nath*.

('27) 14 AIR 1927 Rang 255 (256) : 104 Ind Cas 368 (DB), *Ahmedsa Rowther* v. *Maung San Nyen*. (Promissory note bearing two endorsements, as to same payment, on different dates — Plaintiff must prove correctness of date bringing his suit within time.)

the suit is within time.[2] If there is no such statement the Court has to dismiss the suit.[3]

The admission made by the promisor on the back of a promissory note to the effect that part payment was made by him on a particular date, must be presumed to be true, for, it has been said that what a man admits to be true must reasonably be presumed to be true; the admission shifts the burden on the person making it of showing that this admission was untrue in fact or was under circumstances which did not make the admission binding upon him.[4]

It has been held in the undermentioned case[5] that if a payment towards the debt is shown to have been made, it is not necessary to show whether it is towards the principal or interest. This view clearly goes against the decision of the Privy Council in A I R 1940 P. C. 63 (67)[5a] and is not correct. It is for the plaintiff claiming extension of time to show that the payment by the defendant is of such a nature as would extend limitation under this section.[6] He must therefore show not only that the payment was made within the prescribed period but also that it was made with the intention of paying it for interest or for part of the principal, or, where the debtor had not indicated his intention in this respect, that the creditor had appropriated the payment towards the principal.[7] He must also show, where the payment is made by a person other than the debtor, that such person was an agent duly authorised by the debtor to make the payment.[8]

36. Article 75 and this section. — Article 75 provides that in the case of suits on promissory notes or bonds payable by instalments which provide that if default be made in one or more instalments the whole shall become due, the suit should be filed within three years of the *date of default*, unless the payee or the obligee waives the benefit of the provision, in which case the suit should be filed within three years of the date when fresh default is made in respect of which there is no such waiver. Where payments of certain instalments are made and are accepted by the creditor, time will run from the date of the default of the next instalment. There is no need in such a case to resort to S. 20 and show that by reason of earlier payments the limitation is extended under this section.[1] In other words, this section has no application to cases falling within Art. 75.[2] The question when a default was made will, however, involve a determination of the question whether any earlier payments were made and accepted by the creditor. In order to prove such payments, it is not necessary that the payment should be in the handwriting of or in a writing signed by the person making the payment. As has been seen in Note 24, it is only *for the purposes of section 20* that a payment towards the debt should be in the handwriting of the person making it; the creditor is not debarred from proving by evidence that a payment of certain instalments was made for his debt and that he had waived the default in respect of such instalments.[3]

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[2] ('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.* (Written statement cannot be called in aid.)
('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (710), *Jago* v. *Mahadeo.*
('35) 22 AIR 1935 Cal 648 (648): 158 I.C. 512, *Ananda Charan* v. *Jhatu Charan.*

[3] ('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros.* v. *R. D. Mehta & Co.*
[*See* ('10) 7 Ind Cas 455 (456) : 34 Bom 540 (DB), *Ghulam Hussain* v. *Muhammadali.* (Plaint not in accordance with law.)]

[4] ('37) 24 AIR 1937 Cal 284 (287) : ILR (1937) 2 Cal 137 : 172 Ind Cas 362 (DB), *Md. Moizuddin* v. *Nalini Bala Devi.* (29 All 184 (PC) relied on.)

[5] ('39) 26 AIR 1939 Nag 156 (158) : ILR (1939) Nag 235 : 182 Ind Cas 573 (DB), *Narain Chouthmal* v. *Rama Jago.*

[5a] ('40) 27 AIR 1940 P C 63 (67) : 187 Ind Cas 233 : I L R (1940) Kar P C 134 : 67 Ind App 160 : I L R (1940) Lah 470 (PC), *Rama Shah* v. *Lal Chand.*

[6] ('13) 22 Ind Cas 959 (959) : (1913) 1 Upp Bur Rul 178, *Nga Ya Baw* v. *Nga Bya.*
[*See also* ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand* v. *Surajpal Singh.* (It must be shown that payment was made towards principal or appropriated by creditor towards principal.)]

[7] *See* ('38) 25 AIR 1938 Rang 401 (402): 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung* v. *L Ah Choy.*
('15) 2 AIR 1915 Lah 275 (276) : 31 Ind Cas 782 (DB), *Muinuddin* v. *Ahmad.*
('14) 1 AIR 1914 All 114 (115) : 23 Ind Cas 863, *Ramachandra* v. *Durgi.*
('09) 2 Ind Cas 524 (525) : 31 All 590 (DB), *Oudh Behari* v. *Mahabi.*

[8] ('11) 11 Ind Cas 858 (858) (DB) (Low Bur), *Muthu Veerappa* v. *Abdul.*

See also Note 23 to Article 75.

Note 36

1. ('25) 12 AIR 1925 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal* v. *Akki.* (16 Ind Cas 961 not followed.)

('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 : 130 Ind Cas 571 (DB), *Probhat Chandra* v. *Mohesh Chandra.* (Do.)

('20) 7 AIR 1920 Lah 472 (472), *Ram Jawaya Shah* v. *Ram Singh.*

('24) 11 AIR 1924 Pat 439 (440) : 75 Ind Cas 98 (DB), *Mundo Singh* v. *Krishna Dayal Gir.* (Section 20 applies where the cause of action has already arisen and the plaintiff is seeking to have a fresh period of limitation computed from the time when a payment was made by the debtor.)

[*See* ('39) 26 AIR 1939 Lah 212 (215), *Abdullah* v. *Ishaq Mohammad.* (Case under Article 135 — Mortgage deed providing that on default in payment of interest, mortgagee should be entitled to possession—Payment and acceptance of overdue arrears of interest—Limitation for suit for possession by mortgagee runs from next default and no question of the applicability of S. 20 arises.)]

[See however ('38) 25 AIR 1938 Lah 570 (571) : 178 Ind Cas 597, *Bhagat Ram* v. *Ralla Ram.* (Mortgage bond providing that in case of default of payment of interest for three years, the mortgagee would become entitled to realise the whole amount—Default made for more than three years—Subsequent payment of entire arrears of interest—*Held* that there was no waiver of the default clause and that the payment would only give the plaintiff a fresh period of limitation under this section from the date of *payment* but would not postpone the starting point of limitation till there was again default for three years in payment of interest.)]

2. ('34) 21 AIR 1934 Oudh 455 (457) : 151 I. C. 852 (DB), *Gaya Din* v. *Kiali Ram.*

3. ('27) 14 AIR 1927 Cal 102 (106) : 98 Ind Cas 147 (DB), *Gobinda Chandra* v. *Pulin Behari.*

('25) 12 AIR 1925 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal* v. *Akki.*

('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 (DB), *Probhat Chandra* v. *Mohesh.*

[But see ('12) 16 Ind Cas 961 (961) : 1913 Pun Re No. 35 (DB), *Jawand Lal* v. *Sharf Din.*]

37. Distinction between Sections 19 and 20 and Article 183. — Article 183 contains a proviso under which an acknowledgment of liability or a part payment or payment of interest will give a fresh starting point of limitation under that article. But, there are various points of difference between Ss. 19 and 20 on the one hand and Art. 183 on the other, as regards the *requirements* of such acknowledgment or payment. Thus, under both Ss. 19 and 20, the acknowledgment or payment must be made before the expiry of the prescribed period of limitation, while Art. 183 does not prescribe any time limit within which the acknowledgment or payment must be made.[1] Similarly, an acknowledgment under S. 19 need not be addressed to the person entitled, while under Art. 183 the acknowledgment is required to be made to the person entitled. Again, in regard to a payment under S. 20, an acknowledgment of the payment is required to be made in the handwriting or in a writing signed by the person making the payment, while there is no such provision in Art. 183. So also, it has been held that a payment under Art. 183 need not be made by the person liable or his agent,[2] while under S. 20 the payment must be made by the person liable or his agent. Thus, an acknowledgment or payment which satisfies the requirements of Ss. 19 and 20 may fail to satisfy the requirements of Art. 183 and conversely, an acknowledgment or payment which satisfies the requirements of Art. 183 may fail to satisfy the requirements of S. 19 or S. 20.

In the first case, it is clear, the acknowledgment or payment will not furnish a fresh starting point of limitation under Art. 183 taken by itself. But, under S. 3, the articles in the first schedule must be read subject to the provisions of Ss. 4 to 25 of the Act and hence, a fresh period of limitation will run from the date of the acknowledgment or payment under Ss. 19 and 20 notwithstanding the fact that the acknowledgment or payment is ineffective for the purposes of Art. 183.[3]

In the converse case, viz., that of an acknowledgment or payment which satisfies the requirements of Article 183 but fails to satisfy the requirements of sections 19 and 20, the date of the acknowledgment or payment will be the starting point of limitation under Article 183 notwithstanding that the acknowledgment or payment does not satisfy the requirements of sections 19 and 20.[4]

Note 37

[1] **('87) 11 Bom 506 (513) (DB), *Purmananddas Jiwandas* v. *Vallabdas Wallji.***

[2] **('25) 12 AIR 1925 Mad 1131 (1132) : 90 Ind Cas 1022 (DB), *Prabappa Chetti* v. *Desikachari.* (Payment for judgment-debtor or on his account is sufficient.)**

('31) 18 AIR 1931 Pat 218 (219) : 10 Pat 213 : 132 Ind Cas 109 (DB), *Tugan Mull* v. *Ladhu Lal.*

[3] **('40) 27 AIR 1940 Cal 210 (210) : I L R (1939) 2 Cal 523 : 188 Ind Cas 280, *Sreenarain Kayan* v. *Bhagwandas Churiwalla.* (Acknowledgment not made to creditor though not falling under Proviso to Article 183, will extend limitation under S. 19.)**

[4] **('31) 18 AIR 1931 Pat 218 (219) : 10 Pat 213 : 132 Ind Cas 109, *Tugan Mull* v. *Ladhu Lal.* (Provisions of Article 183 regarding acknowledgments and**

Section 20
Note 37

The reason is that S. 3 only provides that where a proceeding is instituted *after the expiry* of the period prescribed by the first schedule, such proceeding shall be dismissed, subject to the provisions of Ss. 4 to 25. In other words, the provisions of the section come into play only in cases where the proceeding is instituted *after* the period prescribed by the first schedule and not where under the particular article in question itself, the proceeding is not time-barred.

Section 21

Agent of person under disability.

21.* *(1)* The expression "agent duly authorised in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment.

Acknowledgment or payment by one of several joint contractors, etc.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the

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* **Act of 1877 : S. 21.**

One of several joint contractors, etc., not chargeable by reason of acknowledgment or payment made by another of them.

21. Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of any other or others of them.

Act of 1871 : S. 20, Explanation 2.

Explanation 2. — Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Act of 1859 : S. 4, Proviso.

Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

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payments are self-contained and must be read independently of the provisions of Ss. 19 and 20.)

('25) 12 AIR 1925 Mad 1131 (1132) : 90 Ind Cas 1022 (DB), *Prabappa Chetty* v. *Desikachari*.

[*See* ('24) 11 AIR 1924 Mad 638 (640) : 78 Ind Cas 832, *Sabapathy Chetty* v. *Shanmugappa Chetty*. (Properties belonging to the judgment-debtor were sold and the proceeds brought into Court—The Court ordered payment thereout to the decree-holder but the money was actually paid only some time later—*Held* that the payment by Court operated to give a fresh starting point of limitation for execution of the decree under Article 183 of the Limitation Act—Such payment was a payment by an *agent* of the judgment-debtor.)]

agent of, any other or others of them.

(3) for the purposes of the said sections —

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

Synopsis

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4. Acknowledgment or payment by a guardian of insane person.

5. Court of Wards, acknowledgment or payment by.

5a. Acknowledgment by agent of guardian.

6. Sub-section (2) — General.

7. Joint contractors—Acknowledgment or payment by one of them — Effect of.

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11. Co-mortgagors — Acknowledgment or payment by one — Effect of.

12. Principal and surety — Acknowledgment or payment by one, whether will save limitation against the other.

13. Partner — Authority of, to acknowledge or pay on behalf of firm.

14. Hindu trading family.

15. Executors.

16. Joint mortgagees.

17. Acknowledgment or payment by one of several judgment-debtors.

18. "Chargeable," meaning of. See Note 6.

19. Acknowledgment or payment by Hindu widow, whether binding on reversioners.

20. Acknowledgment or payment by manager of Hindu joint family — Sub-section (3) clause (b).

21. Acknowledgment or payment by manager of Malabar tarwad.

22. Acknowledgment or payment by head of Muhammadan family.

Other Topics (miscellaneous)

Acknowledgment or payment by a partner after dissolution — Whether binds estate of a deceased partner. See Note 13.
Acknowledgment or payment by manager after partition — Whether binds other members. See Note 20.
Lawful guardian of minor. See Note 3.
Natural guardian of minor. See Note 3.
Sections 19, 20 and 21. See Notes 2, 6.

1. Legislative changes.

(1) In the Act of 1859, there was a general provision that if more than one person were liable, none of them should be chargeable by reason only of an acknowledgment signed by another of them.

(2) In the Act of 1871, the general words which occurred in the Act of 1859 were repealed and it was provided that in the case of *partners* or *executors*, an acknowledgment by one of them alone could not, by itself, be binding on the others.

(3) In the Act of 1877, the provision was expanded so as to include joint contractors and mortgagees. Further, whereas the previous sections had only referred to acknowledgments of liability, the provision in the Act of 1877 referred both to acknowledgments and payments.

(4) Sub-section (1) of the section was added in the Act of 1908.

(5) Sub-section (3) was added by the Limitation (Amendment) Act, I of 1927.

2. Scope of the section.— This section supplements the provisions of Ss. 19 and 20 as to the *persons* by whom an acknowledgment or payment may be made.

The section only deals with the question as to who can *keep alive* a right which is not time-barred. It is not concerned with the question as to who can *revive* a time-barred debt. Thus, it does not deal with the question whether a Hindu widow can revive a time-barred debt of her husband. Similarly, it does not deal with the power of the manager of a Hindu joint family to revive a time-barred debt of the family. The undermentioned cases[1] can, however, be consulted in regard to this matter.

Section 21 — Note 2

[1] ('37) 24 AIR 1937 Nag 327 (329) : 172 Ind Cas 493, *Chunilal Dhurajmal* v. *Chakkilal.* (Manager of Hindu family *cannot* revive time-barred debt — Hindu father alone has the power to pass a promissory note for a time-barred debt so as to be binding on his son.)

('82) 5 Mad 169 (170) (FB), *Chinnaya Nayudu* v. *Gurunatham.* (Manager of Hindu family *cannot* revive time-barred debt.)

('21) 8 AIR 1921 Pat 99 (100) : 61 Ind Cas 20 : 6 Pat L Jour 256 (DB), *Sadhusaran Prasad* v. *Brahmdeo Prasad.* (Do.)

('90) 13 Mad 189 (190) (DB), *Kondappa* v. *Subba.* (Do.)

3. Acknowledgment or payment by guardian of minor. — Before the enactment of sub-s. (1) in the Act of 1908, there was a conflict of decisions on the question whether the guardian of a minor is an agent duly authorised within the meaning of Ss. 19 and 20 for the purpose of making acknowledgments of liability and payments on behalf of the minor.[1] This conflict has now been set at rest by the enactment of sub-s. (1), under which it is clear that an acknowledgment

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('96) 20 Bom 155 (157, 158) (DB), *Dinkar* v. *Appaji*. (Manager of a joint Hindu family has no power to revive a debt by an acknowledgment except as against himself.)

('24) 11 AIR 1924 Lah 611 (613) : 5 Lah 317 : 82 Ind Cas 96 (DB), *Thakur Das* v. *Putli*. (Do.)

('27) 14 AIR 1927 Lah 657 (658) : 103 Ind Cas 706 : 9 Lah 85 (DB), *Santu Ram* v. *Dodan Bai*. (Hindu widow can acknowledge and revive *time-barred* debts of her husband—Whether the debt was time-barred during or after the lifetime of the husband is immaterial.)

('11) 11 Ind Cas 737 (737) (DB) (All), *Indar Singh* v. *Sarju Singh*. (Mortgage by father for time-barred antecedent debt not binding on sons.)

('13) 18 Ind Cas 726 (727) : 35 All 207 (DB), *Dalip Singh* v. *Kundan Lal*. (Father of Hindu joint family cannot revive time-barred debt except in the case of necessity.)

('27) 14 AIR 1927 Oudh 52 (52) : 99 Ind Cas 215 (DB), *Bramhadin* v. *Ram Lakhan*. (Hindu mother as guardian of minor son is not competent in law to revive time-barred debt due from his deceased father.)

Note 3

[1] ('08) 30 All 422 (438) : 5 All L Jour 375 (FB), *Ram Charan Das* v. *Gaya Prasad*. (Dissenting from 26 All 598—Acknowledgment or payment if for benefit of minor may be made by guardian.)

('02) 26 Bom 221 (233, 234) : 3 Bom L R 817 (FB), *Annapagauda* v. *Sangadyapa*. (Overruling 20 Bom 61—Guardian can acknowledge or pay if it is for minor's benefit.)

('02) 4 Bom L R 812 (813) (DB), *Bhulli* v. *Nanalal*. (Guardian can acknowledge or pay if it is for minor's benefit.)

('95) 18 Mad 456 (457), *Kailasa Padiachi* v. *Ponnukannu Achi*. (Guardian *can* acknowledge or make payments.)

('94) 17 Mad 221 (222), *Sobhanadri Appa Rao* v. *Sriramulu*. (Do.)

('03) 26 Mad 330 (331) (DB), *Subramania Ayyar* v. *Arumuga Chetti*. (Do.)

('86) 1886 Pun Re No. 25, p. 44, *Behari Lal* v. *Chattan Lal*. (Do.)

('90) 1890 Pun Re No. 7, p. 17, *Jodh Raj* v. *Chuttan Lal*. (One of the certificated co-guardians can acknowledge a debt.)

('04) 27 Mad 243 (255) : 14 Mad L Jour 84 (FB), *Periasami Mudaliar* v. *Seetharama Chetti*. (*Obiter* — Payment of interest or part payment of principal by a receiver or guardian may stand on a different footing from an acknowledgment of liability made by him.)

('02) 29 Cal 647 (650) : 6 Cal W N 729 (DB), *Narendra Nath Sirkar* v. *Rai Charan Haldar*. (Certificated guardian can make part payment or payment of interest on behalf of minor.)

('99) 26 Cal 51 (52) : 3 Cal W N 313 (DB), *Chhato Ram* v. *Billo Ali*. (Guardian whether certificated or natural cannot give acknowledgment.)

('86) 13 Cal 292 (295) (DB), *Wajibun* v. *Kadir Buksh*. (Natural guardian cannot give acknowledgment.)

('83) 13 Cal L R 112 (114), *Asuddin* v. *Lloyd*. (Do.)

or payment made by the guardian of a minor will be binding on him.[2]

There is a conflict of decisions, however, on the question whether an acknowledgment or payment by the guardian will be effective irrespective of the question of its being for the *minor's benefit.* One view is that the question of benefit to the minor is irrelevant under this section and that it is relevant only in considering the powers of the guardian to incur *fresh* debts on behalf of the minor.[3] The other view is that an acknowledgment or payment under this section will not bind the minor unless it is for his benefit.[4] It is submitted that the former view is correct.

The section requires that the acknowledgment or payment must be made by the "lawful guardian" of the minor. A person appointed guardian by the Court, will be a lawful guardian for the purposes of the section.[5] But the expression will also include *natural* guardians who under the law are the legal guardians of the minor.[6] Thus, under the Hindu law, after the father's death, the mother is the natural and legal guardian of a minor and so, she will be a lawful guardian for the purposes of this section.[7] But an acknowledgment or payment by the *de facto* guardian of a minor who is not his legal guardian will not be binding on the minor under this section.[8] See also the undermentioned cases[9] bearing on the question as to who would be lawful guardians within the meaning of this section.

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[2] ('39) 26 AIR 1939 Mad 414 (420) ; 184 Ind Cas 735 (DB), *Margaret Lornie* v. *Abu Backer Sait.*
('33) 20 AIR 1933 Mad 713 (713, 714) : 57 Mad 43 : 145 Ind Cas 654 (DB), *Rosayya* v. *Pitchayya.*
('22) 9 AIR 1922 Nag 98 (100, 101) : 18 Nag L R 145 : 65 Ind Cas 53 (DB), *Jiwan Das* v. *Janaki.* (Guardian can also execute a bond for a previous debt which is binding on the minor.)
('23) 10 AIR 1923 All 499 (499) : 45 All 524 : 81 Ind Cas 275 (DB), *Alijan Khan* v. *Majiduddin.* (Acknowledgment made in 1907—*Held*, S. 21 of the *present* Act was sufficient answer to question that it was not valid.)

[3] ('39) 26 AIR 1939 Cal 399 (402): I L R (1939) 2 Cal 33: 187 Ind Cas 831 (DB), *Gumti Devi* v. *Jugal Kishore.*
('32) 1932 Mad W N 1193 (1196), *Subbakka* v. *Venkata Setti.* (If a guardian is a lawful guardian S. 21 applies irrespective of the question of minor's benefit.)
('34) 21 AIR 1934 Lah 685 (686): 153 Ind Cas 23 (DB), *Ram Narain* v. *Harbans.* (The question of benefit is only relevant to the original debt.)

[4] ('19) 6 AIR 1919 Mad 993 (996) : 43 Ind Cas 865 (DB), *Chidambaram* v. *Veerappa.* (An executor cannot acknowledge unless he is empowered to do so.)
('33) 20 AIR 1933 Oudh 132 (133) : 145 Ind Cas 180 (DB), *Bechu* v. *Baldeo.*

[5] ('32) 19 AIR 1932 Pat 337 (339): 12 Pat 147: 142 Ind Cas 495 (DB), *Bageswari Charan Singh* v. *Bindeswari Charan Singh.*

[6] ('28) 15 AIR 1928 Mad 226 (231) : 108 Ind Cas 529 (DB), *Ramaswami* v. *Kasinatha.* (A *de facto* guardian cannot give an acknowledgment.)
('13) 19 Ind Cas 362 (362) (Mad), *Tirapayya* v. *Ramaswami.* (Person need not be *appointed* a guardian.)

[7] ('40) 27 AIR 1940 Mad 33 (35) : I L R (1940) Mad 358 : 186 Ind Cas 749 (FB), *Chennappa* v. *Onkarappa.*
('39) 26 AIR 1939 Cal 399 (402) : I L R (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Debi* v. *Jugal Kishore.*
('33) 20 AIR 1933 Oudh 132 (133) : 145 Ind Cas 180 (DB), *Bechu Singh* v. *Baldeo.*
('13) 19 Ind Cas 362 (362) (Mad), *Tirapayya* v. *Ramaswami.*

The section contemplates a lawful guardian of *property*. A mere guardian of the *person* of the minor will not be a lawful guardian within the meaning of this section.[10]

('18) 5 AIR 1918 Cal 977 (978) : 45 Cal 630 : 42 Ind Cas 472 (DB), *Bireswar* v. *Ambikacharan*. (Payments made by the eldest brother of the infants while their mother was alive cannot be said to be made by a 'lawful guardian' within the meaning of this section.)

('34) 21 AIR 1934 Lah 685 (686): 153 Ind Cas 23 (DB), *Ram Narain* v. *Harbans*.

[8] ('40) 27 AIR 1940 Mad 33 (35, 37) : I L R (1940) Mad 358 : 186 Ind Cas 749 (FB), *Chennappa* v. *Onkarappa*. (Lawful guardian is *de jure* guardian in contrast to *de facto* guardian.)

('38) 25 AIR 1938 Mad 853 (855) : I L R (1939) Mad 65 : 179 Ind Cas 201 (DB), *Nama Nagayya* v. *Kalla Narasayya*. (19 Ind Cas 362 overruled.)

('32) 1932 Mad W N 1193 (1196), *Subbakka* v. *Venkata Setti*. ('Lawful guardian' means guardian *de jure*—Guardian *de facto* is not within section.)

('28) 15 AIR 1928 Mad 226 (231) : 108 Ind Cas 529, *Ramasami Pillai* v. *Kasinatha Iyer*. (Dissenting from 19 Ind Cas 362.)

[*See* ('17) 4 AIR 1917 Pat 510 (511) : 40 Ind Cas 809 (DB), *Gita Prasad Singh* v. *Raghu Singh*. (He was undoubtedly the *de facto* guardian and there is nothing tangible on the record to show that he was not the lawful guardian—Payment was for *minor's* benefit and avoided a suit against him—*Held* that the payment extended limitation against the minor.)]

[9] ('40) 27 AIR 1940 Mad 33 (35, 36, 38) : I L R (1940) Mad 358 : 186 Ind Cas 749 (FB), *Chennappa* v. *Onkarappa*. (Under Hindu law, after the father and mother, no other relation including the paternal grandmother is the lawful guardian—A I R 1928 Mad 42 and A I R 1926 Mad 457 overruled—2 Cal L R 583 followed.)

('32) 1932 Mad W N 1193 (1196), *Subbakka* v. *Venkata Setti*. (Interim guardian appointed by Court in proceedings under the Guardians and Wards Act is lawful guardian within S. 21—But the powers of such guardian may be defined by the order of the Court—If the order appointing him restricts his power, an acknowledgment by him is of no effect.)

('95) 17 All 198 (206, 207) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah*. (Person appointed by Collector as manager of land is not guardian or even *agent* to acknowledge *personal* liability.)

('07) 1907 Pun L R No. 43, p. 244: 1907 Pun W R No. 23 (FB), *Ghulam Haidar Shah* v. *Ghulam Muhammad Khan*. (A Settlement Officer is not a guardian of a Mahomedan minor.)

('19) 6 AIR 1919 Mad 993 (995) : 43 Ind Cas 865 (DB), *Chidambaram Pillai* v. *Veerappa Chettiar*. (Mere direction to executor appointed under will to manage property till minor beneficiaries attain age will not constitute him guardian of the property.)

('37) 24 AIR 1937 Cal 191 (192, 193) : 171 Ind Cas 712 (DB), *Abheswari* v. *Baburali Shaikh*. (Mother of Mahomedan infant sons in the absence of any evidence to the contrary is not *lawful* guardian.)

('17) 4 AIR 1917 Lah 8 (8) : 42 Ind Cas 17, *Charan Shah* v. *Wadhu Ram*. (Do.)

('18) 5 AIR 1918 Cal 977 (978) : 45 Cal 630 : 42 Ind Cas 472 (DB), *Bireswar Mookerjee* v. *Ambika Charan Bhattacharjee*. (Eldest brother is not lawful guardian of Hindu minor during the mother's lifetime.)

[10] ('18) 5 AIR 1918 Low Bur 186 (187) : 9 Low Bur Rul 78 : 40 Ind Cas 858, *Yagapp Chetti* v. *A. Y. Mahmod*. (Under the Mahomedan law the father's brother is only a guardian of the *person* of a minor girl.)

The implied agency of the guardian terminates on the ward's death and hence, the guardian cannot make an acknowledgment or payment after the ward's death so as to bind the ward's estate.[11]

A guardian continuing in management of the ward's property after the ward attains majority is not entitled as *guardian* to acknowledge or pay debts on behalf of the ward. But the authority to *manage* includes the power to pay interest on subsisting debts as an incident of the management and hence, a payment of interest by the ex-guardian will save limitation in such cases.[12]

Where the certificate of guardianship has been granted to two persons jointly, an acknowledgment by one of them alone will not be binding on both and through them on the minors, unless the guardian who signed the acknowledgment acted as the agent of the other guardian. But the authority to act as agent need not be express or special. Hence, where one of the guardians, whether by express agreement or by general understanding with the other guardian, was left to do almost the whole work of guardianship, especially the work of going over accounts and signing balances, it was held that an acknowledgment signed by him alone was binding on the minor.[13]

Where a guardian has been appointed by the Court, his position must be taken subject to the restrictions imposed by the order appointing him guardian. Hence, where an order appointing an interim guardian required that he must take the permission of the Court before making any payments, it was held that payments made by him without such permission cannot save limitation under S. 20.[14]

In the undermentioned case[15] an acknowledgment made by a *vakil* on behalf of a minor was held binding on the minor.

4. Acknowledgment or payment by a guardian of insane person. — In the undermentioned case[1] it was held that before a person is *appointed* the guardian of an insane person he is not the lawful guardian of the insane person. In that case, the defendant's deceased husband had executed a promissory note in favour of the plaintiff. In a suit against the defendant on the promissory note, the plaintiff relied, for the purpose of meeting the plea of limitation, on an admission made by the defendant in a petition by her to get herself appointed the guardian of her insane husband. Pending the petition the husband died and she was never in fact appointed guardian. It was held that the admission was not made by a lawful guardian within the meaning of this section, and that the wife as such was not an *agent* of the husband for the purposes of making the acknowledgment.

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[11] ('06) 30 Bom 218 (219) : 7 Bom L R 739 (DB), *Yellappa* v. *Desayappa.*

[12] ('95) 18 Mad 456 (457), *Kailasa Padayachi* v. *Ponnukannu Achi.* (No special authority to make payment is necessary.)

[13] ('90) 1890 Pun Re No. 7, p. 17, *Jodh Raj* v. *Chuttan Lal.*

[14] ('32) 1932 Mad W N 1193 (1196), *Subbakka* v. *Venkata Setti.*

[15] ('96) 23 Cal 374 (387) (DB), *Norendra Nath Pahari* v. *Bhupendra Narain.* (9 Cal 730 relied upon.)

Note 4

[1] ('33) 20 AIR 1933 Mad 686 (687, 688) : 56 Mad 964 : 146 Ind Cas 49 (DB), *Gomathi Ammal* v. *Avu Ammal.* (The defendant was held to be not even an agent of necessity.)

5. Court of Wards, acknowledgment or payment by. — A Court of Wards can make acknowledgments or payments so as to save limitation in respect of the debts due from the ward.[1] But the Court of Wards is not the *guardian* of the ward. Its authority is *statutory.* (See Note 58 under section 19.)

5a. Acknowledgment by agent of guardian. — The mere fact that a person has been appointed manager of the estate of a ward by the guardian of the minor or the Court of Wards does not invest such manager with power to make acknowledgments of liability or payments so as to save limitation. The Court must be satisfied apart from the fact of such appointment, that the manager was "duly authorised" expressly or impliedly by the guardian or the Court of Wards to make the acknowledgment or payment.[1]

6. Sub-section (2) — General. — An *acknowledgment* under section 19 may be made by the person liable or by his agent, and such acknowledgment will bind not only the person by whom or by whose agent it is made, but also those who claim under such person. Where more persons than one are jointly liable, an acknowledgment by one of them will not bind the others,[1] though it will bind the particular

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Note 5

[1] ('16) 3 AIR 1916 Cal 107 (108): 43 Cal 211 : 34 Ind Cas 205 (DB), *Rashbehary* v. *Anand.*

('88) 1888 All W N 187 (189) (DB), *Kamla Kuar* v. *Har Sahai.*

('94) 17 All 198 (208, 209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani* v. *Collector of Etawah.*

('10) 6 Ind Cas 407 (408): 34 Mad 221 (DB), *Kondamodalulinga* v. *Sarvarayadu.* (Acknowledgment by the Collector as the agent of the Court of Wards, is equally binding—Collector cannot promise to pay a barred-debt.)

[*See* ('97) 1897 Pun Re No. 1, p. 4, *Sardar Bachattar Singh* v. *Jagannath.* (Payment of money made in pursuance of an order of the President of the Court of Wards to the creditor of the ward on account of the debt due to him would not amount to part payment within the meaning of S. 20 though the order directing the payment would amount to an acknowledgment so as to save limitation under S. 19.)]

Note 5a

[1] ('39) 26 AIR 1939 Bom 237 (248, 249) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya* v. *Chanbasappa Mallappa.*

Note 6

[1] ('28) 15 AIR 1928 All 387 (388): 110 I. C. 561 (DB), *Gaya Prasad* v. *Babu Ram.*

('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi* v. *Chinnavava Rowther.*

('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah* v. *Dakkhini Din.* (Acknowledgment by one of the debtors if made as agent of the others will however bind the other debtors.)

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person who makes the acknowledgment and those who claim under him.[2]

A *payment* under S. 20 is required to be made by the person liable to pay the debt or legacy or by his agent, and such payment will save limitation not only against the person by whom or by whose agent the payment is made, but also as against those who claim under such person.[3] Where more than one person are jointly liable to pay a debt, a payment under S. 20 need not be made by *all* the persons liable but may be made by *any one* of such persons.[4] In such cases, limitation will be saved not only as against the person making the payment and those who claim under him, but also as against other joint-debtors [except in cases coming under section 21 (2).][5] In *Chinnery* v.

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu* v. *Gunnamma*. (*Obiter* — A I R 1929 Mad 881 and A I R 1920 Mad 418 relied on.)

2. ('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram*.

('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar* v. *Ram Din Poddar*.

3. ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah* v. *Dakkhini Din*. (But part payment by one of the judgment-debtors will not save limitation against the other judgment-debtors except where such other judgment-debtors are the legal representatives of the person making the payment.)

('28) 15 AIR 1928 All 387 (389) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram*.

('32) 19 AIR 1932 Cal 620 (620) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra* v. *Monindra Narain*.

('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull* v. *Govindaswami Chetty*. (A Hindu widow can keep a debt of the husband alive by making payments under Section 20.)

4. ('26) 13 AIR 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari* v. *Doman*. (The expression 'persons liable to pay' in S. 20 does not mean the entire body of persons liable to pay the debt.)

('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi* v. *Chinnavava Rowther*.

('37) 24 AIR 1937 Cal 191 (192) : 171 Ind Cas 712 (DB), *Abheswari* v. *Baburali*. (But if the debt is susceptible of division a different rule applies.)

('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendranath Samanta*. (Section 20 contemplates debts of all kinds whether secured or unsecured.)

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu* v. *Gunnamma*.

[But see ('34) 21 AIR 1934 Pat 224 (225) : 151 Ind Cas 753, *Madho Lal* v. *Shamlal*.]

5. ('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi* v. *Chinnavava Rowther*.

('40) 27 AIR 1940 Cal 401 (403) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar* v. *Kisori Mohan*. (Following 33 Cal 1278.)

('39) 26 AIR 1939 Mad 69 (70) : I L R (1939) Mad 140 : 180 Ind Cas 49 (DB), *Somasundara Edangapurandar* v. *Narasimha Chariar*. (On death of Hindu father, sons becoming liable under pronote executed by father — One of the sons endorsing payment on pronote — Endorsement saves limitation also against son who has become a convert to Islam.)

('38) 25 AIR 1938 Mad 774 (777) : I L R (1938) Mad 968 : 178 Ind Cas 243 (DB) *Pangudaya Pillai* v. *Uthandiya Pillai*.

('05) 32 Cal 1077 (1081) : 9 Cal W N 868 (DB), *Krishna Chandra* v. *Bhairab*.

Evans,[6] a payment was made by the agent of the mortgagor after a portion of the mortgaged property had been sold by the mortgagor, and the question arose whether such payment saved limitation as against the purchaser from the mortgagor. It was held that the payment saved limitation also as against the purchaser. In construing section 40 of 3 & 4 Will IV, c. 27, the material words in which are similar to the words of section 20, the Lord Chancellor said as follows:

> "It is quite clear that the payment of money to the mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its original integrity and force, with respect to *all* the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent."

In this respect section 20 differs from section 19 under which the acknowledgment operates only against the person making the acknowledgment and not against others who may be jointly liable with him.[7] In *Lewin* v. *Wilson*,[8] while discussing certain sections of a statute of

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('15) 2 AIR 1915 Cal 5 (7) : 22 Ind Cas 510 (DB), *Hem Chandra* v. *Purna Chandra.* **(Payment of interest by mortgagor after parting with equity of redemption in one of the mortgaged properties extends period of limitation against the purchaser.)**

('27) 14 AIR 1927 Cal 193 (194, 195) : 98 Ind Cas 381 (DB), *Rajtilak Narayan* v. *Mufizuddin Topadar.* **(***Lewin* v. *Wilson***, (1886) 11 A C 639, followed—Payment by mortgagor—Limitation was saved against the purchaser of equity of redemption.)**

('33) 20 AIR 1933 Cal 325 (327) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Umesh Chandra* v. *Hemanga Chandra.* **(Where estates A, B and C are included in one mortgage and the owner of** ***A*** **pays interest, the mortgagee's remedy against B and C is preserved.)**

('37) 24 AIR 1937 Cal 191 (192) : 171 Ind Cas 712 (DB), *Abheshwari* v. *Baburali.* **(If the debt is one and indivisible, payment by one would interrupt limitation against all the debtors unless they can come within the exception laid down in Section 21 (2).)**

[*See also* **('37) 24 AIR 1937 Cal 226 (229) : 172 Ind Cas 121,** *Sudhamoyee Bose* v. *Bhujendra Nath.* **(Decree for rent of tenure against widow — Widow relinquishing tenure in favour of reversioners— Payment by one reversioner — Time is extended against all.)**

('38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendra Nath.* **(Joint mortgagors were held in this case to be joint contractors within the meaning of Section 21 (2).)**

('30) 17 AIR 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha* v. *Lokhono.* **(Payment by one co-heir of the debtor saves limitation against the other co-heirs.)**

('12) 17 Ind Cas 619 (619) (DB) (Mad), *Velayudam* v. *Vaithilingam.* **(Suit on promissory note against promisor and promisor's universal donee — Payment by promisor after the gift saved limitation against universal donee.)]**

6. (1864) 145 R R 79 (84) : 11 L T (N S) 68 (72) : 11 H L C 115 : 10 Jur (N S) 855 : 13 W R 20 : 4 N R 520.

7. ('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), ***Lakshmi*** **v.** ***Gunnamma.*** **(Point conceded.)**

8. (1886) 11 A C 639 (645) : 55 L J P C 75. (Cited in A I R 1938 Cal 129.)

New Brunswick which correspond approximately to sections 19 and 20, the Privy Council observed as follows :

> " . . . . Payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may . . . be made by a person who, though a party to a mortgage contract, has ceased to have any substantial interest in it and has nothing to lose by acknowledgment, whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If, therefore, we find that the Legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

The above passage sums up what may be assumed to be the reasons of the Legislature in making a distinction between sections 19 and 20 on the question under discussion.

What is the effect of this sub-section on the above summarised provisions ? As regards section 19, even if that section stood alone, an acknowledgment by one person can save limitation only as against him and not as against others who may be jointly liable with him, unless the latter have authorized the former to make the acknowledgment.[9] Hence, the effect of this sub-section is simply to provide that members of the groups specified therein are not *ipso facto* agents of each other for the purpose of making acknowledgments. In other words, the sub-section does not constitute an *exception* to section 19, but simply serves as an *explanation* to that section dealing with the question of who can be considered as agents for the purpose of the section. Thus, it was observed in *Chandra Kumar Dhar* v. *Ramdin Poddar*,[10] "section 21 does not lay down an exception to S. 19, but enumerates those cases in which the act of one member of a class is liable to be taken as the act of all; and, in respect of these cases, it provides that an acknowledgment of one should not, by itself, be taken as the acknowledgment of the other, but that there must be some authority express or implied."

As regards S. 20, if the persons liable constitute any of the groups mentioned in this sub-section and the debt is *common* to all the members of the group as such, this sub-section operates as an *exception*

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[9] ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah* v. *Dakkhini Din*. (Sub-section does not constitute an exception to S. 19.)
('28) 15 AIR 1928 All 387 (388) : 110 I. C. 561 (DB), *Gaya Prasad* v. *Babu Ram*.
('35) 22 AIR 1935 Mad 101 (103, 104) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi* v. *Gunnamma*. (Payment by managing member — Authority to make payment is implied.)

[10] ('12) 13 Ind Cas 702 (704) (DB) (Cal).

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to the provisions of S. 20. The reason is that as a general rule, under S. 20 a payment by one of the persons liable to pay a debt will operate against all the persons liable to pay the same debt (see *supra*), while in the cases mentioned in this sub-section such payment will not operate against the other persons liable to pay the same debt.[11] But, where the debt is *not common* to all the persons but a distinct debt is owed by each of them, a payment by one of them will, even under S. 20 itself, operate only against him and not against the others unless he has been authorized by the latter to make the payment.[12] Hence, in such cases, the sub-section does not operate as an *exception* to S. 20. The effect of the sub-section in such cases is only to provide that the members of the groups referred to therein are not *ipso facto* agents of each other for making part payments or payments of interest. Thus, while in regard to section 19 this sub-section operates only as an *explanation* and not as an *exception*, in regard to S. 20 it operates in some cases as an *exception* and in others as an *explanation*.[13] In the undermentioned case[14] the Calcutta High Court observed as follows :

> "The word 'only' in that sub-section [sub-s. (2)] is not a mere surplusage and if effect be given to the word, the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements."

It is submitted that the proposition that this sub-section does not *in any way* interfere with the operation of Ss. 19 and 20, is, in view of the above discussion, too wide.

In some decisions[15] it has been held that a payment under S. 20, like an acknowledgment under S. 19, only operates against the person who makes the payment and not against the others. The logical result of this view will be that even in the case of section 20 (as in that of S. 19) this sub-section only operates as an *explanation* and not as an *exception* to the section. But, the balance of authority is against this view and it must be taken to be not good law.

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[11] ('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendra Nath*. (Operation of S. 20 is subject to the provisions of S. 21 (2).)

('29) 16 AIR 1929 Mad 881 (882, 883) : 53 Mad 119 : 121 Ind Cas 858 (DB), *Thayammal* v. *Muthukumaraswami Chettiar*. (The fact that the defendant making the payment was permanently living and messing with the defendants did not constitute specific authorization within the meaning of S. 20.)

[12] ('38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendra Nath*. (Obligation of the principal debtor and his surety are distinct.)

('37) 24 AIR 1937 Cal 191 (193) : 171 Ind Cas 712 (DB), *Abheswari* v. *Baburali*. (A Mahomedan debtor died leaving behind him his widow and sons — The widow made payment — *Held* it saved limitation in respect of her share of debt only.)

[13] ('38) 25 AIR 1938 Cal 129 (134, 135) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendra Nath*.

[14] ('27) 14 AIR 1927 Cal 193 (195) : 98 Ind Cas 381 (DB), *Rajtilak Narayan* v. *Mufizuddi Topadar*.

[15] ('39) 26 AIR 1939 All 230 (231) : ILR (1939) All 258 : 181 Ind Cas 490 (DB), *Ram Kumar* v. *Hira Lal*. (Sub-section (2) does not lay down exceptions to any general principle embodied in S. 20—Payment by one joint judgment-debtor does not save limitation against others.)

('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah* v. *Dakkhini Din*.

In the undermentioned case,[16] it was held by the Patna High Court that the payment under S. 20 must be made by *all* the persons liable to pay the debt. On this reasoning it was held in that decision that a payment by one of two debtors could not save limitation as against the other. It was observed in this connexion that this is made clear by the provisions of this sub-section. In other words, the view according to the above Patna decision also seems to be that this sub-section is only an *explanation* to S. 20 dealing with what will constitute agency for the purposes of making a payment under the section and what will not constitute such agency. But the view that a payment under S. 20 must be made by *all* the persons liable is not correct. (See *supra.*)

The sub-section does not mean that a member of any of the classes mentioned therein *cannot in any circumstances* acknowledge or make payments on behalf of the other members of the class. The word "only" implies that where the person making the acknowledgment or payment is *authorised* to do so by the other members of the group to which he belongs, such acknowledgment or payment will operate against the other members also. In other words, the sub-section merely means that where there is nothing else than an acknowledgment or payment by a partner, joint contractor etc., the other partners, joint contractors etc., will not be affected by such acknowledgment or payment. Where, however, the person making the acknowledgment or payment has the authority of the other members of the group to which he belongs, to make the acknowledgment or payment, such acknowledgment or payment will bind the other members also.[17]

See also the observations in the following cases :

('17) 4 AIR 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty* v. *Shanmugan Chetty.*

('18) 5 AIR 1918 Cal 707 (709, 710): 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kishore* v. *Hindustan Co-operative Insurance Co., Ltd.* (Payment of interest by principal even with consent of surety does not extend limitation against a surety.)

[16] ('34) 21 AIR 1934 Pat 224 (225) : 151 Ind Cas 753, *Madho Lal* v. *Shamlal.*

[17] ('32) 19 AIR 1932 Bom 316 (318, 319) : 138 Ind Cas 805, *Gordhandas* v. *Bhulabhai.* (In a going mercantile concern a partner must be presumed to act as an agent in making an acknowledgment or a part payment.)

('29) 16 AIR 1929 Cal 714 (716) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd.* v. *Jatindra Nath Majumdar.* (Acknowledgment or part payment by one partner will bind the other partners where such an act was necessary for or usually done in carrying on the business — Contract Act, S. 251.)

('26) 13 AIR 1926 Mad 114 (115): 92 Ind Cas 653 (DB), *Mahadeva Iyer* v. *Ramakrishna Reddiar.* (Mercantile firm — Partner's authority extends to making an acknowledgment by part payment so as to bind his partners.)

In the undermentioned case[18] of the Rangoon High Court it was observed that the existence of a mortgage or charge on immovable property would be a circumstance beyond the mere acknowledgment or payment referred to by the sub-section, and that therefore, a payment made by one of several persons jointly liable in respect of a *mortgage* would, under S. 20, operate against all of them, notwithstanding the provisions of this sub-section. It is submitted that the reasoning is not correct. It assumes that S. 20 makes the existence of a mortgage or charge a determining factor in regard to the applicability of the rule contained therein, viz., that a payment by one of several joint debtors operates against *all* of them. This view of S. 20 is not correct. That section makes no distinction between secured and unsecured debts, and equally in both cases the fact that the debt is common to all the debtors is the only factor on which the rule that payment by one operates against all is based.

The authorisation of a member of any of the groups mentioned in the sub-section to acknowledge or pay on behalf of others may be express or implied and may be general or special. (See Notes under Ss. 19 and 20.) It need not have been made with reference to the particular acknowledgment or payment in question.[19]

The sub-section does not interfere with the rule under Ss. 19 and 20 that an acknowledgment or payment will operate against the person making such an acknowledgment or payment and those who

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('28) 15 AIR 1928 All 491 (492) : 50 All 982 : 111 Ind Cas 143, *Devi Dayal* v. *Baldeo Prasad.* (Acknowledgment made during the course of partnership business binds the other partners.)

('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull* v. *Govindaswami Chetty.* (Under S. 21 a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.)

('86) 10 Bom 358 (362), *Premji Ludha* v. *Dossa Doongersey.* (The meaning of the word "only" in S. 21 is that it must also be shown that the partner signing the acknowledgment had the authority express or implied—In a going mercantile concern such agency is presumed as a general rule.)

('88) 10 All 418 (420) : 1888 All W N 93 (DB), *Gadu Bibi* v. *Parsotam.*

(1900) 24 Bom 493 (502) : 2 Bom L R 378 (DB), *Kariyappa* v. *Rachappa.*

('99) 1899 Pun Re No. 45, p. 216, *Bichha Lal* v. *Jai Parshad.*

('88) 1888 Bom P J 147, *Ravji* v. *Narayandas.*

('28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangaswami Aiyangar* v. *Somasundaram Chettiar.* (When nothing more appears than that one of several co-obligors has made a payment or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt.)

18. ('36) 23 AIR 1936 Rang 504 (505) : 165 Ind Cas 828, *U Tha Mo* v. *Palaniappa.* (In case of a simple promissory note however payment by a debtor does not operate to save limitation against his co-debtors.)
See also Note 11.

19. ('33) 20 AIR 1933 Cal 826 (827) : 147 Ind Cas 459 (DB), *Jiban Krista* v. *Hari Nath.* (A I R 1922 All 230 distinguished.)

claim under him irrespective of its consequences with regard to other persons who may be jointly liable with him.[20]

The word "chargeable" in this sub-section refers not only to personal liability but also to liability in respect of *property.*[21] Hence, in cases where this sub-section operates as an exception to S. 20, it will serve as such exception both with reference to personal liability as well as liability with reference to property. In other words, where one member of any of the groups mentioned in this sub-section makes a payment under S. 20, limitation will not be saved as against the other members of the group not only with regard to their *personal* liability but also with regard to their liability in respect of *property.*

The categories mentioned in this sub-section are exhaustive and not merely illustrative.[22] Hence, in cases which do not come within any of them the operation of Ss. 19 and 20 will not be affected in any way by this sub-section. The view expressed in the undermentioned decision[23] that the categories mentioned in this sub-section are *not* exhaustive is, it is submitted, not correct.

The sub-section is not concerned with the question as to the validity of an acknowledgment or payment made to one of several creditors. Hence, a payment made to one of several joint mortgagees is sufficient for the purposes of section 20.[24]

7. Joint contractors — Acknowledgment or payment by one of them — Effect of. — An acknowledgment under S. 19 saves limitation only as against the person who makes the acknowledgment and those who claim under him. Hence, where an acknowledgment of liability is made by one of several joint contractors, limitation is saved only as against the particular joint contractor who makes the acknowledgment and those who claim under him and not as against others. Where, however, any of the other joint contractors has authorised the acknowledgment to be made, it will bind him and limitation will be saved as against him also. This sub-section provides that the mere fact that certain persons are related to each other as joint contractors cannot make them, by itself, agents of each other for making acknowledgments of liability.

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[20] ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar* v. *Ram Din Poddar.* (Section 21 does not lay down exceptions to S. 19.)

('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram.*

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu* v. *Gunnamma.*

[21] ('29) 16 AIR 1929 Mad 881 (884) : 53 Mad 119 : 121 Ind Cas 858 (DB), *Thayammal* v. *Muthukumaraswami Chettiar.* (The term 'joint contractors' has been held by the Madras High Court to include joint mortgagors.)

[22] ('30) 17 AIR 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha Naiko* v. *Lokhono.* (Thus co-heirs and other persons who derive their liability not from direct contract with the promisee cannot be brought within the scope of S. 21 (2).)

[23] ('17) 4 AIR 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty* v. *Shunmugam Chetty.* (The words 'joint contractors' in S. 21 apply to surety.)

[24] ('28) 15 AIR 1928 All 387 (389) : 110 Ind Cas 561 (DB), *Gaya Prasad* v. *Babu Ram.*

As regards a *payment* under S. 20, where the debt is common to several joint debtors, a payment by any one of them will save limitation as against the others also. The effect of this provision is curtailed in the case of joint *contractors* by sub-s. (2) of this section. Hence, in the case of joint contractors, though the debt may be common to all of them, and notwithstanding the provisions of S. 20, a payment by one of them will not save limitation against the others.[1] Thus, where A and B borrow money on the security of a promissory note,[2] or a bond,[3] a payment by A will not save limitation against B. But, where one joint contractor has authorised another joint contractor to make a payment, such payment will save limitation against both.[3a] Such authorisation need not be express and may be inferred from the conduct of the joint contractors.[4]

Note 7

[1] ('33) 20 AIR 1933 Cal 90 (91) : 141 Ind Cas 716 (DB), *Wazed Ali* v. *Brojendro.*

[2] ('41) 28 AIR 1941 Rang 37 (40) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoof Karwa* v. *Mrs. Niemeyer.* (There must be some evidence from which it can be inferred that one joint contractor was acting as agent of other.)

('37) 24 AIR 1937 Rang 195 (196, 197) : 169 Ind Cas 477 (DB), *Palaniappa* v. *U Tha Mo.* (A I R 1936 Rang 504 confirmed.)

('34) 21 AIR 1934 Mad 327 (330) : 150 Ind Cas 91 (DB), *Mahomed Aliyar* v. *Gnana.*

('28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangasamy Aiyangar* v. *Somasundaram Chettiar.*

('33) 20 AIR 1933 Cal 826 (826) : 147 Ind Cas 459, *Jiban Krista* v. *Hari Nath.*

('26) 13 AIR 1926 Oudh 601 (603) : 96 Ind Cas 353 : 2 Luck 180 (DB), *Oudh Commercial Bank Ltd.* v. *Bishambhar Nath.* (Promisors in this case were jointly and severally lible under the promissory note.)

('11) 11 Ind Cas 858 (858, 859) (DB) (Low Bur), *Muthuveerappa Chetty* v. *Abdul Kadir.* (The decision in so far as it lays down that the authority should be express is, it is submitted, not correct.)

('30) 124 Ind Cas 555 (555, 556) (DB) (All), *Bhagwat Prasad* v. *Muzaffar.*

[*See also* ('34) 21 AIR 1934 Pat 224 (225) : 151 Ind Cas 753, *Madho Lal* v. *Shamlal.* (Hand-note executed by two persons — Payment by one does not save limitation against other — The reasoning on which the decision is based is that under S. 20 where there are more than one debtor the payment must be by *all* the debtors—Submitted that this view is not correct.)]

[3] ('32) 19 AIR 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra Saha* v. *Monindra Narain Chakravarty.* (14 Ind Cas 128 is correctly decided.)

[3a] ('28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangasami* v. *Somasundaram.* (Authority need not be express.)

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali* v. *Gopi.*

('35) 22 AIR 1935 Mad 101 (104) : 154 Ind Cas 1053 : 58 Mad 418 (DB), *Lakshmi* v. *Gunnamma.* (*A* and *B* co-mortgagors — *A* making payment can be shown to have acted as manager of family authorised to pay on *B*'s behalf also.)

[4] ('28) 15 AIR 1928 Mad 173 (175) : 107 Ind Cas 646, *Rangaswamy* v. *Somasundaram.* (Previous endorsement by *A*—Subsequent endorsement by *B* — *Held, B* had adopted and ratified the prior endorsement.)

Although a payment by one of several joint contractors will not, in the absence of authority from the others, save limitation as against them, yet, the payment will save limitation as against the particular contractor who makes the payment[5] and those who claim under him.[6]

It has been held that although the payment or acknowledgment by one joint debtor may not, in view of this section, save limitation as against any other debtor, the former can sue the other co-debtors for contribution where he has been compelled to pay more than his share of the joint debt.[7]

8. "Joint contractors," meaning of. — Where two or more persons jointly make a contract with another person, the former will be joint contractors. The question has arisen if the expression "joint contractors" in S. 21 includes any *other* class or classes of persons and if so, what class or classes of persons? On this question, there is a conflict of decisions. The different views taken may be classified as follows :

(1) The *first* view is that the test to be applied to see if any set of persons would constitute joint contractors is whether they are jointly liable on a contract which, *when it was made*, was made by two or more persons jointly. According to this view, where a contract is made by two or more persons jointly, all persons who are jointly liable on such a contract will be joint contractors within the meaning of this section although they or any of them may not have been, *originally*, parties to the contract. Thus, where A and B make a joint contract with C, and A dies leaving D as his heir, B and D would be joint contractors.[1] Similarly,

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('35) 22 AIR 1935 Mad 101 (104) : 154 Ind Cas 1053 : 58 Mad 418 (DB), *Lakshmi* v. *Gunnamma.* (Agency may be implied from the facts and circumstances.)

('15) 2 AIR 1915 Mad 307 (307) : 25 Ind Cas 927, *Annamalai Pattar* v. *Natesa Aiyar.* (*Held* that the series of endorsements on the promissory note constituted sufficient evidence that the defendants had authorised each other to make acknowledgment so as to bind both.)

[5] ('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi* v. *Chinnavava Rowther.*

('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devi Chand* v. *Jamshedji.*

[6] ('28) 15 AIR 1928 All 387 (389) : 110 I. C. 561 (DB), *Gaya Prasad* v. *Babu Ram.*

('32) 19 AIR 1932 Cal 620 (620) : 138 Ind Cas 740 : 59 Cal 1128 (DB), *Jogeshchandra* v. *Monindra Narain.*

('15) 2 AIR 1915 Mad 962 (965) : 28 Ind Cas 69, *Kallianiamma* v. *Narayanan.*

('23) 10 AIR 1923 Lah 135 (137, 138) : 71 Ind Cas 737 (DB), *Ramkishen* v. *Hirde Ram.*

[7] ('15) 2 AIR 1915 Mad 675 (678) : 39 Mad 288 : 27 Ind Cas 337 (DB), *Abraham* v. *Raphial.* (This is so because duty to contribute is clearly distinct from the duty to pay to the promisee.)

Note 8

[1] ('41) 28 AIR 1941 Mad 110 (111), *C. K. Kunjandi* v. *Chinnavava.* (One of joint contractors dying — Subsequent payment by other within limitation — Payment does not save limitation against heirs of deceased joint contractor.)

where A and B make a joint contract with C, the successors of A and B would be joint contractors.[2] But, where the contract, when made, was not entered into by several persons jointly but was only made by a *sole* contractor, the fact that subsequently two or more persons become jointly liable under the contract cannot make such persons joint contractors.[2a] Thus, the co-heirs of a single debtor will not be joint contractors.[3] Similarly, where A mortgages certain property to B and subsequently transfers a portion of the equity of redemption to C who therefore becomes jointly liable with A in respect of the mortgage to B, A and C are *not* joint contractors.[4]

('38) 25 AIR 1938 Cal 129 (132, 136) : 176 Ind Cas 191 (DB), *Azizur Rahman Osmani* v. *Upendranath Samanta.* (Mortgage by *A* and *B*—*A* dying leaving *B*, *C* and *D* as heirs — Payment by *B* after the death of *A*, on his own behalf only will not operate as against *C* and *D* — The fact that the surviving co-mortgagor who makes the payment is himself one of the co-heirs does not affect the question.)

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak* v. *Gopinath.*

[*See* ('33) 20 AIR 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharnidhar* v. *Indranarayan.* (Mortgage by *A* and *B* — *B* dying leaving *C*, his son — Payment by *A* does not operate as against *C*.)]

[2] ('38) 25 AIR 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu* v. *Duraisami Naidu.* (Purchasers from co-mortgagors are joint contractors.)

('18) 5 AIR 1918 Pat 646 (646) : 43 Ind Cas 351 (DB), *Sarab Narain Das* v. *Top Ojha.* (Mortgage by two widows—Reversioners succeeding to estate are joint mortgagors—37 Cal 461 distinguished.)

[2a] ('12) 17 Ind Cas 619 (620) (DB) (Mad), *Velayudam Pillai* v. *Vaithiyalingam Pillai.* (Executant of promissory not and universal donee from executant who is liable on the promissory note under S. 128, Transfer of Property Act are not joint contractors.)

[3] ('41) 28 AIR 1941 Mad 110 (111), *C. K. Kunjandi* v. *Chinavava Rowther.* (Payment by one heir saves limitation against other heirs.)

('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saradocharan* v. *Durga Ram.* (Co-heirs of sole mortgagor are not joint contractors.)

('29) 16 AIR 1929 Mad 419 (420) : 118 Ind Cas 302, *Narasimha Rama Aiyar* v. *Ibrahim.* (Payment by one co-heir will extend period of limitation against other co-heirs even where such co-heirs take the property as tenants-in-common and that their interests are several—14 Ind Cas 128 dissented from.)

('38) 25 AIR 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu* v. *Duraiswami Naidu.* (*Obiter.*)

('38) 25 AIR 1938 Cal 129 (136) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendranath Samanta.*

[4] ('33) 20 AIR 1933 Pat 1 (4) : 12 Pat 93 (DB), *Badri Das* v. *Pasupathi.* (AIR 1920 Mad 418 distinguished.)

('33) 20 AIR 1933 Cal 325 (327) : 60 Cal 87:143 Ind Cas 315 (DB), *Omeshchandra* v. *Hemangachandra.* (10 Jur (N S) 855 followed.)

('05) 32 Cal 1077 (1080, 1081) (DB), *Krishna Chandra* v. *Bhairab Chandra.*

('06) 33 Cal 1278 (1281) : 11 Cal W N 107 (DB), *Domilal Sahu* v. *Roshan Dobay.* (Payment by mortgagor who is personally liable operates against transferee of equity of redemption also.)

('27) 14 AIR 1927 Cal 193 (195) (DB), *Raj Tilak* v. *Mufizuddi.* (Do.)

(2) The *second* view is that the test to be applied to see if certain persons are joint contractors is whether, *at the time of the acknowledgment or payment* they are jointly liable on a contract.[5] According to this view, therefore, although a contract may have been made, in the first instance, by a *sole* contractor, if subsequently several persons become jointly liable on the contract, they will be joint contractors within the meaning of this section. Thus, the co-heirs of a single debtor will be joint contractors under this view.[6]

(3) The *third* view is that the expression "joint contractors" is confined to persons who *themselves* jointly enter into a contract with another and cannot apply to their successors. According to this view, even where a contract is made by several persons jointly, the *successors* of the contractors will not be joint contractors. This view proceeds on the ground that the categories given in S. 21 are exhaustive and not merely illustrative and that cases of co-heirs and other persons who derive their liability not from *direct contract with the promisee*, cannot be brought within its scope.[7]

It is submitted that the *first* view mentioned above is correct on principle. The expression "joint contractors" necessarily implies that the persons have *jointly* entered into a contract. Where one of them dies, his successor will be in the same legal position and will be a joint contractor with the other.[8] But, where the contract is entered into by a sole contractor, his successors will be only successors of a *sole* contractor and cannot have the character of *joint* contractors.[9] The balance of authority also is in favour of this view.

('15) 2 AIR 1915 Cal 5 (7) : 22 Ind Cas 510 (DB), *Hemchandra Chowdhry* v. *Poornachandra Chowdhry*. (Do.)

[*See also* ('18) 5 AIR 1918 Lah 310 (312, 313) : 44 Ind Cas 213 : 1918 Pun Re No. 3 (DB), *Ram Chand* v. *Mewa Ram*. (Payment by mortgagors to sub-mortgagee keeps alive the right of suit by sub-mortgagee against the sub-mortgagor.)]

5. ('36) 23 AIR 1936 All 820 (825) : I L R (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan* v. *Raja Ram*. (Overruling AIR 1927 All 209 and AIR 1918 All 61.)

6. ('36) 23 AIR 1936 All 820 (825) : ILR (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan* v. *Raja Ram*. (Co-heirs of sole mortgagor are joint contractors.)

('12) 14 Ind Cas 128 (128) (Cal), *Arjun Ram Pal* v. *Rohima Banu*. (Do.)

('35) 22 AIR 1935 Cal 648 (650) : 158 Ind Cas 512, *Annada Charan* v. *Jhatu Charan*. (Following AIR 1922 All 37—37 Cal 461 not followed.)

('18) 5 AIR 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 : 40 Ind Cas 858, *Yagappa* v. *Mahomed*. (14 Ind Cas 128 relied on.)

7. ('30) 17 AIR 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha* v. *Lokhono Naiko*. (Descendants of co-mortgagors are not joint contractors.)

8. ('41) 28 AIR 1941 Mad 110 (111), *C. K. Kunjandi* v. *Chinnavava Rowther*.

9. *See* ('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Sarodacharan* v. *Durgaram*.

9. Co-heirs of single debtor, whether joint contractors.— See Note 8.

10. Muhammadan co-heirs.—An *acknowledgment* of liability under S. 19 is effective only against the person making the acknowledgment and cannot save limitation against other persons who may be jointly liable with the person making the acknowledgment. So, independently of the question whether or not the co-heirs of a deceased Muhammadan debtor are joint contractors within S. 21, sub-s. (2), an acknowledgment made by one of the co-heirs cannot save limitation as against any other co-heir except where the latter has authorized such acknowledgment.[1]

As regards the question whether a *part payment or payment of interest* under S. 20 by one of the heirs of a deceased Muhammadan debtor will save limitation against the other heirs also, there is a conflict of decisions. According to one view such payment will not save limitation against the other heirs. This view is based on the ground that the co-heirs are joint contractors and so, under sub-s. (2) of this section, payment by one of them will be effective only against the particular co-heir who makes the payment and not against others.[2] According to the *second* view also a payment by one of the co-heirs will not save limitation against the other co-heirs. But this view proceeds on the ground that under Muhammadan law, each co-heir is bound to pay only a proportionate share of the debt of the deceased and so, there being no common debt between the co-heirs, a payment by one of them operates only as against him and not against others.[3] A *third* view is that a payment by one co-heir will operate as against the other co-heirs also, the reason being that the debt is a single debt under section 20 and the co-heirs are not joint contractors within the meaning of this section.[4]

Note 10

[1] **('36) 23 AIR 1936 All 820 (825, 826) : ILR (1937) All 272 : 166 I. C. 106 (FB), *Md. Taqi Khan* v. *Raja Ram*. (Co-heirs of debtor are joint contractors — AIR 1918 All 61 and AIR 1927 All 209, *held* overruled.)**

('22) 9 AIR 1922 All 37 (41) : 44 All 360 : 66 Ind Cas 171 (DB), *Collector of Jaunpur* v. *Jamna Prasad*.

('30) 17 AIR 1930 Mad 218 (220) : 53 Mad 480 : 122 Ind Cas 504 (DB), *Raja Rama* v. *Fakruddin Sahib*.

[2] **('36) 23 AIR 1936 All 820 (825, 826) : ILR (1937) All 272 : 166 Ind Cas 106 (FB), *Md.Taqi Khan* v. *Raja Ram*. (Overruling AIR 1927 All 209).**

('12) 14 Ind Cas 128 (128) (Cal), *Arjun Ram Pal* v. *Rohima Banu*.

('18) 5 AIR 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 : 40 Ind Cas 858, *Yagappa Chetty* v. *Mahomed*.

[3] **(37) 24 AIR 1937 Cal 191 (192, 193) : 171 Ind Cas 712 (DB), *Abheswari* v. *Baburali*. (It is only where the debt is one and indivisible that payment of interest by one of the debtors would interrupt limitation against all unless the case came within Section 21 (2).)**

[*See also* ('85) 11 Cal 421 (427) (DB), *Bussenteram* v. *Kamaluddin*.]

[4] **('29) 16 AIR 1929 Mad 419 (420) : 118 Ind Cas 302, *Narasimha* v. *Ibrahim*.**

11. Co-mortgagors — Acknowledgment or payment by one — Effect of. — An *acknowledgment* by one co-mortgagor will be effective only against him and cannot save limitation as against other co-mortgagors.[1] The reason is that apart from the provisions of this section, under section 19, an acknowledgment by one of several joint debtors will save limitation only as against the person making the acknowledgment and not against his co-debtors.

As regards the question whether a *payment* under section 20 by one co-mortgagor will save limitation as against other co-mortgagors also, there is a conflict of decisions. The different views taken may be classified as follows:

(1) The *first* view is that a payment by one of the co-mortgagors will *not* save limitation against the other co-mortgagors. This view is based on the ground that co-mortgagors are joint contractors within section 21, sub-section (2).[2]

Note 11

[1] ('39) 26 AIR 1939 Pat 451 (455) : 18 Pat 434 : 184 Ind Cas 597 (DB), *Rameshwar Dayal* v. *Ram Das Sahu.*

('02) 25 Mad 220 (233) (FB), *Narayana Ayyar* v. *Venkataramana Ayyar.* (Co-mortgagors are joint contractors and acknowledgment by one cannot save limitation against others.)

('28) 15 AIR 1928 All 387 (388) : 110 I. C. 561 (DB), *Gaya Prasad* v. *Babu Ram.*

('36) 23 AIR 1936 All 820 (825, 826) : ILR (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan* v. *Raja Ram.* (Acknowledgment by one of the heirs of a mortgagor does *not* save limitation against others.)

[2] ('41) 28 AIR 1941 Rang 37 (41, 46) : 1940 Rang L R 603 : 194 Ind Cas 177, (DB), *Esoof Karwa* v. *Mrs. Niemeyer.* (Mahomedan brother and sister executing mortgage—Payment by one cannot save limitation against other—Brother cannot be deemed to be sister's agent.)

('39) 26 AIR 1939 Rang 287 (288, 289) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom.*

('29) 16 AIR 1929 Mad 881 (884) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayammal* v. *Muthukumaraswami.*

('20) 7 AIR 1920 Mad 418 (419) : 55 Ind Cas 763 (DB), *Muthu* v. *Muhammad.*

('15) 2 AIR 1915 Cal 652 (653) : 26 Ind Cas 511 (DB), *Baikuntagni* v. *Lal Chand.*

('36) 23 AIR 1936 All 820 (825) : ILR (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi* v. *Raja Ram.*

('18) 5 AIR 1918 Pat 646 (646) : 43 Ind Cas 351 (DB), *Sarab Narain Das* v. *Top Ojha.* (Successors of original mortgagors are joint contractors.)

('38) 25 AIR 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu* v. *Duraisami Naidu.* (Purchasers from co-mortgagors are joint contractors.)

('33) 20 AIR 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharanidhar Ghose* v. *Indranarayan Sinha.* (Mortgage by *A* and *B*—*B* dying, leaving *C*, his son—Payment by *A* does *not* operate against *C*.)

('38) 25 AIR 1938 Cal 129 (132) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendranath.* (Do.)

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali* v. *Gopinath.* (Do.)

[*See also* ('32) 19 AIR 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra* v. *Monindra Narain.*]

The balance of authority is in favour of this view. It is submitted that this view is also correct on principle. The obligation of co-mortgagors to pay the mortgage debt is based on *contract* and *prima facie*, therefore, co-mortgagors are joint contractors. The fact that the sub-section specifically refers to *mortgagees* but does not specifically refer to *mortgagors* does not appear to be a sufficient reason for not giving the words "joint contractors" their natural meaning.

(2) The *second* view is also to the effect that a payment by one of the co-mortgagors will not save limitation against other co-mortgagors. But the reason given is that under S. 20 (as in the case of section 19) a payment by one joint-debtor cannot save limitation as against other joint-debtors.[3] The difference between the first view and this view is this. Under the *first* view, a payment by one co-mortgagor would, if S. 20 stood alone, operate against the other co-mortgagors also, but this result is *averted* by the operation of S. 21, sub-section (2). But, under this second view even under section 20 itself, such payment would not save limitation against the other co-mortgagors. It is submitted that the latter view is not correct. It is now settled law that a payment under section 20 will save limitation as against *all* the persons who are liable to pay the debt.

(3) The *third* view is that a payment by one co-mortgagor *will* save limitation against the other co-mortgagors also. This view proceeds on the ground that S. 21, sub-s.(2) is relevant only when the question is whether a certain person is or is not the duly authorized agent of another person for the purpose of making an acknowledgment or payment on his behalf. According to this view, where, *independently of any question of agency*, one person is competent by his act, to start a fresh period of limitation against another person, S. 21, sub-s.(2) has no application at all. Hence, as under S. 20, a payment by one co-mortgagor will save limitation against other co-mortgagors also, *apart from any question of agency*, S. 21, sub-s. (2) does not apply at all to the question.[4] But, in regard to the *personal* covenants of

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[3] ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah* v. *Dakkhini Din.*

See also the observations in the following cases, which indicate that payment and acknowledgment stand on the same footing in this respect :

('18) 5 AIR 1918 Cal 707 (709, 710) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra* v. *Hindusthan Co-operative Insr. Society Ltd.* (Payment by principal debtor does not keep alive the debt against the surety.)

('17) 4 AIR 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty* v. *Shunmugam Chetty.* (The words 'joint contractors' in S. 21 would apply to a surety.)

[4] ('33) 20 AIR 1933 Pat 1 (5) : 12 Pat 93 : 140 Ind Cas 145 (DB), *Badri Das* v. *Pasuputi Banerji.* (Per Agarwala, J.)

('36) 23 AIR 1936 Pat 361 (362) : 163 Ind Cas 808, *Sripati Samanta* v. *Lalji Sahu.* (Distinction between joint contractors and the body of persons interested the mortgagors, the liabilities are distinct and so, under S. 20, payment by one of the co-mortgagors will not save limitation as against the others unless the person making the payment is the duly authorized agent of the person sought to be bound.[5] In such cases, S. 21, sub-section (2) would be relevant as showing that one joint contractor is not, *ipso facto*, the agent of another joint contractor for the purpose of making an acknowledgment or payment on his behalf. It is submitted that this view also is not correct. The language of sub-s. (2) is general and does not warrant the view that the sub-section does not apply to cases where the act of one person binds another independently of any question of agency. Further, there is no reason for making any distinction between the liability of the co-mortgagors as regards the *property* and their liability on their *personal* covenants. In either case, the debt would be only one and the same for all the debtors.

(4) The *fourth* view also is that a payment by one co-mortgagor will save limitation as against other co-mortgagors also. But, the reason given is that "the existence of the charge on the property is clearly something beyond the payment or acknowledgment which follow the words 'by reason only of'" in S. 21, sub-s. (2).[6] It is submitted that the reasoning is not correct. It assumes that the existence of the charge is a determining factor under S. 20 in making a payment by one of the co-mortgagors effective against the others. This is not so. Under that section, the basis on which limitation is saved against all the co-debtors is that the *debt is common* to all of them. No special significance attaches to its being a *secured* debt.

(5) In the undermentioned case,[7] a payment by one co-mortgagor was held sufficient to save limitation under S. 20 as against other co-mortgagors also. But, no reference is made to the provisions

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in equity of redemption is that with the joint contractors there are number of separate single debts : for the persons interested in equity of redemption there is one single indivisible debt and a single indivisible security.)

[5] ('36) 23 AIR 1936 Pat 361 (362) : 163 Ind Cas 808, *Sripati Samanta* v. *Lalji.*
[*See also* ('38) 25 AIR 1938 Pat 383 (385) : 174 Ind Cas 156 (DB), *Baijnath Prasad* v. *Sati Lal Sahu.* (According to Wort, J. payment by one co-mortgagor will keep alive the *mortgage* against all but will not keep alive the personal liability of the other mortgagors—But according to Manohar Lall, J. payment by one mortgagor cannot save limitation against the other mortgagors.)]

[6] ('36) 23 AIR 1936 Rang 504 (505) : 165 Ind Cas 828, *U Tha Mo* v. *Palaniappa Chettiar.* (But in case of a simple promissory note, payment by a debtor does not extend limitation against his co-debtor.)

See also Note 6.

[7] ('35) 22 AIR 1935 Rang 473 (477) : 160 Ind Cas 314, *U Sin* v. *U Tun Si.* (Note that this case relies on A I R 1918 All 61 and A I R 1927 All 209 which have been overruled in A I R 1936 All 820 (F B).)

of S. 21, sub-s. (2) at all. In view of the discussion above, the decision cannot be accepted as correct.

(6) A mortgaged his property to B. B sub-mortgaged the property to C. It was held that a payment by A to C saved limitation for a suit by C, not only against A but also against B.[8] The reason given was that though the debt due by A and B was one and the same, they were not *joint* contractors. But, at the same time, it was pointed out that A and B were not co-mortgagors. Hence, the case did not touch the question whether co-mortgagors are joint contractors.

(7) In the undermentioned case,[9] where there were two mortgagors, A and B, it was contended that a payment made by A alone would not be effective under section 20 to start a fresh period of limitation. This contention was overruled and it was held that the section did not require that the payment under it should be made by the entire body of persons liable to pay the debt. It is submitted that this case does not touch the question as to whether a payment by one co-mortgagor will save limitation as against the other co-mortgagor also.[10]

It has already been seen that the correct view under this section is that co-mortgagors are joint contractors and that a payment by one of them will not save limitation against the others. The further question arises whether this proposition applies only to cases of persons who have *themselves* jointly executed a mortgage in favour of another or whether it applies also to *other* cases where two or more persons may be jointly liable to pay a mortgage debt. This depends on the question whether the expression "joint contractors" in this section is confined to persons who have *themselves* jointly entered into a contract with another or whether the expression will include also *other* persons who may be jointly liable in respect of a contract. This question has been fully discussed in Note 8.

A payment by one co-mortgagor does not save limitation as against others not only as regards their *personal* liability but also as regards their liability in respect of their share in the mortgaged *property*. The reason is that the word "chargeable" in sub-s. (2) refers not only to *personal* liability but also liability in respect of *property*.[11] (See Note 6.)

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[8] **('18) 5 AIR 1918 Lah 310 (312, 313) : 1918 Pun Re No. 3 : 44 Ind Cas 213 (DB), *Ram Chand* v. *Mewa Ram*. (Sub-mortgagor's position is that of an acknowledged surety.)**

[9] **('26) 13 AIR 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari* v. *Doman*.**

[10] **('32) 19 AIR 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra* v. *Monindra Narain*.**

[*See also* ('38) 25 AIR 1938 Pat 383 (385) : 174 Ind Cas 156 (DB), *Baijnath Prasad* v. *Satilal Sahu*. (Observations of Manohar Lall, J. support the above view of the decision in A I R 1926 Cal 150.)]

Although a payment by one co-mortgagor does not save limitation as against the other co-mortgagors, such payment will save limitation as against the particular co-mortgagor who makes the payment.[12] In such cases limitation will be saved not only in regard to the *personal* liability of the co-mortgagor making the payment but also in regard to his liability in respect of his share in the mortgaged *property*.[13] Further, such co-mortgagor's share will be liable for the *whole* mortgage debt and not merely for a proportionate part of it. The reason is that the mortgagee is entitled under the law to proceed against *any* part of the mortgaged property for the recovery of his debt.[14]

Sub-section (2) of this section, however, has no application to the case of a joint Hindu family in which the father as manager makes a payment on behalf of the family. Such a case will come within the provisions of sub-s. (3) (b) of the section. Thus, where a decree on a mortgage is passed against the father and his sons who are members of a joint Hindu family and the father as manager of the family makes a payment towards interest, such payment will operate to save limitation not only against the father but against his sons as well.[15]

Where a mortgage deed executed by two persons contains a default clause to the effect that on default in the payment of the annual interest the mortgagee should be entitled to the possession of the mortgaged property and where after default is committed, one of the co-mortgagors pays off the arrears of interest completely, and the mortgagee accepts such payment, the cause of action based on the default is wiped out and limitation for a suit for possession by the mortgagee will only run from the next default. In such a case, there is no question of the extension of the period of limitation by payment by one of the co-mortgagors and hence sub-s. (2) of this section does not apply at all. Although payment by one of the co-mortgagors may not be sufficient to extend the period of limitation as against the other co-mortgagor such payment may be sufficient to discharge both the co-mortgagors from the liability they may have incurred under the terms of the mortgage deed.[16]

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[11] ('39) 26 AIR 1939 Rang 287 (289) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom.* (Relationship of principal and surety does not exist between joint contractors.)

('29) 16 AIR 1929 Mad 881 (884) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayammal* v. *Muthukumaraswami.*

[See however ('38) 25 AIR 1938 Pat 383 (385) : 174 Ind Cas 156 (DB), *Baijnath Prasad* v. *Satilal Sahu.* (According to Wort, J. payment by one mortgagor will keep alive the *mortgage* against all but not the liability on the personal covenant.)]

[12] ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan* v. *Kishori.*

[13] ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan* v. *Kishori.*

[14] ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan* v. *Kishori.*

[15] ('38) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi* v. *Nathu Lal.*

12. Principal and surety—Acknowledgment or payment by one, whether will save limitation against the other. — An *acknowledgment* of liability by the principal debtor will save limitation only as against him and not as against the surety.[1] Similarly, an acknowledgment by the surety will save limitation only as against him and not as against the principal debtor.

There is a conflict of decisions as to whether a *payment* made by a principal debtor will save limitation as against the surety and conversely, whether a payment by the surety will save limitation as against the principal debtor. One view is that for the purpose of S. 20, the debts of the principal debtor and the surety are *distinct* and that, therefore, a payment by one of them cannot save limitation as against the other.[2] Another view is that the debt is *common* both to the surety and the principal debtor, and that, therefore, a payment by one of them *will* save limitation against the other also. This view involves the assumption that the principal debtor and the surety are not joint contractors within this sub-section.[3] In some decisions[3a] belonging to the first group, an opinion has been expressed that even viewing the debt as the joint debt of the principal debtor and the surety, they will be *joint contractors* within S. 21, sub-s. (2) and therefore a payment by one of them will not save limitation as against the other. In the undermentioned case[4] it was held that a payment by the principal debtor will not save limitation against the surety. But, beyond saying that an *acknowledgment* by a principal debtor will save limitation only against him and not as against the surety, the judgment does not give any reason for its decision.

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[16] ('39) 26 AIR 1939 Lah 212 (215), *Abdullah* v. *Ishaq Mohammad.*

Note 12

[1] ('39) 26 AIR 1939 Nag 31 (32) : 179 Ind Cas 771, *Suwalal* v. *Fazle Hussain.* (This principle will apply to continuing guarantee also.)

('31) 18 AIR 1931 Lah 691 (694) : 13 Lah 240 (DB), *Diyalu Mal* v. *Nandhu.*

[2] ('04) 28 Bom 248 (251, 252) : 5 Bom L R 1020 (DB), *Gopal Daji* v. *Gopal Sonu.* (There is no presumption that principal debtor is agent of surety.)

('18) 5 AIR 1918 Cal 707 (709, 710) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kishore Roy* v. *Hindusthan Co-operative Insurance Society Ltd.* (This holds good even where the payment by the principal debtor is made with the knowledge and consent of the surety and even at his request.)

('38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman* v. *Upendranath Samanta. (Obiter.)*

('11) 9 Ind Cas 8 (9) (Mad), *Sami Aiyangar* v. *Laxmi.*

('17) 4 AIR 1917 Mad 895 (896) : 32 Ind Cas 608, *Kothandaraman Chetty* v. *Shunmugam Chetty.* (The words 'joint contractors' in Section 21 (2) would apply to a surety.)

('30) 17 AIR 1930 Mad 112 (112) : 120 Ind Cas 576, *Secretary of State* v. *C. R. Subramania Iyer.* (28 Bom 248 and 21 Mad L Jour 455 followed ; A I R 1919 Lah 374 not followed.)

('34) 21 AIR 1934 Mad 639 (640) : 152 Ind Cas 464 (DB), *Vaiyapuri Pandaram* v. *Seetharama Chettiar.* (A I R 1918 Cal 707 followed.)

('25) 12 AIR 1925 Mad 132 (132) : 80 Ind Cas 932, *Jaganadha Reddiar* v. *Lakshmana Reddiar.* (Liability of the endorser of a promissory note arises out of the endorsement and not on the note—A payment of money by the maker of the note and signed by him saves limitation only against the person liable on the note and has nothing to do with persons liable on the endorsement.)

('24) 11 AIR 1924 Nag 411 (412) : 20 Nag L R 140, *Abde Ali* v. *Askaran.* (It was conceded that payment by the principal debtor in this case was not on behalf of surety.)

('31) 18 AIR 1931 Oudh 310 (310) : 132 Ind Cas 798 (DB), *Jainarain Singh* v. *Parmeshar Murao.* (Point not disputed.)

The weight of authority is in favour of the first view. It is submitted, however, that the view does not seem to be correct on principle. The *debt* is common to both the surety and the principal debtor although the *contracts* under which they are liable are distinct.[5] Further, the *third* view referred to above that even if the debt of the surety and principal debtor is deemed to be common to both, they are *joint contractors* within the meaning of sub-section (2) of this section, does not also appear to be correct. The *contracts* under which the two are liable are distinct, though the *debt* is common.

13. Partner, authority of, to acknowledge or pay on behalf of firm.—As seen in Note 6, sub-section (2) does not preclude an acknowledgment or payment by a member of any of the groups specified therein from being effective against the other members of the

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('32) 19 AIR 1932 Rang 88 (89) : 10 Rang 398 : 139 Ind Cas 138, *U Ba Pe* v. *Ma Lay*. (Payment by surety did not extend limitation against the principal.)

('25) 12 AIR 1925 Bom 244 (245) : 49 Bom 202 : 86 Ind Cas 883 (DB), *Raghavendra Gururao* v. *Mahipat Krishna*. (The principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation.)

[3] ('40) 27 AIR 1940 Cal 401 (402 to 405) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar* v. *Kisori Mohan*.

('19) 6 AIR 1919 Lah 374 (375) : 1919 Pun Re No. 105 : 53 Ind Cas 586, *Harbanslal* v. *Nathu*. (Dissenting from 28 Bom 248.)

[*See* ('18) 5 AIR 1918 Lah 310 (312, 313) : 1918 Pun Re No. 3 : 44 Ind Cas 213, *Ram Chand* v. *Mewa Ram*.]

[*See also* ('39) 26 AIR 1939 Rang 287 (289) : 184 Ind Cas 622 (DB), *U So Maung* v. *J. Thom*. (The observations of Mackney, J., in this case suggest that payment by principal debtor will save limitation against the surety also.)

[3a] ('17) 4 AIR 1917 Mad 895 (896) : 32 Ind Cas 608, *Kotandaraman Chetty* v. *Shunmugam Chetty*.

('18) 5 AIR 1918 Cal 707 (712) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kissore* v. *Hindusthan Co-operative Insurance Society Ltd.* (Per Mookerji, J.)

[4] ('31) 18 AIR 1931 Lah 691 (694) : 13 Lah 240 (DB), *Diyalu Mal* v. *Nandhu*.

[5] ('40) 27 AIR 1940 Cal 401 (402) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar* v. *Kisori Mohan*.

Section 21
Note 13

group where such members have *authorised* such acknowledgment or payment. Hence, an acknowledgment or payment by a partner will save limitation against the other partners also where the latter have *authorised* such acknowledgment or payment. Such authorisation need not be express and may be implied from the facts and circumstances of each case.[1] Further, under the law, each partner has implied authority on behalf of all the partners to do all such acts as are necessary or usually done in the course of carrying on the business of the kind carried on by the firm of which he is partner. (See S. 19 of the Partnership Act of 1932.) Hence, if the nature of the business of the firm is such that acknowledgments of liability or making part payments or payments of interest are things done in the usual course of the business, a partner may be presumed to have been authorized by the other partners to make such acknowledgments or payments.[2] Thus, in a going *mercantile* concern, as an ordinary rule, each partner may be presumed to have authority to acknowledge and make payments

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Note 13

1. ('19) 6 AIR 1919 Mad 1140 (1142, 1143) : 41 Mad 427 : 45 Ind Cas 18 (FB), *Veeranna* v. *Veerabhadraswami*. (Overruling 32 Mad 421 and 35 Mad 142.)

('25) 12 AIR 1925 Rang 30 (32) : 84 Ind Cas 391 : 2 Rang 367 (DB), *Rala Singh* v. *Bhagwan Singh & Sons*. (Trading partnership — One partner has implied authority to bind the other partners by signing a pro-note.)

('35) 22 AIR 1935 Lah 559 (560) : 158 Ind Cas 260, *Dayal & Co.* v. *Radha Kishan*. (Endorsement made by a partner in the ordinary course of business and with the implied consent of the other partner binds the latter.)

('26) 13 AIR 1926 Mad 114 (115) : 92 I. C. 653 (DB), *Mahadeva* v. *Ramakrishna*.

('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull* v. *Govindaswami*. (Partner *ipso facto* has no authority to acknowledge or to make a part payment. But if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out special authority.)

2. ('88) 10 All 418 (419, 420) : 1888 All W N 93 (DB), *Gadu Bibi* v. *Parsotam*.

('28) 15 AIR 1928 All 491 (491, 492) : 50 All 982 : 111 Ind Cas 143, *Debi Dayal* v. *Baldeo*. (When a joint Hindu family carries on business, its members are in a position of partners in regard to persons dealing with that business.)

('26) 13 AIR 1926 Mad 114 (115) : 92 Ind Cas 653, *Mahadeva* v. *Ramakrishna*.

('32) 19 AIR 1932 Lah 456 (456) : 137 Ind Cas 771, *Kuljas Ram* v. *Wishan Singh*. (A I R 1926 Lah 616 Followed.)

('09) 4 Ind Cas 708 (709) : 32 All 51, *Lalta Parshad* v. *Babu Parshad*. (Case of managing partner.)

('16) 3 AIR 1916 Bom 119 (121) : 38 Ind Cas 873 (DB), *Abdullai* v. *Ranchodlal*. (Partner appointed vahivatdar by Court to manage business of partnership can acknowledge or pay on behalf of the firm.)

('99) 1899 Pun Re No. 45, p. 216, *Bichhalal* v. *Jai Parshad*.

[*See* observations in ('14) 1 AIR 1914 Mad 609 (612) : 37 Mad 146 : 21 Ind Cas 634, *K. R. V. Firm* v. *Sitharamaswami*. (An opinion was expressed in this case that the cases to the contrary reported in 32 Mad 421 and 35 Mad 142 should be reconsidered.)]

[But see ('16) 3 AIR 1916 Mad 508 (509) : 28 Ind Cas 845 (DB), *Veerappa Chetty* v. *Chidambaram Chettey*. (Even if a partner was put in charge of a branch of partnership business and was himself a partner that alone will not justify the presumption that he was authorized to bind the firm by payment or acknowledgment.)]

on behalf of the firm.[3] But, in the case of partnerships which are not of such a character, as for instance, a mining company, a farming company, a firm of attorneys, etc., there is no such implied authority.[4]

Moreover, even in the case of partnerships to which the presumption of agency above referred to applies, the presumption will hold good only in the case of acknowledgments or payments made in the *course of the partnership business*.[5] Thus, where an acknowledgment is made by a partner in the course of proceedings relating to his insolvency, he cannot be considered as acting in the course of the partnership business and the acknowledgment cannot be used as against the other partners.[6] Further, where a partner purports to acknowledge only his own liability and not that of the partnership as a whole, his acknowledgment cannot save limitation as against the other partners.[7]

The presumption of agency above referred to does not apply in the case of a partnership which has ceased to be a *going concern*.[8] Hence, after a partnership has been dissolved, an acknowledgment or payment made by one of the ex-partners in respect of a debt which was a partnership debt cannot bind the other ex-partners.[9] But, even in such cases, a partner who has been authorized to wind up the business[10] or to collect and pay the debts of the partnership, or who has been appointed a receiver with the consent of the other partner to realise assets, to *pay debts* and do other acts,[10a] will be considered as having authority to acknowledge or make payments in respect of such debts so as to save limitation.[11]

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[3] ('39) 26 AIR 1939 Lah 397 (398) : 184 Ind Cas 734, *Gulsaran Das* v. *Brij Mohan*.
('86) 10 Bom 358 (362), *Premji Ludha* v. *Dossa Doongersy*.
('32) 19 AIR 1932 Bom 316 (318, 319) : 138 I. C. 805, *Gordhandas* v. *Bhulabhai*.
[*See* ('73) 10 Bom H C R 319 (322) (DB), *Premabhai Hemabhai* v. *T. H. Brown*. (One partner can bind firm by giving promissory note or drawing bill of exchange.)
('88) 1888 Bom P J 147, *Ravji* v. *Narayandas*.]
[But see ('09) 2 Ind Cas 309 (310) : 32 Mad 421 (DB), *Valasubramania Pillai* v. *Ramanathan Chettiar*. (Authority cannot be presumed even in a going mercantile concern.)]

[4] *See* ('73) 10 Bom H C R 319 (322) (DB), *Premabhai Hemabhai* v. *T. H. Brown*. (No authority to draw bill of exchange or give promissory note.)

[5] ('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*

[6] ('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*

[7] ('01) 3 Bom L R 144 (150) (DB), *Baldeo Das* v. *Manekchand*.

[8] ('89) 1889 Pun Re No. 140, p. 477, *Naubat Rai* v. *Seva Ram*. (Where the firm merely exists for the purpose of winding up its affairs, one partner cannot sign acknowledgments on behalf of the firm.)
('16) 3 AIR 1916 Low Bur 75 (76) : 36 Ind Cas 225 : 8 Low Bur Rul 363 (DB), *Malayandi Chetty* v. *Narayanan Chetty*. (When a money lending firm is being wound up, one partner cannot give an acknowledgment for a subsisting debt so as to bind the firm.)
('25) 12 AIR 1925 Nag 268 (270) : 85 Ind Cas 775, *Sheonarain* v. *Babu Lal*.

[9] ('86) 10 Bom 358 (362, 363), *Premji Ludha* v. *Dossa Doongersey*.
('26) 13 AIR 1926 Mad 114 (115) : 92 I. C. 653 (DB), *Mahadeva* v. *Ramakrishna*.
('98) 8 Mad L Jour 261 (262) (DB), *Rajagopala Pillai* v. *Krishnasami Chetti*. (Where a partnership is dissolved by the death of one of the partners, the surviving

Under S. 45 of the Partnership Act of 1932, notwithstanding the dissolution of a firm, the partners will continue to be liable *as such* to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution. There was a similar provision contained in S. 264 of the Contract Act before the Partnership Act of 1932 was passed. Hence, notwithstanding the dissolution of a firm, if the creditor has no notice of such dissolution and an acknowledgment or payment is made by a partner in respect of a partnership debt, the acknowledgment or payment will save limitation against the other partners also. The reason is that in such cases, by virtue of the provisions above referred to, the presumption of agency applicable to going concerns will apply also to *dissolved* partnerships, so far as third parties, like creditors of the firm, who are ignorant of the dissolution of the firm, are concerned.[12]

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partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorised to do so.)

('25) 12 AIR 1925 Nag 268 (269, 270) : 85 Ind Cas 775, *Sheo Narain* v. *Babu*. (Do.)

('16) 3 AIR 1916 Mad 235 (236) : 30 Ind Cas 675 (DB), *Muthuswami Nadan* v. *Sankaralingam Chetty*.

[10] ('29) 16 AIR 1929 Lah 266 (267) : 118 Ind Cas 529, *Pahumal* v. *Chunilal*. (But the question whether a particular partner was authorized to wind up the business is mixed question of law and fact.)

[10a] ('37) 24 AIR 1937 Mad 764 (766) : 174 Ind Cas 22, *Krishnayya* v. *Seetharamayya*.

See also Note 52 under S. 19 and Note 22 under S. 20.

[11] ('16) 3 AIR 1916 Mad 235 (236, 237) : 30 Ind Cas 675 (DB), *Muthuswami Nadan* v. *Sankaralingam Chetty*. (Partner authorized to pay debts—From this the lesser power of acknowledging debts can be inferred.)

[12] ('32) 19 AIR 1932 Bom 316 (319) : 138 Ind Cas 805, *Gordhan Das* v. *Bhula Bhai*. (In absence of proof and knowledge of dissolution by creditors, signature of partner to acknowledgments must be deemed to be on behalf of other partners.)

('02) 26 Bom 42 (49) : 3 Bom L R 484 (DB), *Dalsukh Ram* v. *Kalidas*. (Burden of proving that the creditor had notice of dissolution is on the partner who asserts that the creditor had such notice.)

('30) 17 AIR 1930 Bom 236 (237, 238) : 125 Ind Cas 442, *Krishnabai* v. *Varjivandas Jagjivandas*. (10 Bom 358 distinguished on the ground that it must be assumed in that case that the creditor had knowledge of the dissolution of the firm.)

('29) 16 AIR 1929 Cal 714 (716) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd.* v. *Jatindra Nath*.

('26) 13 AIR 1926 Lah 616 (616, 617) : 7 Lah 403 : 99 Ind Cas 563 (DB), *Ganda Singh* v. *Bhag Singh*. (But where on the date of the acknowledgment the partners have ceased to do business and the fact was *within the knowledge of the*

Suppose, after the dissolution of a firm, of which the creditor has no notice, one of the partners makes an acknowledgment or payment in respect of a partnership debt. Will such acknowledgment or payment bind the estate of a deceased partner? It was held by the Bombay High Court in the undermentioned case[13] that the acknowledgment or payment will bind the estate of the deceased partner. The reason given was that in such cases, the presumption under S. 264 of the Contract Act, of the *continuance* of the firm must be made even against the estate of the deceased partner. Further, it was held that S. 261 of the said Act only provided that the estate of a deceased partner would not be liable in respect of any *obligation incurred* by the firm after his death. As in the case of an acknowledgment under S. 19 or payment under S. 20, *no fresh obligation is incurred*, the above provision did not form any objection to holding that the estate of the deceased partner was bound by the acknowledgment or payment made by one of the partners after his death.

It is submitted that the above ruling would not be good law under the Partnership Act of 1932, the proviso to S. 45 of which provides that the estate of a partner who dies is not liable under S. 45 (corresponding to S. 264 of the Contract Act) for *acts done* after his death. The reason is that the expression "acts done" is wide enough to include acknowledgments of liability and part payments or payments of interest.

Under S. 4 of the Limitation Act of 1859, an acknowledgment by *an agent* was not recognised. Hence, under that Act one partner could not acknowledge on behalf of another even if he was authorised by the latter to do so.[14]

14. Hindu trading family. — Where a joint Hindu family carries on business, the members of the family are in the position of partners in regard to persons dealing with the business. Hence, as in the case of other partnerships, an acknowledgment or payment by *any* member of the family made in the course of the business may be presumed to be authorised by the other members of the family.[1]

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person in whose favour the acknowledgment was made, one partner has no power to make an acknowledgment so as to save limitation against the other.)

('29) 16 AIR 1929 Lah 266 (267) : 118 Ind Cas 529, *Pahu Mal* v. *Chuni Lal.*

('26) 13 AIR 1926 Mad 114 (115) : 92 Ind Cas 653 (DB), *Mahadeva* v. *Rama Krishna.*

[13] ('35) 22 AIR 1935 Bom 357 (358, 359) : 60 Bom 5 : 158 Ind Cas 159 (DB), *Babu* v. *Dayambai.*

[14] ('67) 2 Agra 370 (374) (DB), *Banarasee Dass* v. *Khooshal Chund.*

Note 14

[1] ('37) 1937 Mad W N 1312 (1313), *Narayana Iyer* v. *Narayana Iyer.* (But this presumption will not apply to an acknowledgment made by one of the members after partition — In such a case the onus of proving that he was authorized by the other members to give the acknowledgment will be on the plaintiff.)

('28) 15 AIR 1928 All 491 (491, 492) : 50 All 982, *Debi Dayal* v. *Baldeo.*

Similarly, the presumption applicable to partnerships, viz., that even after dissolution a partnership must be deemed to be continuing as regards creditors and others dealing with the firm who have no notice of the dissolution, will also apply to a Hindu trading family. Hence, even after partition in the family, if the creditor has no notice of such partition, an acknowledgment or payment made by any member of the family in the ordinary course of business will be binding on the other members of the family also.[2]

15. Executors. — An executor can make acknowledgments of liability under S. 19 and payments under S. 20 on behalf of the estate.[1] Where there are more than one executor, an acknowledgment or payment by one of them alone will not be effective against the others.[2]

16. Joint mortgagees. — In the case of joint mortgagees, there is no question of any *payment* by them under S. 20. But, they can make an acknowledgment of liability under S. 19 so as to save limitation for a suit for redemption by the mortgagor.

As seen in Note 6, an acknowledgment under S. 19 operates only as against the person making it and not against others who may be jointly liable with him. Hence, even under S. 19 itself, an acknowledgment by a co-mortgagee will not operate against the other co-mortgagees for purposes of limitation, except where the latter have authorised him to make the acknowledgment.[1] The object of sub-section (2) of this section in such cases is to provide that the mere fact that persons stand to each other in the relation of co-mortgagees will not make them agents for each other for the purpose of making acknowledgments under section 19.[1a]

Although an acknowledgment under S. 19 will be effective against the particular person who makes the acknowledgment irrespective of its effect with regard to others who may be jointly liable with him, an acknowledgment of liability by a co-mortgagee will be ineffective even to sustain a suit for redemption of such co-mortgagee's *share* in the mortgage. The reason is that the entire mortgage must be treated as one indivisible unit and redemption of a portion of the mortgage alone cannot be allowed under the law except in certain special circumstances.[2] Where, however, the mortgagees have partitioned the mortgagee right and each of them is in separate possession of a portion of the mortgaged property, an acknowledgment by one of them can be used in a suit for redemption of the particular share which is in his enjoyment.[3]

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[2] ('30) 17 AIR 1930 Bom 236 (237) : 125 Ind Cas 442, *Krishnabai* v. *Varjivandas.*

Note 15

[1] (1864) 2 Mad H C R 84 (85), *Raja Iswara Das* v. *Richardson.*

[2] ('67) 8 Suth W R 63 (63), *Chunder Kant Mitter* v. *Ramnarain Dey Sircar.* (The admission of one executor would not bind another, at any rate, if the admission was not made in the character of executor.)

See also Note 56 to section 19.

Note 16

[1] ('07) 1907 Pun L R No. 43, p. 236 : 1907 Pun W R No. 23 (FB), *Ghulam Haider Shah* v. *Ghulam Muhammd Khan.*

('10) 5 Ind Cas 992 (994) : 1910 Pun Re No. 39, *Ganga Ram* v. *Pokhar Das.*

('09) 4 Ind Cas 579 (581) (All), *Jaigopal Misir* v. *Sheo Sagar Singh.*

[1a] *See* ('41) 28 AIR 1941 Pat 147 (150) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukh Narain* v. *Ramlochan Tiwari.* (Under S. 21 (2) acknowledgment by one of several mortgagees is insufficient to provide a fresh period of limitation.)

Where A and B are two co-mortgagees and A dies with the result that the entire mortgagee right becomes vested in B, there is no longer any question of co-mortgagees and hence, an acknowledgment by B after A's death in such circumstances will be sufficient to keep alive the right of redemption.[4]

Under the Acts of 1859 and 1871, an acknowledgment of the right of redemption was required to be made by the mortgagee or some person claiming under him. Where there were more than one mortgagee or more than one person claiming under the mortgagee, the expression "mortgagee" or "some person claiming under the mortgagee" was held to mean *all* the mortgagees or *all* the persons claiming under the mortgagee.[5] Further, under the above Acts an acknowledgment by an agent was not valid.[6] Hence, there could be no question of one of several mortgagees acting as the agent of the others for purposes of an acknowledgment.

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[2] ('96) 18 All 458 (460) : 1896 All W N 147, *Dharma* v. *Balmakund*. (17 Bom 173 followed—Case of mortgage in which interest of each mortgagee could not be apportioned so as to allow of the mortgage being redeemed piecemeal—Whole suit is liable to be dismissed.)

('12) 14 Ind Cas 132 (133) : 34 All 371 (DB), *Jwala Prasad* v. *Achay*. (18 All 458, followed.)

('04) 1 All L Jour 355 (357), *Hanuman Prasad* v. *Raghunandan Singh*. (Acknowledgment was made by the mortgagee for himself and as agent of his co-mortgagee, but owing to the fact that it was so made when Limitation Act of 1859 was in force which did not provide for acknowledgment by agents, the redemption suit was dismissed.)

('34) 21 AIR 1934 Lah 293 (293) : 151 Ind Cas 385, *Ahmad Shah* v. *Kartar*.

('11) 10 Ind Cas 238 (240) (All), *Chunni* v. *Hukum Singh*.

('20) 7 AIR 1920 Lah 516 (516, 517): 67 Ind Cas 463 (464), *Nadar Shah* v. *Ishar Das*. (The fact that each branch of the family was recorded as having one-sixth share would not have entitled the plaintiff to sue for redemption piecemeal.)

[3] ('30) 17 AIR 1930 Bom 466 (475) : 54 Bom 625 : 128 Ind Cas 417 (FB), *Motilal Jadav* v. *Samal Bechar*. (17 Bom 173 distinguished.)

('09) 2 Ind Cas 469 (470) (DB) (Bom), *Hiralal Icchalal* v. *Narsilal*.

[*See also* ('10) 6 Ind Cas 190 (191) (DB) (All), *Sheonandan Singh* v. *Achhabar Singh*. (Equity of redemption vesting in one co-mortgagee — In a suit for redemption by him, acknowledgment by defendant or some person through whom he derives his title may be relied on.)]

[4] ('15) 2 AIR 1915 Mad 962 (965) : 28 Ind Cas 69, *Kalliani Amma* v. *Narayanan Nambiar*. (The defendants in this case claimed to derive title through *B* alone.)

[5] ('15) 2 AIR 1915 Mad 951 (951) : 26 Ind Cas 127 (DB), *Muhammade* v. *Mayi Kunhi Haji*. (Mortgage in favour of Karnavan of Malabar tarwad — Acknow-

17. Acknowledgment or payment by one of several judgment-debtors. — An *acknowledgment* by one of several co-judgment-debtors will save limitation only against him and not against the other judgment-debtors.[1] A *payment* under S. 20 by one of several joint judgment-debtors will *prima facie* save limitation as against *all* the judgment-debtors. But, where the decree has been passed against them in their capacity as joint contractors, partners, executors or mortgagees, the payment will, under sub-s. (2) of this section, save limitation only against the particular judgment-debtor who makes the payment and not as against the others.[2]

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ledgment by anandravan—Anandravan not 'person claiming under mortgagee'—Treating him as co-mortgagee acknowledgment by one co-mortgagee is not sufficient to save limitation.)

('93) 17 Bom 173 (177, 178) (DB), *Bhogilal* v. *Amritlal.*

('09) 1 Ind Cas 203 (204) (DB) (Mad), *Vaikunta Bhakta* v. *Kunni Pakki Beari.* (In this case the mortgagee making the acknowledgment had subsequently acquired the whole of mortgage property—*Held*, the acknowledgment being not valid at the time it was made did not save limitation.)

('09) 1 Ind Cas 204 (204, 205) (DB) (Mad), *Ganpathy Naicken* v. *Makki Keyi.* (17 Bom 173 followed.)

('77) 1877 Pun Re No. 61, *Mt. Mah Bibi* v. *Motan Mal.* (Single mortgage in favour of number of persons — Acknowledgment by one mortgagee cannot give new period of limitation in respect to share or portion of property mortgaged, but is absolutely without effect.)

('88) 1888 Pun Re No. 157, p. 420, *Hakikat Rai* v. *Gangadas.* (Do.)

('11) 10 Ind Cas 238 (240) (All), *Chunni* v. *Hukum Sinngh.* (Entry in a khewat is sufficient acknowledgment if made by all the mortgagees.)

(1900) 1900 Pun Re No. 62, p. 240, *Bhawani Das* v. *Muhammad Yusuf.* (Sole heir of original mortgagee is "person claiming under mortgagee" though he has sons who have taken an interest by birth in the mortgagee right.)

[6] ('88) 1888 Pun Re No. 157, p. 420, *Hakikat Rai* v. *Gangadas.*
('80) 1880 Pun Re No. 85, p. 204, *Hakim Devi Dyal* v. *Prab Dyal.*
[But see ('78) 1878 Pun Re No. 78, *Khair Md.* v. *Ahmudin.*]

Note 17

[1] ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar* v. *Ram Din.* (27 All 575 followed.)
('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nanda Lal Marwari* v. *Rampal Singh.*
('14) 1 AIR 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behary Kapur* v. *Jnanendranath Ghosh.*
('17) 4 AIR 1917 Cal 422 (424) : 37 Ind Cas 738 (DB), *Jogendra Pd.* v. *Asutosh.*
[*See* ('08) 1908 Pun Re No. 54, p. 270, *Bhagwan Singh* v. *Mohanlal.*]
See also Note 54 to Section 19.

[2] ('27) 14 AIR 1927 Cal 193 (195) : 98 Ind Cas 381 (DB), *Rajtilak Narayan* v. *Mufusuddi.* (Mortgage decree against several persons who are not joint contractors—Payment by one saves limitation against all.)
('33) 20 AIR 1933 Pat 1 (4) : 12 Pat 93 (DB), *Badri Das* v. *Pasupathi.* (Do.)
[*See also* ('38) 25 AIR 1938 Pat 395 (396) : 176 Ind Cas 876, *Ram Ranbijaya Prasad* v. *Nagesar Tiwari.* (One judgment-debtor becoming insolvent—Receiver

18. **"Chargeable," meaning of.** — See Note 6.

19. **Acknowledgment or payment by Hindu widow, whether binding on reversioners.** — Before the enactment of sub-s. (3) cl. (a) of this section in 1927, it was held that an acknowledgment of liability or payment under S. 20 by a Hindu widow would not bind the reversioners succeeding to the estate after her.[1] These decisions are no longer law now since the enactment of the above clause under which it is expressly provided that such payment or acknowledgment will be binding on the reversioners.[2]

20. **Acknowledgment or payment by manager of Hindu joint family — Sub-section (3) clause (b).** — This clause which was introduced into the section by the Limitation (Amendment) Act, I of 1927, gives legislative effect to the decisions[1] which prior to its

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making payment on his behalf—Such payment would not save limitation against other judgment-debtor.)]

[See however ('38) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi* v. *Nathu Lal.* (The latter part of the above rule does not apply where the judgment-debtors constitute a Hindu joint family and a payment is made by the manager—Special provision is made for such a case in sub-s. 3 (b) of S. 21.)]

[But see ('05) 27 All 575 (579) (DB), *Ashanullah* v. *Dakkhini.* (Under S. 20 payment by one co-debtor saves limitation only against him and not against others — Submitted view is not correct.)

('39) 26 AIR 1939 All 230 (231) : ILR (1939) All 258 : 181 Ind Cas 490 (DB), *Ram Kumar* v. *Hira Lal.* (Do.)]

Note 19

[1] ('36) 23 AIR 1936 All 858 (859) : 166 Ind Cas 182 (DB), *Tej Bahadur* v. *Kothi Radha Kishan-Gopi Kishan.* (Right of suit barred before the amendment — Acknowledgment by widow not being binding on reversioners — Right held was not revived by amendment.)

('13) 19 Ind Cas 291 (295) : 40 Ind App 74 : 35 All 227 (PC), *Soni Ram* v. *Kanhaiya Lal.* (Confirming in appeal 3 Ind Cas 725.)

('25) 12 AIR 1925 Cal 862 (864, 866) : 86 Ind Cas 353 (DB), *Mohini Mohan* v. *Sarat Sundari.*

('25) 12 AIR 1925 Nag 207 (210) : 82 Ind Cas 1052, *Laxmi* v. *Venkata Rao.* (If an acknowledgment by a limited female heir would not extend limitation as against the reversionary owner, much less a renewal mortgage by a *trespasser* would extend it.)

[But see ('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull* v. *Govindaswami.* (Hindu widow can keep alive debt by making payment under S. 20, Limitation Act — 35 All 227 (P C) distinguished.)]

[2] ('37) 24 AIR 1937 Pat 40 (42) : 16 Pat 45 : 166 Ind Cas 555 (DB), *Darogi Rai* v. *Basdeo Mahto.* (Case of borrowing and acknowledgment by daughter succeeding to father's estate.)

Note 20

[1] ('14) 1 AIR 1914 All 98 (99) : 36 All 264 : 23 Ind Cas 429 (DB), *Indar Pal* v. *Mewah.*

('28) 15 AIR 1928 Pat 156 (158) : 6 Pat 811 : 109 Ind Cas 655 (DB), *Bajrangi Prasad Singh* v. *Kesho Singh.*

('25) 12 AIR 1925 All 174 (175) : 85 Ind Cas 330 (DB), *Sanwal Das* v. *Saiyid Ali.*

('93) 17 Bom 512 (513, 514) (DB), *Bhasker Tatya Shet* v. *Vijalal Nathu.* (In the absence of proof to the contrary manager must be taken to be an agent authorized for making acknowledgments under S. 19.)

enactment had held that the manager of a Hindu joint family could make acknowledgments and payments so as to save limitation in regard to liabilities which were binding on the family. The clause provides that such payment or acknowledgment must be deemed to be made *on behalf of the family.*[2]

An acknowledgment or payment by the manager need not be *expressed* as made in his capacity as manager.[3] But, an acknowledgment or payment by the manager in his individual capacity will not

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('25) 12 AIR 1925 Cal 1153 (1157) : 88 Ind Cas 1025, *Hari Mohan* v. *Sourendra.*

('19) 6 AIR 1919 Cal 7 (7, 8) : 52 Ind Cas 436 (DB), *Chandra Kanta* v. *Behari Lal.* (Payment by manager saves limitation.)

('16) 3 AIR 1916 Cal 747 (749) : 31 Ind Cas 30 (DB), *Har Prosad* v. *Bindeswari.*

('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saroda Charan* v. *Durga Ram De.*

('24) 11 AIR 1924 Lah 611 (613) : 82 Ind Cas 96 : 5 Lah 317 (DB), *Thakur Das* v. *Putli.*

('84) 1884 Pun Re No. 99, p. 280, *Narsingh Das* v. *Bachatar Singh.*

('19) 6 AIR 1919 Mad 370 (373) : 53 Ind Cas 878, *Thankammal* v. *Kunhamma.*

('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Co.* (Acknowledgment contained in insolvency petition of the managing member is however not binding on the other members of the family.)

('15) 2 AIR 1915 Mad 506 (508) : 26 Ind Cas 911 (DB), *Chidambaram Chetty* v. *Ramaswami Chettiar.*

('82) 5 Mad 169 (170) (FB), *Chinnaya Nayudu* v. *Gurunatham Chetti.* (Overruling 1 Mad 385.)

('25) 12 AIR 1925 Oudh 394 (395) : 86 Ind Cas 693, *Sitla Baksh* v. *Jagatpal Singh.*

('22) 9 AIR 1922 Oudh 135 (137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar* v. *Beni Singh.*

[2] ('39) 26 AIR 1939 Nag 156 (157) : ILR (1939) Nag 235 : 182 Ind Cas 573 (DB), *Narain Chouthmal* v. *Rama Jago.* (Fact that other member had joined manager in borrowing the loan cannot impair representative capacity of manager — Per Niyogi, J., in Order of Reference.)

('39) 26 AIR 1939 Pat 490 (492) : 180 Ind Cas 365 (DB), *Thakur Prasad* v. *Ajodya Prasad.*

('38) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi* v. *Nathu Lal.* (Decree on mortgage passed against father and sons forming joint Hindu family—Father making payment towards interest on behalf of family to stay execution of decree —Payment operates to save limitation under S. 21 (3) (b) both as against himself and his sons.)

('36) 23 AIR 1936 Mad 871 (875) : 170 Ind Cas 749 (DB), *Ambalavana Pillai* v. *Gowri Ammal.*

[*See* ('35) 22 AIR 1935 Cal 648 (649) : 158 Ind Cas 512, *Annada Charan* v. *Jhatu.*

('30) 17 AIR 1930 Pat 301 (303) : 9 Pat 747 (DB), *Hasan Imam* v. *Brahmdeo.*]

[3] ('16) 3 AIR 1916 Cal 747 (749): 31 Ind Cas 30 (DB), *Har Prosad* v. *Bindeswari.*

('25) 12 AIR 1925 Cal 1153 (1157) : 88 Ind Cas 1025, *Hari Mohan* v. *Sourendra.*

('19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal* v. *Kunhamma.*

('36) 23 AIR 1936 Mad 871 (875, 876) : 170 Ind Cas 749 (DB), *Ambalavana Pillai* v. *Gowri Ammal.* (Where the manager is *also* liable in his private capacity to same creditor, it must be shown that his payment or acknowledgment was in his capacity as manager.)

be binding on the other members of the family.[4] Thus, it has been held that where the manager of a joint family mentions a debt in the schedule of debts filed by him in the course of proceedings for his being adjudicated an insolvent, the admission is made by him in his individual capacity and does not bind the family.[5]

The clause applies only where the liability in question is a *joint family* liability. Where the liability has been incurred by the members of the family in their individual capacity, the manager cannot, as such, acknowledge or make payments on behalf of the other members of the family.[6] A liability which has been incurred by the act of *all* the members of the family will be as much a liability of the *family* as a liability incurred by the *manager* on behalf of the family.[7] The fact that the liability has been incurred on behalf of a joint family need not appear on the face of the document under which a loan is borrowed. Such fact may be proved by oral evidence.[7a]

The authority of the manager under this clause will apply only so long as the family continues to be joint. Hence, although the family *was* joint when the liability was incurred, if at the time of the acknowledgment or payment by the alleged manager the family is divided, the acknowledgment or payment will not bind the other members of the family.[8] But, even in such cases, it was held that if the creditor had no notice of the partition in the family at the time of the acknowledgment or payment, the acknowledgment or payment would bind the other members of the family. This view was based on the ground that the termination of the authority of an agent does not take effect as regards third parties, before it becomes known to them.[9] (See Contract Act, section 208.) It is doubtful how far this view will be correct after the enactment of sub-s. (3) under which it is only an acknowledgment or payment by the manager for *the time being* that will save limitation.

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[4] ('17) 4 AIR 1917 Mad 518 (519): 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Co.*
[*See* ('93) 20 Cal 18 (21), *Aghore Nath* v. *Grish Chunder.*]

[5] ('17) 4 AIR 1917 Mad 518 (519): 36 Ind Cas 389 (DB), *Kissendoss* v. *Khatau Co.*

[6] ('41) 28 AIR 1941 Pat 208 (209), *Juro Rauto* v. *Adhikanda Pradhano.* (25 Mad 220 (FB) followed.)
('02) 25 Mad 220 (234) (FB), *Narayan Ayyar* v. *Venkataramana Ayyar.*
('15) 2 AIR 1915 Cal 652 (653) : 26 Ind Cas 511 (DB), *Baikuntagni* v. *Lal Chand.*
[*See* ('20) 7 AIR 1920 Mad 352 (353) : 54 Ind Cas 318, *Duraiswami Aiyar* v. *Krishnier.* (Pro-note by father and son—Payment by father—*Held* in circumstances of case that father was *authorised* to pay on behalf of son also although the transaction was not a *family* transaction.)]

[7] ('36) 23 AIR 1936 Mad 871 (875): 170 Ind Cas 749 (DB), *Ambalavana* v. *Gowri.* (The words of S. 21 (3) (b) are not limited only to cases in which the original contract has been entered into by the manager alone.)

[7a] ('40) 27 AIR 1940 Cal 137 (140) : 186 Ind Cas 891 (DB), *Kistur Chand* v. *Rajani Kanta.* (By such oral evidence the terms of the document are not varied — The words "as such" in the section do not also import that the document itself must show on the face of it that the debt has been incurred on behalf of the joint family.)

[8] ('39) 26 AIR 1939 Pat 451 (455) : 18 Pat 434 : 184 Ind Cas 597 (DB), *Rameshwar Dayal* v. *Ram Das Sahu.*
('38) 25 AIR 1938 Mad 774 (776, 778) : ILR (1938) Mad 968 : 178 Ind Cas 243 (DB), *Pangudaya Pillai* v. *Uthandiya Pillai.* (In this case the contention was raised that apart from the provisions of this section, under S. 20 itself, a payment by one member of the joint family whether before or after partition would save limitation against all, as under that section a payment by one joint debtor saves limitation against all (see Note 6) — So, it was argued even after partition, pay-

An acknowledgment or payment by a *junior member* of a Hindu joint family who is not the manager cannot bind the other members of the family.[10]

The opinion was expressed in the undermentioned case[11] that where a debt is incurred by the father in a Hindu joint family for his own personal needs, an acknowledgment of liability signed by him will not be binding on his sons and grandsons against whom the debt is sought to be enforced under the doctrine of pious obligation. It is submitted that the view is not correct. No doubt, in such cases,

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ment by the quondam manager would save limitation against all the members — In rejecting the contention it was held that the liability of the members of a Hindu joint family for a joint family debt was not a debt within the meaning of S. 20 and so the principle that payment by one joint debtor would save limitation against all the joint debtors did not apply to such cases. It is submitted that the reason given is obviously incorrect as it leads to the result that there can be no extension of limitation by payment under S. 20 in respect of a debt due by a joint Hindu family — The true reason for holding that the manager alone can make payments in regard to such debts so as to save limitation would appear to be that Section 21 (3) (b) is a *special* provision which prevails over the general provisions of Section 20.)

('37) 24 AIR 1937 Mad 586 (588) : 173 Ind Cas 319, *Rama Vadhyar* v. *Manian Vadhyar.* (AIR 1920 Mad 352, distinguished on the ground that the acknowledgment in that case was made while the family was still joint.)

('17) 4 AIR 1917 Mad 534 (535) : 32 Ind Cas 997, *Kodandarama Aiyar* v. *Arunachala Aiyar.*

('17) 4 AIR 1917 Mad 167 (167) : 33 Ind Cas 986 (DB), *Bapanna* v. *Bhimalingam.*

[9] ('94) 1894 Bom P J 58, *Bhaskar Tatyashet* v. *Tulsidas Vijalal.* (Formal notice to creditors about partition and determination of managership is not necessary.)
[*See also* ('11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim Haji Yakub* v. *Chuni Lal Chand.* (Not a case of manager of Hindu family but one of gumastha of family.)]

[10] ('01) 3 Bom L R 144 (151), *Baldeo Das Mohakamchand* v. *Manikchand.*

('22) 9 AIR 1922 Mad 23 (23) : 66 Ind Cas 155 : 45 Mad 345 (DB), *Rama Pattar* v. *Viswanath Pattar.* (Manager absent from his home but in correspondence with the junior members and controlling the management.)

('18) 5 AIR 1918 Oudh 323 (325) : 47 Ind Cas 655, *Lachhmi Narain* v. *Daya Shankar.* (If the father is alive, the son cannot in the absence of any other evidence be considered to be an *agent* of the father so as to bind the family by an acknowledgment of his.)

('23) 10 AIR 1923 Lah 135 (137) : 71 Ind Cas 737 (DB), *Ram Kishan* v. *Hirde.*

[11] ('40) 27 AIR 1940 Cal 137 (140) : 186 Ind Cas 891 (DB), *Kistur Chand* v. *Rajani Kanta.*

S. 21 (3) (b) will have no application as the debt is not a joint family debt. But the acknowledgment will be binding on the sons and grandsons under S. 19 as made by a person from whom they derive their liability. Similarly, a payment by the father under S. 20 will be binding on the sons and grandsons on the principle that a payment under that section by any one of the persons liable will save limitation as against all the persons liable. Even where the debt was contracted by the father while the family was joint and the payment was made by him after partition, such payment would be binding on the sons and grandsons.[12]

Where an unauthorised person makes an acknowledgment or payment in regard to a debt due by a Hindu father a ratification of such acknowledgment or payment by the father after the expiry of the period of limitation will not keep alive the debt against the sons though it will be kept alive against the father.[13]

Under S. 4 of the Act of 1859, an acknowledgment by an agent was not recognised and so an acknowledgment by the manager of a Hindu joint family was operative under that Act only against himself and not against the other members of the family.[14]

21. Acknowledgment or payment by manager of Malabar tarwad. — The manager of a Malabar *tarwad* can acknowledge or make payments in respect of the liabilities binding on the *tarwad* so as to bind the whole *tarwad*.[1]

22. Acknowledgment or payment by head of Muhammadan family. — The head of a Muhammadan family has no authority, as such head, to make acknowledgments or payments on behalf of the whole family.[1]

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[12] ('33) 20 AIR 1933 Mad 708 (709) : 56 Mad 833 : 145 Ind Cas 404 (DB), *Munusami Goundan* v. *Kutti Moopan*. (AIR 1928 Mad 657 (FB) followed; AIR 1919 Mad 1175 distinguished.)

[13] ('41) 28 AIR 1941 Mad 6 (16) (DB), *Thinnappa Chettiar* v. *Krishna Rao*. (Father cannot acknowledge barred debt so as to keep it alive against son.)

[14] ('75) 14 Beng L R 21 (49) (DB), *Gopal Narain* v. *Muddo Mutty*.

Note 21

[1] ('19) 6 AIR 1919 Mad 370 (372, 373): 53 Ind Cas 878 (DB), *Thankammal* v. *Kunhamma*.

Note 22

[1] ('18) 5 AIR 1918 Low Bur 136 (137) : 40 Ind Cas 858, *Yagappa* v. *Mahomed*.

22.[*] *(1)* Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Effect of substituting or adding new plaintiff or defendant.

(2) Nothing in sub-section *(1)* shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

Synopsis

1. Legislative changes.
2. Scope.
3. Applicability of section to "applications."
4. Applicability of section to "appeals."

4a. Applicability to applications under Section 68 of the Provincial Insolvency Act.

5. Addition of parties under Order 1, Rule 10, Civil Procedure Code.
6. "New plaintiff or defendant."
7. "Substituted or added."
8. New party — Minor.
9. New relief claimed by a party.
10. Misdescription.
11. Parties in representative character.
12. Suit or appeal by or against a dead person.
13. Question of limitation to be considered, whether before or after addition or substitution.
14. "Deemed to have been instituted."
15. "As regards him."
16. Necessary parties.
17. Joinder of parties in mortgage suits.
18. Necessary parties in suits relating to firms.
19. Necessary parties in suits relating to firms — Disclosure of partners' names.
20. Necessary parties in preemption suits.
21. Necessary parties in suits by or against clubs and corporations.
22. Necessary parties in suits between landlord and tenant.
23. Joint promisors and promisees and owners of joint right of action.
24. Torts.

24a. Necessary parties in suit for specific performance of contract to sell.

25. Objection to nonjoinder of parties.
26. "When he was so made a party."
27. Sub-section (2).
28. "Assignment or devolution."
29. Transposition of parties.

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[*] Act of 1877 : S. 22.

Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Other Topics (miscellaneous)

- Addition of new ground of right or liability. See Note 6.
- Addition of party after limitation — Effect as against others on record. See Notes 5 and 15.
- Addition of party whose name already struck off. See Note 6.
- Addition of persons already represented in suit. See Note 6.
- Benamidar impleaded—Addition of real owner. See Note 6.
- Hindu joint family represented by manager—Addition of other members. See Notes 6 and 11.
- Necessary and proper parties—Distinction. See Note 16.
- Original party having no right to sue—Addition of person having such right. See Note 6.
- Person correctly described—Mistake as to person liable discovered—No case of misdescription. See Note 10.
- Person not party to suit added in appeal—Section applies. See Note 4.
- Person not party to suit — Appellate Court's power to add such person. See Note 4.

1. Legislative changes. — Under the prior Acts, only cases of devolution by *death* were excluded from the operation of sub-s. (1).

Sub-section (2) now excludes from the operation of sub-s. (1) not only cases of devolution by death, but cases of *assignment* of interest and *all* cases of devolution of interest.

2. Scope.—Where a suit has been instituted, it may subsequently appear that some persons have not been made parties to the suit either as plaintiffs or as defendants though such persons may have been necessary or proper parties. In such cases, these persons may be subsequently impleaded in the suit by the leave of Court as provided by the provisions of the law of procedure in that behalf. But when such subsequent impleading of parties takes place, it cannot be said that the suit was instituted with these persons as parties to the action even *on the date of original institution itself*. On the other hand, so far as these persons are concerned, the suit must be deemed to have been filed on the date when they were made parties subsequently. This is indeed a general principle of law and the section is, in fact, based upon it. It does not introduce any new principle.[1] The justice of this rule is that, if it were not so, a party who may have acquired a right against another by lapse of time in the matter of making persons parties, would be compelled to lose it for no fault of his. This section is intended to safeguard such a right.[2]

Proviso where original defendant dies.

Provided also, that when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

Act of 1871 : S. 22.
Almost the same as that of Act of 1877.

Act of 1859.
No corresponding provision.

Section 22 — Note 2

[1] *See* ('75) 1 Bom 295 (301) : 1 Ind Jur 128 (DB), *Abdul Karim* v. *Manji Hansraj.*

[2] ('27) 14 AIR 1927 P C 252 (255) : 6 Rang 29 : 107 Ind Cas 237 : 55 Ind App 7 (PC), *Chockalingam Chetty* v. *Seethai Ache.*

It follows, also, that the section covers and contemplates only cases in which the action is defective *when it started*, by reason, for example, of the person or one of the persons in whom the right of action is vested not being before the Court. If A is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the rule of limitation, to take advantage of a suit improperly instituted by B.[3] Necessarily, therefore, the section can have no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest subsequently.[4] This latter principle is embodied in sub-section (2) of the section.

All that the section lays down is that a suit in which a party is subsequently joined shall be deemed to be instituted as regards him on the date of his joinder. Whether the suit becomes barred as regards him alone or as regards other parties also is a matter which will have to be ascertained with reference to the substantive law relating to the subject of necessary parties to an action and the law relating to limitation of actions contained in the statutes of the country.[5]

3. Applicability of section to "applications."—The section expressly deals with 'suits'. A 'suit' as defined in S. 2, cl. (10) of the Act does not include an 'application'. Applications are, therefore, not

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[*See* ('67) 8 Suth W R 241 (243) (DB), *Mt. Brojo Kissore Dossee* v. *Sreenath Bose.*]

[3] *See* ('40) 27 AIR 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai* v. *Ganpatsa.* (Suit on pro-note by wrong person — Right person substituted after period of limitation— Suit so far as right person is concerned shall be deemed to be instituted on date of substitution.)

[4] ('16) 3 AIR 1916 P C 202 (205, 206) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramanian Chetty.* (Case under Straits Settlement Limitation Ordinance.)

('24) 11 AIR 1924 Sind 47 (48) : 17 Sind L R 263 : 76 Ind Cas 119 (DB), *Manghoomal Jethanand* v. *Aratmal Satramdas.* (A I R 1922 Sind 13 affirmed.)

('34) 21 AIR 1934 Bom 385 (386) : 58 Bom 536 : 153 Ind Cas 800 (DB), *Krishnaji Shivaji* v. *Hanmaraddi Mallaraddi.* (Pro-note in favour of father — Son suing as plaintiff — Father, the right plaintiff, cannot be substituted or added after limitation.)

('09) 5 Ind Cas 931 (931, 932) : 33 Mad 115, *Subbaraya Iyer* v. *Vaithinatha Iyer.* (Pro-note in favour of mother—Her minor sons suing on the pro-note with mother as guardian—Mother cannot be impleaded as proper plaintiff after limitation.)

[*See* ('10) 6 Ind Cas 680 (680) (Mad), *Guruvappa Chetty* v. *Srinivasa Row.*

('24) 11 AIR 1924 Cal 90 (91) : 75 Ind Cas 255 (DB), *Rajani Kanta Roy* v. *Jyoti Prasad Singh.*]

[*See also* (1864) 1864 Suth W R Gap 152 (152, 153) (DB), *Kishen Lall Chowdhry* v. *Chunder Coomar Roy.*]

[5] ('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa* v. *Dajiba Bhau.*

('16) 3 AIR 1916 Sind 53 (54) : 10 Sind L R 38 : 35 Ind Cas 551 (DB), *Gehimal Dyalmal* v. *Karmoomal Siroomal.* (28 Bom 11 followed.)

Section 22
Notes 3–4

within the scope of this section.[1] Thus, the section does not apply to the following :

(1) Execution applications.[2]

(2) Applications under O. 21 R. 100 of the Code of Civil Procedure.[3]

(3) Applications under O. 22 of the Civil Procedure Code for substitution of legal representatives.[4]

(4) Applications under O. 9 R. 13 of the Civil Procedure Code.[5]

(5) Application for filing an award under Schedule II Para. 20 of the Civil Procedure Code[6] (now repealed by the Arbitration Act, 1940), though such an application is to be registered as a suit and the parties are to be treated as plaintiffs and defendants under the Civil Procedure Code.

But though the section does not in terms apply to applications the *principle* of the section applies to them[7] and in so far as any of the above decisions may hold to the contrary, it is submitted that they are not correct.

4. Applicability of section to "appeals." — This section applies only to suits. As under the definition in S. 2 (10) a suit does

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Note 3

1. ('23) 10 AIR 1923 Pat 88 (88) : 62 Ind Cas 536 : 6 Pat L Jour 463 (DB), *Chandrika Ray* v. *Ram Kuer Thakur.*

('09) 3 Ind Cas 324 (327) (DB) (Cal), *Jagat Tarini Dasi* v. *Rakhal Chandra.* (Execution proceedings.)

2. ('21) 8 AIR 1921 Pat 180 (181) : 62 Ind Cas 30 : 6 Pat L Jour 358 (DB), *Golab Koer* v. *Syed Mohamed Zaffer Hussain.*

[*See* ('30) 17 AIR 1930 All 597 (599) : 133 Ind Cas 23 (DB), *Zahurul Hasan* v. *Badri Narain.*]

3. ('31) 18 AIR 1931 Cal 385 (387) : 58 Cal 55 : 132 Ind Cas 631, *Indubhushan Das* v. *Hari Charan Mandal.*

4. ('19) 6 AIR 1919 Nag 150 (152) : 15 Nag L R 21 : 49 Ind Cas 34, *Amolaksao* v. *Govindrao.*

5. ('23) 10 AIR 1923 Pat 88 (88) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB), *Chandrika Ray* v. *Ram Kuer Thakur.*

6. ('31) 18 AIR 1931 All 725 (726): 133 I. C. 410 (DB), *Mangal Sen* v. *Prag Das.*

7. ('31) 18 AIR 1931 All 725 (726) : 133 Ind Cas 410 (DB), *Mangal Sen* v. *Prag Das.* (Principle of S. 22 applies to application under C. P. C., Sch. II Para 20 and there is no bar to the transposition of a respondent as an applicant after the expiry of the period of limitation.)

('19) 6 AIR 1919 Cal 510 (510) : 50 Ind Cas 5 (DB), *Ajiuddin Ahamed* v. *Khoda Bux.* (Auction-purchaser not joined as party to application to set aside execution sale within the period of limitation for the application—Application is barred.)

('11) 10 Ind Cas 417 (420) (DB) (Cal), *Khoda Baksh* v. *Sader Pramanik.* (Application under S. 47, C. P. C.)

('91) 1891 All W N 121 (121) (DB), *Karamat Khan* v. *Mir Ali Ahmed.* (Auction purchaser is necessary party to application to set aside execution sale—His being made a party after the period prescribed by Art. 166 does not cure the defect due to his original non-joinder.)

not include an appeal, this section does not apply to the joinder of parties to appeals. But as seen in Note 2, the section is based on a *general* principle; and this principle applies to appeals also.[1] Hence, where a person is newly added or substituted as a party to an appeal, the appeal must be held to have been instituted as regards such person on the date when he is so added or substituted. But, this principle does not apply to the special power of an appellate Court under Order 41, Rule 20 to add as respondent to an appeal a person who appears to the appellate Court at the hearing of the appeal to be interested in the result of the appeal.[2] As to the nature and extent of this power of the appellate Court, see the commentary under O. 41 R. 20 in the Authors' Civil Procedure Code, 3rd Edition.

4a. Applicability to applications under Section 68 of the Provincial Insolvency Act. — It has been held that proceedings under S. 68 of the Provincial Insolvency Act, 1920, are more akin to appeals than to a suit and that section 22 of this Act does not apply to them.[1] But it is submitted that S. 22 embodies a general principle which may apply to a proceeding although it may not be covered by the words of the section. At the same time the above decision may be supported on the other ground mentioned therein, viz., that section 68, Provincial Insolvency Act, does not contemplate that in a proceeding under it, any persons should be named as applicants and respondents to the proceeding and that there is no question of making any person a party to such proceeding.

5. Addition of parties under Order 1 Rule 10, Civil Procedure Code. — This section provides that where a *new* plaintiff or defendant is added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.[1] Thus, if on the

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Note 4

[1] ('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa* v. *Dajiba Bhau.* (Section 22 applies to appeals as much as to suits in principle—But there is a difference in the result arising from the application of S. 5 of the Act.)

('78-80) 2 All 487 (492) (DB), *Ranjit Singh* v. *Sheo Prasad Ram.*

[2] ('37) 24 AIR 1937 Mad 741 (744) : I L R (1938) Mad 52 : 172 Ind Cas 776 (DB), *Swaminatha* v. *Gopalaswami.* (Venkatasubba Rao, J., observed: "It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded by the time the appeal comes on for hearing for under the rule, be it noted, the action to be taken is at the hearing of the appeal.")

See also cases cited in Authors' Commentary on the Civil Procedure Code, 3rd Edn., O. 41 R. 20 Note 11.

Note 4a

[1] ('37) 24 AIR 1937 Lah 611 (611) : 168 Ind Cas 389, *Mai Chand* v. *Official Receiver, Ferozepore.*

Note 5

[1] ('27) 14 AIR 1927 P C 252 (255) : 6 Rang 29 : 107 Ind Cas 237 : 55 Ind App 7 (PC), *Chockalingam Chetty* v. *Seethai Ache.*

('34) 21 AIR 1934 Bom 385 (386) : 58 Bom 536 : 153 Ind Cas 800 (DB), *Krishnaji Shivaji* v. *Hanmaraddi Mallaraddi.* (14 Cal 400 dissented from.)

addition of a new defendant the suit is barred against him, it will have to be dismissed as against him.[1a] But does the addition of a party after the period of limitation affect the suit against other defendants who are already on the record ? The answer to this depends upon the question whether the added party is a *necessary* party or is only a *proper party* or whether he was already *constructively a party* to the suit though not actually so. If he was a *necessary* party, i. e., if the suit will not be a properly constituted one unless he is made a party, his addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all.[2] Where the party added is only a *proper*

('85) 9 Bom 1 (9), *Fisher* v. *Pearse.*

('30) 17 AIR 1930 Cal 113 (127) : 57 Cal 170 : 123 Ind Cas 250 (DB), *Currimbhoy & Co.* v. *L. A. Creet.*

('30) 17 AIR 1930 Lah 747 (748) : 11 Lah 688 : 126 Ind Cas 78 (DB), *Sher Singh* v. *Sundar Singh.*

('25) 12 AIR 1925 Mad 917 (918) : 85 Ind Cas 961, *Venkatasubbamma* v. *Pulipulla Reddy.*

('10) 6 Ind Cas 680 (680) (DB) (Mad), *Guruvappa Chetty* v. *Srinivasa Row.* (Subsequently added party may raise question of limitation.)

('10) 5 Ind Cas 931 (931, 932) : 33 Mad 115 (117) (DB), *Subbaraya Iyer* v. *Vaithinatha Iyer.*

('34) 21 AIR 1934 All 198 (200) : 147 Ind Cas 1067 (DB), *Atma Ram* v. *Beni Prasad.*

[*See* ('66) 6 Suth W R 298 (299) (DB), *Rajkishore Dossee* v. *Buddun Chunder.*
('27) 14 AIR 1927 Lah 819 (820) : 104 Ind Cas 700 : 9 Lah 217 (DB), *Muhammad Ismail Khan* v. *Said-ud-din Khan.*]

[1a] ('32) 1932 Mad W N 330 (331), *Venkatasamy* v. *Punnayya.*

('32) 19 AIR 1932 Lah 314 (315) : 137 Ind Cas 89 (DB), *Northern Bank of India* v. *Ramesh Chandar.* (Suit against wrong legal representative—Right legal representative impleaded after time—No question of *bona fides* arises.)

('09) 4 Ind Cas 1160 (1163) : 3 Sind L R 191, *Chelaram* v. *Baden Insurance Company.*

('36) 23 AIR 1936 All 94 (95) : 58 All 594 : 160 Ind Cas 1030, *Manni Gir* v. v. *Amar Jatichela.*

[2] ('38) 25 AIR 1938 Cal 324 (325) : 177 Ind Cas 798 (DB), *Dinesh Chandra* v. *Rajendra Chandra.*

('04) 28 Bom 11 (17) : 5 Bom L R 618 (DB), *Guruvayya* v. *Dattatraya.*

('33) 20 AIR 1933 Sind 121 (122) : 143 Ind Cas 900 (DB), *Pahloomal* v. *Paramanand.* (Suit for accounts against one partner only—Other partners added as parties after period of limitation—Suit must be dismissed.)

('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govindchandra Ghose* v. *Jamaluddin Mondal.* (All mortgagees or heirs of mortgagee must be parties to suit—Necessary party joined after limitation — Whole suit fails.)

('12) 13 Ind Cas 197 (199, 200) (DB) (All), *Gendan Lal* v. *Baburam.* (Necessary party not impleaded in mortgage suit till after limitation—Defect fatal to suit.)

('99) 21 All 346 (347, 348) : 1899 All W N 123 (DB), *Ganesha Singh* v. *Mundi Forest Company.* (Suit against unregistered company represented by its partner —Other partners sought to be added after limitation—Suit dismissed.)

('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imam-ud-din* v. *Liladhar.* (Partnership debt—Suit for—All partners must join—Addition of a partner after limitation—Suit to be dismissed.)

party but not a necessary one, the suit as against the other defendants will not be barred.[3] Where the added party is already constructively

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('29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Giris Chandra* v. *Ram Saran Majumdar.* (Plaintiff suing as assignee of one of mortgagees—Representatives of deceased mortgagee not brought on record till expiry of limitation—Suit must be dismissed.)

('14) 1 AIR 1914 Cal 455 (456) : 41 Cal 727 : 22 Ind Cas 570 (DB), *Sidheshuri Pershad* v. *Dharamjit Narain.* (Suit by manager of joint Hindu family upon mortgage without joining nephew within limitation—*Held*, following 28 Cal 517, that suit must be dismissed.)

('28) 15 AIR 1928 Lah 33 (34) : 100 Ind Cas 859, *Devi Dayal* v. *Narain Singh.* (Suit brought in name of Panchayat—Plaintiffs' names substituted after limitation—Suit must be dismissed.)

('02) 1902 Pun Re No. 69, page 250, *Ramchand* v. *Subban Baksh.*

('82) 1882 Pun Re No. 104, page 297, *Khan Muhammad Shah* v. *Muhammad Jan.* (Pre-emption suit—All representatives of deceased vendee not joined—Addition after limitation—Whole suit is barred.)

('25) 12 AIR 1925 Mad 761 (761, 762) : 87 Ind Cas 198, *Pappi Amma* v. *Kunhu.* (Karnavan necessary party in a suit on *teer* deed.)

('14) 1 AIR 1914 Mad 395 (395) : 23 Ind Cas 813, *Ramaswamy Iyengar* v. *Pavadai Chetty.* (Suit instituted by insolvent after adjudication—Receiver seeking to be made a plaintiff after the period of limitation.)

('16) 3 AIR 1916 Pat 411 (414) : 36 Ind Cas 77 (DB), *Chand Gorain* v. *Khub Lal Mohton.* (All heirs of mortgagee must be impleaded in a suit on mortgage debt.)

('15) 30 Ind Cas 795 (796) (DB) (U P B R), *Fakhirunnissa Bibi* v. *Imdad Ali.* (Ejectment suit against sub-tenants' sub-tenant—Sub-tenant joined after limitation—Suit must be dismissed.)

[But see ('37) 24 AIR 1937 All 502 (503) : 170 Ind Cas 743, *Mt. Jamna Kunwar* v. *Kunj Behari Lal.* (Necessary party can be impleaded as *pro forma* defendant and relief granted so far as other defendants are concerned—Submitted not correct—A necessary party is *ipso facto* not a *pro forma* party.)]

See also Notes 12 and 15.

[3] ('39) 26 AIR 1939 Pat 138 (139) : 17 Pat 588 : 180 Ind Cas 983 (DB), *Bas Kuar* v. *Gaya Municipality.* (No relief claimed against party brought on record out of time—Question of limitation does not arise—6 Cal L J 558 relied on.)

('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivu Bai* v. *Shiddeshwar.* (Redemption suit filed in time—Other persons interested in equity of redemption may be impleaded after limitation.)

('04) 26 All 528 (535) : 1904 All W N 119 (DB), *Pateshri Pratap* v. *Rudra Narain.* (Affirmed on appeal to Privy Council : 32 All 241.)

('97) 1897 All W N 36 (37), *Behari Lal* v. *Girdhari Lal.* (Suit for possession of immovable property against some only of several persons in joint possession—Other defendants can be joined after expiry of limitation.)

('25) 12 AIR 1925 Bom 547 (560) : 94 Ind Cas 575, *Coorla Spinning & Weaving Mills Co.* v. *Vallabhdas Kallianji.* (*Del credre* agent suing—Principal not a necessary but only a proper party—Addition after limitation—Section 22 does not apply.)

('19) 6 AIR 1919 Bom 135 (137) : 43 Bom 575 : 51 Ind Cas 223 (DB), *Sabduralli* v. *Sadashiv Supde.* (If Court can adjudicate as between parties impleaded section does not apply.)

('15) 2 AIR 1915 Bom 272 (272) : 39 Bom 729 : 31 Ind Cas 180 (DB), *Virchand Vajekaran* v. *Kondu Kasom Atar.*

('10) 8 Ind Cas 890 (890) (Cal), *Bhola Roy* v. *Jung Bahadoor.* (Plaintiff added to meet possible future objections.)

('04) 28 Bom 11 (18) : 5 Bom L R 618 (DB), *Guruvayya* v. *Dattatraya.*

a party to the suit, as in the case of representative suits, it is really not a case of adding or substituting *new* parties, and this section does not apply to such a case.[4] See also Note 6.

Illustrations.

1. A, one of the two heirs of a deceased Khoja Mahomedan institutes a suit to recover a debt due to the estate of the deceased. Here the suit is not a properly constituted one without adding the other heir as a party, and if the other heir is added after the period of limitation, the whole suit will be barred.[5]

('98) 22 Bom 672 (679) (DB), *Ravji* v. *Mahadev*. (Benamidar suing—Real owner added.)

('09) 1 Ind Cas 626 (629, 630) : 36 Cal 675 (DB), *Mathewson* v. *Ram Kanai Singh Deb*.

('07) 6 Cal L Jour 558 (565, 570) : 12 Cal W N 84 (DB), *Mahomed Ishaq* v. *Sheikh Akramul Huq*. (Addition of *pro forma* defendants.)

('06) 33 Cal 613 (620, 621) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali* v. *Baij Nath Ram Sahu*. (Purchaser of a *small portion* of mortgaged property added after limitation — Suit not barred wholly.)

('06) 33 Cal 1079 (1093) (DB), *Thakurmani Singh* v. *Dai Rani Koeri*. (Do.)

('81) 7 Cal 284 (287) (DB), *Obhoy Churn* v. *Kritartha Moyi*. (Suit for possession —Some persons in possession impleaded after limitation—Suit dismissed against them.)

('12) 16 Ind Cas 420 (421) (DB) (Mad), *Rangacharlu* v. *Muthukaruppan Kothan*. (Do.)

('16) 3 AIR 1916 Mad 1029 (1034) : 29 Ind Cas 634 : 40 Mad 722 (DB), *Arunachalla Ambalan* v. *R. G. Orr*. (Where a suit is properly instituted and an assignment is made pending suit by the plaintiffs, and the assignee is allowed to continue the suit, Section 22 does not apply.)

('14) 1 AIR 1914 Mad 272 (275) : 38 Mad 837 : 22 Ind Cas 826 (DB), *Annamalai Velan* v. *Marugappa Velan*. (Suit to set aside rent sale under Madras Rent Recovery Act — Person at whose instance sale was brought about is not necessary party.)

('16) 3 AIR 1916 Sind 53 (54) : 10 Sind L R 38 : 35 Ind Cas 551 (DB), *Gehimal Dyalmal* v. *Karmoomal Siroomal*. (Suit to recover property alienated by Hindu widow during plaintiff's minority — Intermediate purchasers are not necessary parties.)

[*See* ('08) 30 All 538 (540) : 5 All L Jour 554 : 1908 All W N 246 : 4 Mad L Tim 447 (DB), *Hazarimal* v. *Bhawani Ram*. (Objection as to non-joinder of parties must be raised at earliest opportunity.)

('91) 13 All 78 (85) : 1891 All W N 1, *Sohna* v. *Khalak Singh*.

('86) 12 Cal 642 (650) (DB), *Oriental Bank* v. *Charriol*.]

[*See also* ('28) 15 AIR 1928 Bom 526 (526) : 112 Ind Cas 786 (DB), *Bhauddin* v. *Ibrahim*.

('36) 23 AIR 1936 Cal 388 (390) : 166 Ind Cas 493, *Gajendra Nath Mandal* v. *Kunja Behari Mistri*.]

See also Notes 12 and 15.

[4] See illustration (4) in the Note.

[5] ('97) 21 Bom 580 (583) : Chitty's S C C R 527 (D B), *Fatmabai* v. *Pirbhai Virji*.

[But see ('32) 19 AIR 1932 Lah 652 (653) : 141 Ind Cas 190, *Khairatti Shah* v. *Diwan Singh*. (Suit by one legal representative of a creditor — Other joined as plaintiff after limitation—Decree for share of former is not bad.)]

2. A, B and D are partners carrying on business in partnership. A sues B for partnership accounts without impleading D as party. In this case also the suit is not a properly constituted one without impleading D as party, and if he is added after the period of limitation, the whole suit will become barred.[6] The same principle will apply to one of several joint promisees suing without impleading the other joint promisees as parties.[7]

3. A, the landlord, sues C, a sub-tenant of B, who is himself a sub-tenant of A, for ejectment without impleading B as a party; B is made a party after the period of limitation. The whole suit must be dismissed as barred.[8]

4. A, *the manager* of a joint Hindu family, sues B for rent due in respect of family property. After the period of limitation, C, a member of the family, is added as a co-plaintiff for the purpose of protecting A's interest and of removing any possible objections by the defendant. Here C is only a *proper* but not a necessary party and his addition after the period of limitation will not affect the suit by A, who in his own right as manager of the family was entitled to institute the suit.[9] The same result may also be arrived at on the principle that the manager *represents* the other members, that the latter are *constructively parties* to the suit and that therefore their subsequent addition is not an addition of any *new* parties within the meaning of this section.[10]

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6. ('87) 14 Cal 791 (794) (DB), *Ramdayal* v. *Junmenjoy Coondoo.*

('13) 19 Ind Cas 963 (964) (DB) (Cal), *Ambika Charan* v. *Tarini Charan.* (All representatives of deceased partner not brought on record within time.)

See also Note 18.

7. ('83) 7 Bom 217 (220) : 7 Ind Jur 428 (DB), *Kalidas Kevaldas* v. *Nathu Bhagwan.* (One member of a joint family suing for joint debt.)

('06) 1906 Pun Re No. 79 : 1906 Pun W R No. 124, *Motan Mal* v. *Kripa Mal.* (One of two brothers suing for joint debt.)

('09) 4 Ind Cas 38 (41, 42) : 32 Mad 284 (DB), *Seshan Pattar* v. *Veeraraghava.* (One member of a joint family suing for joint debt.)

('86) 1886 Pun Re No. 8, *Dalluram* v. *Nibahumal.* (Joint contractors.)

('81) 6 Cal 815 (826) : 8 Cal L R 457 (DB), *Ramsebuk* v. *Ramlall Koondoo.*

[*See* ('96) 6 Mad L Jour 27 (29) (DB), *Gopalasami* v. *Periasami Thevar.* (One coparcener suing to recover joint property.)]

See also Note 23.

8. ('15) 30 Ind Cas 795 (796) (DB) (U P B R), *Fakirunnissa Bibi.* v. *Imdad Ali.*

See also Note 22.

9. ('11) 9 Ind Cas 739 (741) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad* v. *Har Narain Singh.*

('34) 21 AIR 1934 Bom 178 (183) : 58 Bom 348 : 151 Ind Cas 870, *Madhgouda* v. *Halappa.*

('14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy* v. *Jung Bahadur Singh.* (Observations in 14 Cal 400 as to applicability of Section 22, Limitation Act, to substitutions under Section 27 of the C. P. C. of 1882, doubted.)

('06) 33 Cal 1079 (1093) (DB), *Thakurmani Singh* v. *Dai Rani Koeri.* (28 Bom 11 followed.)

10. ('24) 11 AIR 1924 All 908 (908) : 46 All 709 : 79 Ind Cas 1001 (DB), *Chetan Singh* v. *Sartaj Singh.* (34 All 549 followed.)

5. A, as executrix of B's will, files a suit for recovery of possession of the lands belonging to the deceased B. C and D, the beneficiaries under the will are substituted for A after the period of limitation. The suit is not barred by this section. The reason is that an executor, trustee or administrator represents the persons beneficially interested and the addition of C and D is not the addition of any *new* party.[11]

See the cases cited below[12] for further illustrations.

The mere fact that the Court, of *its own motion*, orders the name of any person to be added as a party does not render the provisions of this section inapplicable. So also the section applies to persons who are made defendants on their own application.[13]

This section does not apply to a case of *transposition* of parties, as sub-section (2) itself shows.[14]

('12) 14 Ind Cas 35 (38) (DB) (All), *Nathilal* v. *Lala*.

[*See also* ('15) 2 AIR 1915 Mad 424 (424) : 25 Ind Cas 945, *Rajam Iyengar* v. *Muthukrishna*. (Suit by plaintiff in private capacity—Amendment as manager of a company does not amount to addition of party—S. 22 does not apply.)]

11. ('03) 7 Cal W N 817 (820, 821) (DB), *Janhabi* v. *Brojomohini*.

('08) 12 Cal W N 8 (11) (DB), *Mohunt Padmalall* v. *Lukmi Rani*. (Executors substituted for the legal representatives of the deceased.)

[*See also* ('16) 3 AIR 1916 Cal 337 (338, 339) : 29 Ind Cas 680 (DB), *Nistarini Dassya* v. *Sarat Chandra*. (Widow suing as *administratrix* for benefit of her sons.)]

See also Note 11.

12. ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram* v. *Munshi Ram*. (Suit to enforce mortgage bond after mortgagor's death — Wrong person made defendant — Right persons made parties after limitation — Suit to be dismissed.)

('40) 27 AIR 1940 Nag 274 (275): 190 Ind Cas 430, *Mt. Gowarjabai* v. *Ganpatsa*. (Suit on promissory note to be instituted in name of person in whose name the note stands, as plaintiff—Suit instituted in name of wrong person—Right person substituted after limitation—Suit to be dismissed—33 Mad 115 and A I R 1934 Bom 385 followed)

13. ('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imamuddin* v. *Liladhar*.

('06) 8 Bom L R 942 (946) (DB), *Damodar* v. *Nainsukh*.

('08) 35 Cal 519 (523) : 11 Cal W N 350 : 5 Cal L Jour 242 : 2 Mad L Tim 137 (FB), *Ramkinkar Biswas* v. *Akhilchandra*. (Overruling 24 Cal 640 and 27 Cal 540.)

('30) 17 AIR 1930 Lah 747 (748) : 11 Lah 688 : 126 Ind Cas 78 (DB), *Sher Singh* v. *Sunder Singh*.

('25) 12 AIR 1925 Sind 181 (183) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralli Ram Shewa Ram* v. *Budhuram*.

('24) 11 AIR 1924 Cal 74 (76) : 50 Cal 549 : 75 Ind Cas 81, *Sheodayal Khemka* v. *Joharmull Manmull*.

('10) 5 Ind Cas 931 (931, 932): 33 Mad 115 (DB), *Subbaraya Iyer* v. *Vaithinatha Iyer*.

('03) 1903 Pun L R No. 74, p. 291 : 1903 Pun Re No. 25 (DB), *Nabi Baksh* v. *Fakir Muhammad*.

14. ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram* v. *Munshi Ram*. (A I R 1928 Bom 526 dissented from.)

Under sub-rule (5) of O. 1 R. 10, Civil Procedure Code, a person will be deemed to have been made a party, and proceedings will be deemed to have begun against him, only on the *service of summons on him*. Applying this sub-rule, some cases[15] have held that the suit as against such a person will be barred unless the service is within the period of limitation. But, as the sub-rule is expressly made subject to section 22 of the Limitation Act, the suit as against a newly added defendant must be deemed to have been instituted when he is made a party, *for purposes of limitation*,[16] though for *other* purposes, it must be deemed to be instituted when the summons is served on the defendant. When a person is added as a party on an application made for the purpose, such addition must be deemed to have effect from the date of the *application* and not merely from the date of the *order* on the application.[17] The same principle applies even where the addition is made by the appellate Court in appeal from an order by the lower Court refusing to make the addition.[18] (See also Note 26.)

A party once discharged and subsequently re-instated is a party only from the date of re-instatement.[19]

6. "New plaintiff or defendant." — It is only when a *new* plaintiff or defendant is added that the suit will be deemed to have been instituted when he was so made a party.

1. Addition of persons already represented in the suit :

Where a person is effectively represented in the suit, by those whose actions bind him in law, such as his father or the manager of the joint Hindu family, of which he is a member, the specific addition of his name among the parties after limitation is not the addition of a *new* party.[1]

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[15] ('15) 30 Ind Cas 795 (795, 796)(DB)(U P B R), *Fakirunnissa Bibi* v. *Imdad Ali.*
('87) 14 Cal 400 (401) (DB), *Subodini Debi* v. *Ganoda Kant. (Obiter.)*
('25) 12 AIR 1925 Pat 37 (37, 38) : 3 Pat 230 : 78 Ind Cas 312 (DB), *E. I. Ry. Co. Ltd.* v. *Ram Lakhan Ram.*

[16] ('11) 12 Ind Cas 586 (587) (DB) (Bom), *Mahomedbhai* v. *Ismail Haji Halinabhai.*

[17] ('27) 14 AIR 1927 Mad 468 (469) : 100 Ind Cas 680 : 50 Mad 372 (DB), *South Indian Industrials Ltd.* v. *Narasimha.* (Dissenting from A I R 1925 Mad 487.)
('30) 17 AIR 1930 Sind 259 (260) : 128 Ind Cas 675 : 32 Cri L Jour 174 : 25 Sind L R 107 (DB), *Hassanand* v. *Nandiram.* (Do.)

[18] ('98) 17 Bom 29 (32) (DB), *Ramkrishna Moreshwar* v. *Ramabai.*
('04) 1 All L Jour 188 (190) (DB), *Rahim Baksh* v. *Brijbhukhan Saran.*
[*See also* ('10) 5 Ind Cas 931 (931) : 33 Mad 115 (DB), *Subbaraya Iyer* v. *Vaithinatha Iyer.*]

[19] ('26) 13 AIR 1926 P C 88 (91) : 96 Ind Cas 887 (P C), *Haveli Shah* v. *Sheikh Painda Khan.*
See also Note 6.

Note 6

[1] ('31) 18 AIR 1931 All 585 (586) : 135 Ind Cas 248 (DB), *Banwari Singh* v. *Sakhraj Singh.* (Redemption suit— Father of joint family impleaded as defendant in time—Sons may be joined after limitation—AIR 1914 P C 136 followed.)

Where by a *bona fide* mistake it was erroneously supposed that the plaintiff should be represented in a particular way and subsequently he is permitted to rectify the mistake and appear personally, it is not the addition of a new party. Thus, in a suit for the recovery of money due on a mortgage, the widow of the mortgagee sued as the administratrix of the estate of the mortgagee *for the benefit of the mortgagee's sons.* It was discovered, subsequent to the institution of the suit, that the period of her appointment as administratrix terminated before the suit and she then prayed that the sons should be added as plaintiffs. The addition was held not to be affected by this section.[2] Similarly, in the case of the addition of *defendants* to a suit, it has been held that where by a *bona fide* mistake, a wrong person is made defendant as the legal representative of a deceased person, and subsequently, the right person is made defendant, this section has no application.[2a] The reason given is that in such a case the estate of the deceased person should be held to be sufficiently represented by the defendant originally impleaded.

('03) 7 Cal W N 817 (820, 821) (DB), *Janhabi Chowdhurani* v. *Brojo Mohini.* (An executor sufficiently represents the beneficiaries—Addition of latter as plaintiffs in a suit begun by the former is not addition of 'new parties.')

('20) 7 AIR 1920 Nag 184 (185) : 56 Ind Cas 386, *Narhar* v. *Narain.* (Benamidar represents real owner—Joining of latter after limitation is not addition of new party.)

('10) 5 Ind Cas 404 (405) : 37 Cal 229 : 37 Ind App 27 (P C), *Peary Mohan* v. *Norendra Nath.* (Suit against trust — All possible persons to represent trust impleaded—Subsequent amendment making it definite as to which of the defendants was proper trustee.)

('25) 12 AIR 1925 Oudh 440 (440, 441) : 87 Ind Cas 180 : 28 Oudh Cas 393, *Mt. Rajvanta* v. *Rameshar.* (Sons in joint family impleaded as defendants after limitation.)

[*See* ('88) 12 Bom 158 (160, 161) (DB), *Hari Gopal* v. *Gokaldas Kushabshet.* (Joint family as plaintiff.)

('25) 12 AIR 1925 Mad 441 (442) : 86 Ind Cas 747, *Mayankutti* v. *Kathiri.* (Suit for maintenance in Malabar tavazhi must be on behalf of all the members.)

('12) 13 Ind Cas 38 (39) (DB) (All), *Bala Prosad* v. *Pratab Singh.* (Sons of mortgagor defendant not impleaded within limitation.)

('14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy* v. *Jung Bahadur Singh.* (Suit filed by head of joint family—Infant nephew impleaded after limitation.)

(1900) 23 Mad 82 (84) (DB), *Puramethan Somayajipad* v. *Sankara Menon.* (Three Sabhas managing a temple — Representatives of two Sabhas alone suing as plaintiffs—*Held* suit bad—Subsequent addition of representatives of third Sabha cannot cure defect.)]

[2] ('16) 3 AIR 1916 Cal 337 (338, 339) : 29 Ind Cas 680 (DB), *Nistarini Dasya* v. *Sarat Chandra.*

[2a] ('41) 28 AIR 1941 Mad 609 (610, 611) : (1941) 1 MLJ 580 (583), *Subbiah Ambalam Servai* v. *Unnamalai Achi.* (Suit against widow as representing estate of deceased person — Subsequent discovery that deceased had left will under which he had appointed two executors — Executors made defendants subsequently — S. 22 does not apply — Estate represented by defendant impleaded *bona fide* — A I R 1929 Mad 482 and A I R 1930 Mad 930 followed— 10 Bom H C R 224 and A I R 1932 Lah 314, dissented from—AIR 1921 Mad 528 and AIR 1925 Mad 917, distinguished.)

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Where, however, a daughter claiming under the will of her father sued to recover properties and subsequently the executor appointed under the will who ought to have been the plaintiff was sought to be substituted as plaintiff, it was held that the latter was a "new party" and could not be impleaded after limitation.[3]

See also Note 11.

2. Estate or person not properly represented in suit—Addition of proper representative:

Where a debutter estate is made a party but it is not properly represented, an amendment adding a proper representative is not an addition of a new party.[4]

See also Note 8.

3. Benamidar impleaded — Addition of real owner:

A *benamidar* sufficiently represents the real owner. Where a *benamidar* is impleaded as a defendant in time, the fact that the real owner is impleaded after limitation is not fatal, where the *benamidar* was acting as the real owner and the *benami* relationship was known only subsequently.[5] So also a suit by the *benamidar* is not infructuous by reason of the addition of the real owner as a party after limitation.[6]

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[3] ('25) 12 AIR 1925 Mad 917 (918, 919) : 85 Ind Cas 961, *Venkatasubbamma* v. *Pulipulla Reddy.*

[*See also* ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram* v. *Munshi Ram.* (Suit to enforce mortgage bond after death of mortgagor — *A*, the right person to be made defendant not joined but *B*, *A's* father, joined as defendant—Subsequent addition of *A*—Section 22 applies.)]

[4] ('05) 32 Cal 582 (598) : 9 Cal W N 421 (DB), *Raja Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee.*

('13) 21 Ind Cas 421 (423) (DB) (Mad), *Subramani Aiyar* v. *Subba Naidu.* (Idol substantially on record from beginning—But representation improper—Rectification by making proper representation of idol—S. 22 does not apply.)

('05) 7 Oudh Cas 176 (178), *Ahmad Raza Khan* v. *Mirza Ali Hussain.* (Disqualified proprietor sued in his own name — Collector as his statutory representative added only after limitation—*Held* it was not a case of a new plaintiff.)

('19) 6 AIR 1919 Mad 809 (809) : 50 Ind Cas 353 (DB), *Ponnappa Naicken* v. *Venkateshaiyar.* (Suit by some trustees of temple against tenants—Addition of other trustees after limitation on objection by defendants—Suit not barred.)

[5] ('38) 25 AIR 1938 Mad 687 (688) : 177 Ind Cas 381 (DB), *Subramania Chettiar* v. *Srinivasaraghava Ayyangar.* (A benamidar is competent to represent the real owner, because as a benamidar he will be in the position of a trustee and the real owner will be bound by any adjudication in a suit to which the benamidar is a party—A I R 1918 P C 140 relied on — The real owner added by way of caution will not be a new party—7 C W N 817 and 28 Bom 11 followed.)

('15) 2 AIR 1915 Cal 496 (497) : 26 Ind Cas 860, *Rajendra Kumar Ghosh* v. *Adinadi.*

[*See also* (1864) 1864 Suth W R Gap 316 (316), *Nundo Gopal Roy* v. *Jankeeram Chuckerbutty.* (Benamidar impleaded subsequently.)]

[See however ('13) 18 Ind Cas 392 (392) (DB) (Cal), *Jagabandhu Biswas* v. *Srinath Chatterjee.* (Principal cannot be added in shoes of benamidar out of time.)]

4. Correction of misdescription :

Where names of parties are substituted only to correct *misdescription*, there is no addition or substitution of a new party.[7] See Note 10.

5. Addition of new ground of the right or liability :

If the amendment sought to be made does not lead to a change in the "*persona*" of the parties or does not introduce a new prayer or relief but only seeks to alter or add to the *ground or basis of the right or liability* of parties already on record, it is not a case of parties being newly added.

Illustrations.

(a) Defendants originally impleaded as members of joint family sought to be made liable in the alternative as *partners*.[8]

(b) Party impleaded as trustee sought to be made liable *personally*.[9]

(c) A son originally impleaded as the *heir* of his father subsequently sought to be placed on record as *executor* under a will of the father.[10]

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6. ('98) 22 Bom 672 (679) (DB), *Ravji* v. *Mahadev*.

('10) 8 Ind Cas 264 (267) (DB) (Mad), *Venkatachala Asari* v. *Subramaniya Chetty*.

('20) 7 AIR 1920 Nag 184 (185) : 56 Ind Cas 386, *Narhar* v. *Narain*.

('15) 2 AIR 1915 Nag 109 (111) : 11 Nag L R 116 : 31 Ind Cas 290, *Kashi Rao* v. *Ukarda*.

[*See* ('07) 30 Mad 245 (246) : 17 Mad L Jour 174 (DB), *Kuthaperumal Rajali* v. *Secretary of State*. (In what cases a benamidar can sue, discussed.)]

[*See also* ('40) 27 AIR 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai* v. *Ganpatsa*. (In this case a promissory note was executed in favour of *A* but the suit on the note was filed by *B* — *A* was substitued after limitation — It was held that S. 22 applied and the suit was barred — The contention that *B* was benamidar for *A* was held not proved.)

('98) 22 Bom 820 (823) (DB), *Dagdu* v. *Balvant Ramchandra Natu*.]

[But see ('68) 10 Suth W R 220 (221, 223) (DB), *Meheroonissa Bibee* v. *Hur Churn Bose*. (Benamidar held not entitled to maintain suit.)

('68) 10 Suth W R 469 (473) : 11 Beng L R 60 (Note) (DB), *Fuzeelun Beebee* v. v. *Omdah Beebee*. (Do.)]

7. ('25) 12 AIR 1925 Bom 527 (527) : 90 Ind Cas 685 (DB), *Ramprasad Shivlal* v. *Shrinivas Balmukund*. (Substitution of names of coparceners in place of firm.)

8. ('31) 18 AIR 1931 Bom 590 (592) : 135 Ind Cas 423, *Bishamberdas* v. *Brijlal Arora*.

9. ('92) 15 Mad 417 (418) : 2 Mad L Jour 119 (DB), *Saminatha* v. *Muthaiya*.

10. ('03) 7 Cal W N 575 (577, 578) (DB), *Prosunno Kumar Sen* v. *Mahabharat Saha*.

[But see ('72) 1872 Bom P J (Reprint) 121 (122) (DB), *Maneklal* v. *Bhaskurrao*. (Defendant originally impleaded as heir of executant of bond—Amendment as coparcener—*Held* suit barred.)]

(d) A person making a claim as being entitled through his father, subsequently seeking to amend his plaint by making the claim as being entitled through his uncle.[11]

(e) Person already on record in his own right sought to be added also as legal representative.[12]

(f) Plaintiff suing in his personal capacity amending his description and claiming also as an administrator of an estate,[13] or as the managing director of a company,[14] or as an agent under a power of attorney.[15]

(g) A sued on a promissory note signed by defendant on his own behalf and as guardian of a minor. The relief originally sought was against the property of the minor in the hands of the defendant. He subsequently prayed for an amendment asking for personal relief against the defendant. It was held that the amendment was only an alteration of the ground of liability of a person already a party.[16]

It has been held in some cases[17] that where a manager of a joint Hindu family files a suit without stating in the plaint the capacity in which he is suing, the omission to state it within the period of limitation bars the suit. A contrary view has been held in the undermentioned cases.[17a]

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11. ('16) 3 AIR 1916 Oudh 115 (117) : 19 Oudh Cas 221 : 36 Ind Cas 941 (DB), *Bisheshar Dayal* v. *Hira Lal*.

12. ('20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager, Encumbered Estates in Sind* v. *Tharumal*.

13. ('25) 12 AIR 1925 Cal 419 (420) : 51 Cal 845 : 79 Ind Cas 403 (DB), *Naba Kumar Chowdhury* v. *Higheazany*.

14. ('17) 4 AIR 1917 Mad 471 (471) : 33 Ind Cas 357, *Muthukrishna Pillai* v. *Rajam Aiyangar*. (On Letters Patent Appeal from A I R 1915 Mad 424.)

15. ('78) 3 Bom 312 (321) (DB), *Ganpat Pandurang* v. *Adarji Dadabhai*. (Per Sergent, J.)

16. ('35) 22 AIR 1935 Mad 160 (161) : 154 Ind Cas 582, *Seshagiri Rao* v. *Seshagiri Rao*.

17. ('16) 3 AIR 1916 Bom 278 (279) : 40 Bom 248 : 33 Ind Cas 771 (DB), *Ramchandra Narayan* v. *Shripatrao Tukojirao*. (The plaint must show that the plaintiff is suing in a representative capacity.)

('16) 3 AIR 1916 Pat 310 (311) : 1 Pat L Jour 468 : 36 Ind Cas 542 (DB), *Girwar Narayan Mahton* v. *Mt. Makbulunnissa*. (Plaint must show that plaintiff is suing as manager.)

('09) 4 Ind Cas 38 (41, 42) : 32 Mad 284 (DB), *Seshan Pattar* v. *Veera Raghava*.

17a. ('22) 9 AIR 1922 Bom 281 (284) : 46 Bom 358 : 64 Ind Cas 966, *Ramnath Dwarkanath* v. *Ramrao Balkrishna*. (It need not necessarily appear in plaint.)

('34) 21 AIR 1934 Bom 178 (182) : 58 Bom 348 : 151 Ind Cas 370, *Madhgouda Babaji* v. *Halappa Balappa*. (Eldest brother alone suing for a debt due to deceased father—Joint family managership presumed in law—Younger brothers may be added as co-plaintiffs after limitation.)

[*See* ('16) 3 AIR 1916 Cal 164 (166) : 28 Ind Cas 818 (DB), *Kuarmani Singha* v. *Wasif Ali Mirza*. (Plaintiff suing as shebait—Fact of representative character

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In the undermentioned case[17b] a member of an unincorporated association was sued in his personal capacity. The plaint was amended allowing the plaintiff to sue him as representing the association. It was held that this was a case of addition of party.

6. Addition of party whose name has been struck off :

When a party originally impleaded is struck out and is again joined a second time, he is a new party within the meaning of this section.[18] A suit was instituted against the sons for compensation for a tort committed by their deceased father. Their names were struck out from the plaint by impleading the administrator of the estate of the deceased person as a party defendant instead. By a subsequent order the sons were again impleaded as defendants as the earlier order striking out their names was wrong. It was held by their Lordships of the Privy Council[19] that the suit as against the sons must be deemed to be instituted on the date of their re-instatement.

Where, however, the names were first struck out by a *bona fide* mistake[20] or were by mistake omitted in the stamped portion of the plaint,[21] the restoration of the names will relate back to the original date.

7. Original party not entitled to sue or liable to be sued :

Where the person originally impleaded had no right to sue or be sued, the addition of the person so entitled or liable will be the addition of a new party. An adjudicated insolvent sued in his own name. After limitation, the Official Assignee was impleaded as a plaintiff. The Official Assignee and not the insolvent being the person legally competent to sue, he is a *new* plaintiff.[22] One of the executants of a

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need not be stated in the cause title though it is a convenient place to state it.)

('24) 11 AIR 1924 All 908 (908) : 79 Ind Cas 1001 : 46 All 709 (DB), *Chetan Singh* v. *Sartaj Singh.* (Father party defendant in time — Sons impleaded beyond time—Presumption is that former represents latter.)]

17b. ('40) 27 AIR 1940 Mad 639 (641), *Sankara Menon* v. *Kuttani.* (By the amendment a very large number of fresh parties was added though by a special procedure one of the members who happened already to be on the record in his personal capacity was treated as the representative of the whole association.)

18. ('31) 18 AIR 1931 Bom 590 (592) : 135 Ind Cas 423, *Bishamberdas* v. *Brijlal Arora.* (Names of sons originally impleaded as members of joint family were struck out—They were sought to be impleaded again as partners of a firm.)

('05) 9 Cal W N 883 (885) (DB), *Ramjoy Nath Sarcar* v. *Shambu Nath Shaha.*

19. ('26) 13 AIR 1926 P C 88 (91) : 96 Ind Cas 887 (PC), *Haveli Shah* v. *Sheikh Painda Khan.*

See also Note 5.

20. ('95) 19 Bom 135 (137), *Kirparam Jhumekhram Modia* v. *Modia Dayalji Jhumekhram.* (Name was first struck out by pleader unauthorisedly.)

21. ('27) 14 AIR 1927 Nag 95 (96) : 98 Ind Cas 658, *Shakurkhan* v. *Sheikh Budhan.* (Amendment has retrospective effect at least from date of application.)

22. ('26) 13 AIR 1926 Bom 366 (366) : 95 Ind Cas 538 (DB), *Sayad Daud* v. *Mahomed Sayad.*

promissory note died and the plaintiff suing on the promissory note impleaded his widow as his legal representative. It is subsequently discovered that a son and not the widow is the legal representative. An application to implead the son, after limitation, is dismissed as being barred by this section. The case is not one of misdescription or of the estate being adequately represented by the widow at first. It is the addition of an entirely new party.[23]

See also the undermentioned cases.[24]

But where owing to the fact that the right to sue is vested in A and B jointly, either of them is not entitled to sue alone and the suit is originally instituted by A alone but before it comes on for hearing, B's interest also devolves on A with the result that A then becomes entitled to sue alone, he can be allowed to continue the suit although at the time when B's interest devolves on him the period of limitation for the suit has expired. This section does not apply to such a case as there is no addition or substitution of a new plaintiff or defendant.[25]

7. "Substituted or added." — The substitution or addition of parties contemplated by sub-section (1) is one consequent on the suit being defective as originally constituted. Where owing to a subsequent devolution of interest the suit becomes defective and new persons are brought on the record to remove the defect, it is not a case of substitution or addition of new parties within the meaning of sub-section (1).[1] Sub-section (2) is based on this principle. See Note 27.

8. New party — Minor. — If a minor is wrongly described as a major and impleaded as a defendant to a suit, and the plaintiff on discovering the mistake has a guardian appointed for him, the minor

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('14) 1 AIR 1914 Mad 395 (395) : 23 Ind Cas 813, *Ramasamy Iyengar* v. *Pavadai Chetty*. (Case of an insolvent under the Provincial Insolvency Act, 1907.)

[23] ('32) 19 AIR 1932 Lah 314 (315) : 137 Ind Cas 89 (DB), *Northern Bank of India Ltd.* v. *Ramesh Chandar*. (*Bona fide* mistake is immaterial.)

[24] ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram* v. *Munshi Ram*. (Suit to enforce mortgage bond—Person not entitled to equity of redemption made defendant—Person entitled to such right added subsequently—S. 22 applies.)

('40) 27 AIR 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai* v. *Ganpatsa*. (Suit on promissory note instituted by person other than person in whose name it had been executed—Such person substituted after limitation—Suit barred.)

('37) 24 AIR 1937 Lah 369 (370) : 173 Ind Cas 357, *Mohindar Singh* v. *Kirpal Singh*. (Bond in favour of *A*—On *A's* death, suit on it by his father in his personal right as *A's* heir—Subsequent application for substitution of *A's* minor son as plaintiff after limitation—Suit is barred.)

[25] ('40) 27 AIR 1940 Mad 412 (416) : 190 Ind Cas 657, *Sornammal* v. *Thangavelu Mudaliar*. (Right to sue on mortgage devolving on two Hindu sisters jointly —Only one suing—Other dying pending suit—Plaintiff can be allowed to continue suit—S. 22 does not apply.)

Note 7

[1] See observations of Privy Council in ('16) 3 AIR 1916 P C 202 (206) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyyappa Chetty* v. *Supramanian Chettiar*. (Case under Straits Settlement Limitation Ordinance.)

is a party from the very beginning notwithstanding the defect of non-representation. He does not become a new party by reason of his being treated as a minor with a validly appointed guardian.[1]

Where a major is, by a *bona fide* mistake, impleaded as a minor plaintiff and his parent institutes the suit as his next friend, an amendment, after limitation, to recognize him as a major and allow him to continue the suit is only a case of misdescription and not of a "new party," the plaintiff always having been the same.[2] Conversely, where a minor sues as a major by a *bona fide* mistake, an application for amendment of the mistake and for proper representation may be allowed even if such application is beyond time,[3] or if he should have attained majority he may be allowed to continue the suit.[4]

But if the minor is not a party plaintiff[5] or party defendant[6] at

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Note 8

[1] ('41) 28 AIR 1941 Nag 130 (131) : 193 Ind Cas 805, *Abdul Aziz* v. *Sheik Amir.*
('30) 17 AIR 1930 All 644 (646) : 128 Ind Cas 438 : 52 All 924 (DB), *Talib Ali Shah* v. *Piarey Lal.* (Decree obtained with the defendant as major — On objection in execution, suit re-opened under S. 151, C. P. C., and defendant treated as minor and guardian appointed.)
('27) 14 AIR 1927 All 787 (787) : 49 All 869 : 102 Ind Cas 624 (DB), *Har Lal Singh* v. *Rudra Singh.* (Pre-emption suit—Vendee defendant impleaded as major —Later discovery of minority and guardian appointed after limitation.)
[*See* ('24) 11 AIR 1924 Lah 157 (158):69 I. C. 401, *Mt. Durga* v. *Gur Narain.*]
[*See also* ('07) 30 All 55 (56) : 1907 All W N 290 : 3 Mad L Tim 58 (DB), *Rupchand* v. *Dasodha.* (A guardian is not himself a party to the suit—Omission to implead *guardian* may be rectified even after limitation—Case of an appeal.)
('81) 4 All 37 (39) : 1881 All W N 129 : 6 Ind Jur 382 (DB), *Khem Karan* v. *Hardayal.*
('01) 1901 Pun L R No. 31, p. 99 : 1901 Pun Re No. 18, *Imami* v. *Saddan.*]

[2] ('41) 28 AIR 1941 Oudh 43 (45) : 191 Ind Cas 150, *Inderpal Singh* v. *Bhagwati.*
('27) 14 AIR 1927 Cal 477 (478) : 100 Ind Cas 469 (DB), *Narayan Chandra* v. *Dulab Chandra.* (37 Cal 229 (P C) referred to.)
('12) 17 Ind Cas 580 (581) (DB) (Mad), *Arunachellam Chetty* v. *Prabhayya Chetty.* (Plaintiff wrongly described as minor by mistake — Himself not signing plaint — His subsequent prosecution of suit is not adding new party.)
[*See* ('04) 1 All L Jour 188 (190) (DB), *Rahim Baksh* v. *Brijbhukhan Saran.*
('94) 21 Cal 866 (868) (DB), *Taqui Jan* v. *Obaidulla.*]
[*See also* ('26) 13 AIR 1926 Lah 82 (82) : 89 Ind Cas 363, *Amritsaria* v. *Gamun.*
('18) 5 AIR 1918 Mad 916 (917) : 40 Mad 743 : 41 Ind Cas 510 (DB), *Shunmuga Chetty* v. *Narayana Iyer.* (20 All 90 dissented from.)]
[But see ('97) 20 All 90 (91) : 1897 All W N 203 (DB), *Sheorania* v. *Bharat Singh.* (Suit dismissed by appellate Court—No question of limitation arose.)]

[3] ('84) 1884 Bom P J 262 (DB), *Parikh Gokaldas* v. *Raval Jalam.*
[*See* ('24) 11 AIR 1924 Lah 188 (188) : 4 Lah 390 : 75 Ind Cas 1028 (DB), *Ali Ahmad* v. *Said Mian.* (Application allowed—Question of limitation not decided.)]

[4] *See* (23) 10 AIR 1923 Mad 553 (554) : 74 Ind Cas 309 (DB), *Rarichan* v. *Manakkal Raman.*

[5] ('37) 24 AIR 1937 Lah 369 (370) : 173 Ind Cas 357, *Mohindar Singh* v. *Kirpal Singh.* (Father of deceased suing as heir — Subsequent application to substitute minor son of the deceased as plaintiff—*Held* addition of new party.)
('75) 12 Bom H C R 17 (22) (DB), *Gopal Kashi* v. *Ramabai Saheb Patvar.* (Mother suing in her own name without impleading minor son.)

[6] ('89) 1889 Pun Re No. 37, *Ude Ram* v. *Mt. Dyan.*

all, but some one else was a party, the addition of the minor after limitation will be the addition of a new party.

The same principle would apply in appeals also.[7]

9. New relief claimed by a party. — Where a *party on record* is allowed to set up new facts or put forward a new cause of action, it would not amount to adding a new *party.*[1]

A purchased some property from X who, however, remained in possession. A sold it to B and B brought a suit against X for mesne profits from the date of A's purchase making A also a *pro forma* plaintiff. B, however, prayed for a decree in his own favour even in respect of the mesne profits due to A before the date of the sale to B. After the period of limitation, B applied for an amendment splitting the relief and praying for a decree in his favour in respect of the mesne profits due to him after the date of the sale to himself. The High Court of Bombay held that it was not a case of a joinder of a new plaintiff seeking relief in respect of a barred claim. The amendment was only directed to claiming the relief severally instead of in favour of one of the plaintiffs alone.[2]

10. Misdescription. — Where a particular person is *intended* to be impleaded in a suit but is *described wrongly,* it is a case of misdescription.[1] Where the person intended to be sued is described correctly, but the plaintiff finds subsequently that he was under a mistake in thinking that such person was liable to answer his claim, it is not a case of misdescription.[2] The question in each case is thus one

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[7] ('21) 8 AIR 1921 Cal 776 (778) : 60 Ind Cas 889 : 47 Cal 721, *In re Lal Bihari Shah.* (Appeal by minor without next friend may be amended by inserting name of next friend.)

('26) 13 AIR 1926 Nag 40 (44) : 88 Ind Cas 235, *Dattu* v. *Bhaoosingh.* (Appeal by major as minor may be amended by striking out guardian's name.)

Note 9

[1] ('25) 12 AIR 1925 Mad 917 (919) : 85 Ind Cas 961, *Venkatasubbamma* v. *Pulipulla Reddi.*

[2] ('29) 16 AIR 1929 Bom 51 (53) : 114 Ind Cas 262, *Bhogi Lal Tarachand* v. *Jethalal Motilal.*

Note 10

[1] ('39) 26 AIR 1939 Pat 40 (41) : 179 Ind Cas 761, *Bhagirath Singh* v. *Munga Lal.* (Members of joint family carrying on family business describing themselves in plaint by names adding word "firm"—Deletion of word "firm" by amendment after limitation held did not bar suit.)

('36) 23 AIR 1936 Lah 147 (148) : 162 Ind Cas 280, *Girdhari Lal* v. *Dharam Das.* (One Girdhari Lal answering the name and description of the defendant as in the plaint was summoned — On finding that he was not the intended person the plaint was amended by changing the description and another person of the same name but with new description was summoned—*Held* this was a case of misdescription and not of substitution.)

[2] ('14) 1 AIR 1914 Mad 636 (637) : 23 Ind Cas 764 (DB), *Narayana Sastrigal* v. *Mangalathammal.*

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of intention, namely, which individual was intended to be impleaded when a particular description was given and which was the intended person according to the amended plaint. If there is the same person or legal entity throughout it is a case of misdescription; otherwise it will come under the head of substitution or addition of new party.[3] In the following cases, it was held that there was only a misdescription and that the amendment of the plaint by giving the correct description was not the addition of a *new* party :

(1) Where in a suit by the District Board of Dacca the plaintiff was described as "Chairman of the District Board, Dacca" instead of "District Board, Dacca."[4]

(2) Where the plaintiff sued on behalf of an idol and in the body of the plaint described himself as *shebait* of the idol and clearly asked for a relief on behalf of the idol, but omitted to describe himself as *shebait* in the cause title.[5] The same view was taken

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('28) 15 AIR 1928 Nag 319 (321): 109 Ind Cas 785, *Deolal* v. *Tularam Ram Sukh.* (It was presumed that suit was against firm and so it was a case only of substituting real representative.)

('02) 6 Cal W N 218 (220) (DB), *Mandardhar Aitch* v. *Secretary of State.* (Suit against Executive Engineer—Subsequent addition of Secretary of State as second defendant — *Held* that Secretary of State was made party only when he was impleaded.)

[*See* ('28) 15 AIR 1928 Mad 367 (369, 370): 110 Ind Cas 433, *Devaraja Reddiar* v. *Liptons Ltd.* (Initials of the defendant's name wrongly given — Amendment after decree.)

('87) 14 Cal 400 (401) (DB), *Subodini Devi* v. *Cumar Ganoda Kant Roy.* (*A* instituted suit as manager of *B*—After limitation *A* was struck out and *B* himself was made plaintiff—No bar of limitation.)

('88) 1888 All W N 58 (59) (DB), *Jamna* v. *Ibrahim.* (Name of respondent in appeal by clerical error, entered as "Nawab Muhammad Umar Daraz Ali Khan" instead of as "Jamna"—*Held* no new party.)

('25) 12 AIR 1925 Pat 37 (38, 39): 3 Pat 230: 78 Ind Cas 312 (DB), *E. I. Ry. Co.* v. *Ram Lakhan Ram.*]

[3] ('39) 26 AIR 1939 Sind 172 (173): ILR (1939) Kar 275: 182 Ind Cas 881 (DB), *Mangharam Rupchand Firm* v. *Haji Sorik Punhoo.* (Contract made by *X* before he became member of firm Y—Suit on contract by firm Y—Amendment of plaint by substituting *X* as plaintiff—*Held* this was no case of misdescription.)

[4] ('28) 15 AIR 1928 Cal 485 (487) : 112 Ind Cas 24 (DB), *Anukul Chandra* v. *Dacca District Board.*

[*See also* ('40) 27 AIR 1940 Cal 153 (155) : 187 Ind Cas 605 (DB), *Municipal Commissioners, Dacca* v. *Gangamani Chaudhurani.* (Suit against Chairman of Municipal Commissioners instead of the Commissioners themselves—*Held* only a case of misdescription.)]

[5] ('26) 13 AIR 1926 Cal 417 (419) : 87 Ind Cas 159 (DB), *Dayamayi* v. *Sankar Nath.*

('19) 6 AIR 1919 Cal 245 (247) : 46 Cal 877 : 50 Ind Cas 525 (DB), *Bidhu Sekhar Banerjee* v. *Kuloda Prasad Deogharia.* (It is not even necessary to state the representative capacity in the cause title.)

('16) 3 AIR 1916 Cal 164 (166): 28 Ind Cas 818 (DB), *Kuarmani Singha* v. *Wasif Ali.* (Do.)

[*See also* ('11) 11 Ind Cas 47 (48) : 33 All 735 (FB), *Jodhi Rai* v. *Basdeo.*]

where the name of the temple was omitted in the cause title.[6] Where, however, a defendant was sued in his individual capacity and the plaintiff denied title of the idol whose *shebait* he was, the addition of the "idol" as a party defendant was held to be the addition of a *new* party.[7]

(3) Where the plaintiffs, the owners of a ship, were wrongly described as "H. Hogarth and Sons" instead of as "Hogarth Shipping Co., Ltd." by a *bona fide* mistake.[8]

(4) Where plaintiff sued the defendant for a dissolution of partnership and for accounts, but by a *bona fide* mistake described the defendant as a firm instead of as an individual.[9]

(5) Where two of the partners of a firm were described by a single name as Joharmull Manmull instead of being separately described as Joharmull Khemka and Manmull Khemka, and there was no doubt that in the pleadings the individuals were sufficiently clearly indicated and described.[10]

(6) Where in a suit for the correction of an entry in a Record of Rights the plaintiff had impleaded Mr. P. J. Forbes as the defendant instead of Miss P. J. Forbes and the circumstances clearly showed that it was the latter who was intended to be sued.[11]

(7) Where the plaintiff was already on record but did not make it clear whether he sued in his private capacity or as managing

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[6] ('23) 10 AIR 1923 Nag 96 (97): 71 Ind Cas 39, *Bakaram* v. *Hiralal*. (*H* and *T* mentioned as plaintiffs in plaint — Suit for temple property — Body of plaint stating that they were managers of temple — Omission to mention temple in heading is only mistake in description.)

[7] ('30) 17 AIR 1930 Oudh 43 (45) : 123 Ind Cas 894, *Avadh Behari* v. *Parmeshur Din*.

[8] ('26) 13 AIR 1926 Cal 722 (725) : 94 Ind Cas 182 (DB), *Mitsui Bussan Kaisha Ltd.* v. *Hogarth Shipping Co. Ltd.* (Affirming A I R 1925 Cal 922.)

[9] ('24) 11 AIR 1924 Sind 144 (146) : 19 Sind L R 262 : 78 Ind Cas 905 (DB), *Dipchand Daulat Ram* v. *Paramanand Chimandas Firm*. ("Paramanand Jethanand" described by mistake as "Paramanand Chimandas Firm.")

[*See also* ('39) 26 AIR 1939 Pat 40 (41) : 179 Ind Cas 761, *Bhagirath Singh* v. *Mungalal*. (Plaintiffs described by their names with the addition of the word "firm" — On objection being taken as to registration of firm, plaint amended by deletion of the word "firm" — Section 22 does not apply.)]

[See however ('36) 23 AIR 1936 Lah 485 (486) : 163 Ind Cas 734 (DB), *Amrik Singh* v. *Sant Singh*. (Suit against foreign firms which had, before suit been dissolved to plaintiff's knowledge—On suit being found not maintainable against foreign firms, plaintiff impleading two partners who were in British India — S. 22 applies—It is a case where no defendants were named in the first instance and not a case of misdescription.)]

[10] ('24) 11 AIR 1924 Cal 74 (78) : 50 Cal 549 : 75 Ind Cas 81, *Sheo Doyal Khemka* v. *Joharmul Manmull*.

[11] ('17) 4 AIR 1917 Cal 420 (421) : 32 Ind Cas 872 (DB), *Jogendra Narain Roy* v. *P. J. Forbes*. (Hindi Record of Rights — The letter frequently used therein both for "Mr" and "Miss" would be the Hindi abbreviation "Mi" — It would be difficult to find out whether the name in the record is that of male or female.)

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Note 10

director of a company and subsequently asked relief in the latter capacity.[12]

(8) Where a company in liquidation sued as "The Official Liquidator, Himalaya Bank, Ltd., in liquidation" instead of "The Himalaya Bank, Ltd., in liquidation, plaintiff."[13]

(9) Where in a suit against a Municipal Committee it was by an error made to be represented by its Secretary instead of its President.[14]

(10) Where the Bombay Baroda and Central India Railway Company sued as defendants were described as "Agent, B. B. & C. I. Railway Company" instead of "B. B. & C. I. Railway Company."[15]

In the undermentioned cases,[16] however, a different view was taken; it was held on the facts and the pleadings in each case that

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12. ('17) 4 AIR 1917 Mad 471 (471) : 33 Ind Cas 357 (DB), *Muthukrishna Pillai* v. *Rajam Aiyangar.* (Affirming on Letters Patent Appeal AIR 1915 Mad 424.)

13. ('96) 18 All 198 (202, 203) : 1896 All W N 28 (FB), *Muhammad Yusuf* v. *Himalaya Bank Ltd.* (17 All 292 overruled.)

14. ('78) 2 All 296 (298) (DB), *Manni Kasundhan* v. *Crooke.* (Section does not apply to the case of a Committee sued in name of its officer.)

15. ('23) 10 AIR 1923 Bom 452 (453) : 47 Bom 785 : 73 Ind Cas 1027 (DB), *Saraspur Manufacturing Co.* v. *B. B. & C. I. Ry. Co.* (The prayer in the plaint was that the defendant *company* should pay suit amount — AIR 1921 Pat 485 dissented from.)

[*See* ('26) 13 AIR 1926 Cal 612 (614): 94 Ind Cas 762 (DB), *Gopi Ram Behari Ram* v. *E. I. Ry. and O. & R. Ry.* (E. I. Ry. Co. as defendant described in plaint as "Agent, E. I. Ry." but company contested without objection.)

('25) 12 AIR 1925 Lah 441 (442) : 6 Lah 252 : 89 Ind Cas 279 (DB), *Nanak Chand Mukandi Lal* v. *E. I. Ry. Co.* (Defendants described as "Agent N. W. Ry., Lahore" and "Agent, E. I. Ry. Calcutta".)

('25) 12 AIR 1925 Nag 155 (156, 157) : 82 Ind Cas 177, *Bulakidas* v. *B. N. Ry. Co. Ltd.* (B. N. Ry. Co. described as 'Agent B. N. Ry. Co.')

('26) 13 AIR 1926 Pat 40 (42) : 5 Pat 128 : 90 Ind Cas 680 (DB), *Radhey Lal* v. *E. I. Ry.* (The plaint taken as a whole and conduct of the defendant (company) held to lead to finding of misdescription.)]

16. ('16) 3 AIR 1916 Cal 818 (819) : 43 Cal 441 : 31 Ind Cas 35 (DB), *India General Steam Navigation and Ry. Co.* v. *Lal Mohan Saha.* (Defendant described as Railway Company "by their Agent A. E. Rogers" — *Held*, suit was substantially against Rogers—But amendment was allowed as no question of limitation arose.)

('25) 12 AIR 1925 Cal 716 (719) : 52 Cal 783 : 90 Ind Cas 426 (DB), *B. N. Ry. Co.* v. *Behari Lal Dutt.* (The company did not appear and proceed with the suit but only the agent appeared and objected to frame of suit.)

('21) 8 AIR 1921 Pat 485 (485, 486) : 64 Ind Cas 125, *Sinehai Ram Bihari Lall* v. *E. I. Ry. Co.* (Suing defendant as "Agent E. I. Ry. Co." held, not against the company in law and amendment after limitation refused—*Held*, not to be a case of misdescription — Railway Company appeared and contested on merits first.)

('25) 12 AIR 1925 Pat 37 (38, 39) : 3 Pat 230 : 78 Ind Cas 312 (DB), *E. I. Ry. Co.* v. *Ram Lakhan Ram.* (Personal decree against the Agent was asked for in the plaint—*Held*, suit was against Agent.)

('68) 10 Suth W R 366 (366, 367) : 2 Beng L R 6a (SN) (DB), *Ram Das Sein* v. *Mr. Cecil Stephenson.* (Deputy Agent of E. I. Ry. Co. made defendant — *Held*, Railway Company was not sued.)

the railway company in question was not originally impleaded, and consequently an amendment on the ground of limitation was refused. In *East India Railway Co.* v. *Ram Lakhan Ram*,[17] the test was laid down in these words: "When there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on record as a defendant on the ground that he all along intended to sue the other and in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription."

Where a person intended to be impleaded is as a matter of fact not impleaded, it cannot be said to be a case of misdescription though the omission to implead may be due to a *bona fide* mistake.[18]

Where A sued four foreign firms which had, before the suit, been dissolved to his knowledge, and on the suit being found to be not maintainable against foreign firms, he impleaded two partners who were in British India, but after the expiry of the period of limitation, it was held that the naming of the firms in the plaint instead of the individuals was not a misdescription and that the suit was barred.[19]

Where a suit was instituted against "Rameshwar Nandlal, a Hindu inhabitant, etc.," instead of "Rameshwar Nandlal Firm" and no individual of the former description ever existed, it was held that this was not a case of mere misdescription.[20]

11. Parties in representative character. — It has been seen in Note 6 that when a person is already properly and sufficiently represented on record by another, a subsequent addition of his name in the plaint is not the addition of a *new* party.

('71) 15 Suth W R 534 (535) (DB), *Nubeen Chunder Paul* v. *Mr. Cecil Stephenson.* (Do.)

[17] ('25) 12 AIR 1925 Pat 37 (39): 3 Pat 230: 78 Ind Cas 312 (DB). (Per Das, J.)

[18] ('25) 12 AIR 1925 Lah 343 (344): 88 Ind Cas 555, *Jawala Das* v. *Gopal Lal.* (One of the vendees in pre-emption suit not impleaded. Omission due to a wrong registration copy of sale deed in which that vendee's name was not mentioned. Not a case of misdescription.)

('11) 11 Ind Cas 938 (938) (DB) (All), *Mamraj Singh* v. *Hirday Ram.* (Pre-emption suit against one Jai Kishen—Later discovery that real vendee was one Shib Charn—Latter not allowed to be substituted after limitation.)

('84) 10 Cal 440 (442, 443) (DB), *Harrington* v. *Gonesh Roy.* (Suit against proprietor of firm—*C* known to plaintiff to be not its proprietor, first made defendant —After limitation, *H* the real proprietor added.)

[*See* (1900) 28 Cal 180 (185, 187) (DB), *Nritya Gopal Hazra* v. *Golam Rasool.*

('73) 10 Bom H C R 224 (227), *Kavasji Sorabji* v. *Barorji Sorabji.* (Wrong persons impleaded as defendants as representatives of deceased debtor — Right representative added after limitation.)]

[19] ('36) 23 AIR 1936 Lah 485 (486): 163 Ind Cas 734 (DB), *Amrik Singh* v. *Sant Singh.*

[20] ('32) 34 Bom L R 1410 (1414), *New East India Press Co.* v. *Rameshvar.*

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Note 11

A joint Hindu family manager sufficiently represents the family as a whole and when he acts in the interests of the family the other members are bound by the result of the action in which the manager was made a party.[1] To such an action the other members of the family are not necessary parties.[2] In such cases, the addition of the other members does not amount to the addition of *new* parties within the meaning of this section. But where the member suing is not the

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Note 11

1. ('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (P C), *Kishen Parshad* v. *Har Narain Singh.* (29 All 311 reversed.)

('14) 1 AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 : 24 Ind Cas 504 (P C), *Sheo Shankar Ram* v. *Mt. Jaddo Kunwar.*

('27) 14 AIR 1927 P C 56 (57) : 101 Ind Cas 44 : 51 Bom 450 : 54 Ind App 122 (P C), *Lingongowda* v. *Basangowda.* (Minor sons bound by judgment against father representing them.)

('16) 3 AIR 1916 Pat 251 (251) : 36 Ind Cas 197 : 1 Pat L Jour 154 (DB), *Mahomed Sadiq* v. *Khedan Lal.*

[*See* ('81) 7 Cal 739 (745) : 10 Cal L R 263, *Bungsee Singh* v. *Soodist Lall.*]

[*See also* ('06) 33 Cal 1079 (1093) (DB), *Thakur Mani Singh* v. *Dai Rani Koeri.* (Mere fact that infant member is joined after limitation is not fatal.)]

2. ('11) 9 Ind Cas 739 (741) : 33 All 272 : 38 Ind App 45 (P C), *Kishen Parshad* v. *Har Narain Singh.* (Mitakshara joint family being a money lending firm—Managing members of the firm entitled to sue in their own name on contracts entered into with them without adding other members of the firm.)

('04) 1 All L Jour 543 (551, 552) (DB), *Pateswari Pratab Narain Singh* v. *Rudra Narain Singh.* (Suit by head of impartible raj.)

('04) 28 Bom 11 (19) : 5 Bom L R 618 (DB), *Guruvayya* v. *Dattatraya.*

('22) 9 AIR 1922 Cal 468 (472) : 72 Ind Cas 722 (DB), *Kalipada Das* v. *Raja Sati Prasad Garga.* (Suit for arrears of rent by manager—Section 188, Bengal Tenancy Act, has no application.)

('11) 10 Ind Cas 874 (877, 879) : 35 Mad 685 (DB), *Sheikh Ebrahim* v. *Rama Iyer.* (Case law reviewed.)

('94) 17 Mad 122 (126, 127) : 4 Mad L Jour 52 (DB), *Ramayya* v. *Venkataratnam.* (Plaintiff suing as manager—Omission to join his brother is only formal error.)

('96) 6 Mad L Jour 27 (30) (DB), *Gopalasamy* v. *Periasamy Tevar.* (Per Best, J.)

[*See* ('22) 9 AIR 1922 Bom 354 (355) : 46 Bom 1022 : 84 Ind Cas 508 (DB), *Gangaram* v. *Bapu Saheb.* (Joint family — Rent note to jagirdar — Junior members need not be joined.)]

[*See also* ('18) 5 AIR 1918 Lah 241 (242) : 42 Ind Cas 377 : 1917 Pun Re No. 87 (DB), *Sher Muhammad* v. *Ram Chand.* (Loan from joint family funds—Bond in name of only one member—Other members not necessary plaintiffs.)

('96) 20 Bom 435 (436, 437) (DB), *Hari Vasudev Kamat* v. *Mahadu Dad Gauda.* (Do.)]

The following cases are no longer good law.

('08) 7 Cal L Jour 251 (260, 261) (DB), *Mir Tapurah Hossein* v. *Gopi Narayan.* (Suit by *karta* of Hindu joint family for rent not maintainable without adding other members.)

(1900) 23 Mad 190 (194) (DB), *Angamuthu Pillai* v. *Kolandavelu Pillai.*

(1900) 22 All 307 (317, 320) : 1900 All W N 73 (DB), *Muhammad Askari* v. *Radhe Ram Singh.*

('06) 30 Bom 477 (486) : 8 Bom L R 268, *Kashinath Chimnaji* v. *Chimnaji Sadashiv.* (Minor coparceners will not be bound by proceedings started by manager.)

manager[3] or does not sue as manager,[4] this rule does not apply. Even the manager can represent other members of the family only in respect of joint family property. He cannot represent them where the suit property is their self-acquired property.[4a]

A trustee or *shebait* of an idol, or an executor or administrator of an estate sufficiently represents the beneficiaries and the joinder of the latter will not introduce a new party.[5] A person who is made a party to a pending suit in his representative character is as much within the section as a person impleaded in his individual capacity. Thus, where a person who had not obtained letters of administration necessary to sue in his representative character originally instituted the suit (which was one for debt due to the deceased for which under S. 4 of Act VII of 1889 no decree could be passed without the production of a probate or certificate of the nature referred to in the section) and after the expiry of the period of limitation the person with such letters was impleaded, the suit was held to have become barred.[6]

B, the promisee under a promissory note executed by A, instituted a suit against C, one of the legal representatives of A, for a simple money decree against the assets of A in his hands. C, however, was only in possession of a *portion* of the assets of A. D and E who were in possession of other portions of the assets were impleaded subsequently as parties, but after the expiry of the period of limitation. It

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3. ('83) 6 Mad 27 (28) : 7 Ind Jur 10 (DB), *Arunachala Pillai* v. *Vythilinga Mudaliar.*

('94) 18 Bom 141 (142) (DB), *Dayabhai Lallubhai* v. *Gopalji Dayabhai.* (Son of a deceased manager not becoming manager cannot sue without impleading other members.)

4. ('13) 20 Ind Cas 262 (263) (DB) (Cal), *Jagat Narain Singh* v. *Udit Narain Singh.* (Where plaintiff does not sue as *karta* but in his own name and in his own right non-joinder of other members of the family may affect.)

4a. ('40) 27 AIR 1940 Lah 262 (264): 192 Ind Cas 105, *Sitaram* v. *Munshi Ram.* (Where a mortgagee institutes a suit against the father of the legal representatives of the deceased mortgagor and it is found that he could not be legal representative of the deceased, the property having been gifted to his sons by the mortgagor, the mortgagee cannot implead the legal representatives of the deceased mortgagor after the expiry of the period of limitation.)

5. ('19) 6 AIR 1919 Cal 245 (246) : 46 Cal 877 : 50 Ind Cas 525 (DB), *Bidhu Sekhar Banerjee* v. *Kuloda Prasad Deogharia.* (Shebait of an idol.)

('03) 7 Cal W N 817 (820, 821) (DB), *Janhabi* v. *Brojo Mohini.* (Executrix filing suit—Subsequent addition of beneficiaries is not addition of 'new parties.')

[*See* ('28) 15 AIR 1928 Lah 375 (376) : 9 Lah 588 : 110 Ind Cas 384 (DB), *Thakardwara, Amritsar* v. *Ishar Das.* (But a *temple*, apart from idol, is not a juridical person and suit with the temple as party is one without any party.)

('11) 11 Ind Cas 47 (48) : 33 All 735 (FB), *Jodhi Rai* v. *Basdeo Prasad.*

('04) 32 Cal 129 (141) : 31 Ind App 203 : 6 Bom L R 765 : 1 All L Jour 585 : 8 Cal W N 809 : 8 Sar 698 (PC), *Jagadindra Nath Roy* v. *Hementa Kumari Debi.*]

See also Note 5.

6. ('97) 21 Bom 580 (583, 584) : Chitty's S C C 527 (DB), *Fatmabai* v. *Pirbhai.*

was held that by virtue of C being sued as being in possession of the assets of A, C could not be held to have been sued in a representative capacity, and that the suit as against D and E was barred.[7]

See also Note 6.

12. Suit or appeal by or against a dead person.—A suit instituted in the name of a sole plaintiff[1] or against a sole defendant[2] who is dead at the time of such institution is a nullity and the plaint cannot be amended by bringing the legal representatives of such deceased person on record. So also, where there are several plaintiffs or several defendants, but *one* of them is dead on the date of suit, his legal representatives, cannot be added as parties and the suit proceeded with.[3] But, in such a case, the suit cannot be said to be void *ab initio* so far as the other parties are concerned.[4] The proper procedure in such a case is to strike out the dead person's name and proceed with the suit.[5] If the deceased person was a necessary party, the plaint

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[7] ('36) 23 AIR 1936 All 94 (95) : 58 All 594 : 160 Ind Cas 1030, *Manni Gir* v. *Amar Jati Chela.*

Note 12

[1] ('23) 10 AIR 1923 Lah 652 (652) : 79 Ind Cas 284 (DB), *Mt. Boondu* v. *Moti Chand.* (Suit on behalf of minor who was dead.)

[2] ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratap Brij Mohandas* v. *Gavrishankar Kashiram.*

('19) 6 AIR 1919 Cal 257 (258) : 51 Ind Cas 160, *Krista Das Law* v. *Khirada Kanta Roy.*

('18) 5 AIR 1918 Mad 794 (794) ; 42 Ind Cas 539, *Rasa Goundan* v. *Pichamuthu Pillai.*

('33) 20 AIR 1933 Mad 454 (455) : 143 Ind Cas 596, *Municipal Council Calicut* v. *Kunhipathumma.*

('16) 3 AIR 1916 Mad 440 (440, 441) : 30 Ind Cas 679 (DB), *In re Arunachallam Chettiar.*

('14) 1 AIR 1914 Cal 895 (896) : 24 Ind Cas 112 (DB), *Bejoy Chand Mahatap Bahadur* v. *Amulya Charan Mitra.* (Provisions as to substitution of heirs apply only when defendant was alive when suit was instituted.)

('18) 5 AIR 1918 Oudh 419 (420) : 47 Ind Cas 894, *Nau Nehal Singh* v. *Deputy Commissioner, Unao.*

('08) 31 Mad 86 (88) : 3 Mad L Tim 12 : 17 Mad L Jour 551, *Veerappan Chetty* v. *Tindal Ponnan.* (Even though the suit is instituted *bona fide* in ignorance of the death.)

(1900) 1 Cal L Jour 62 (Note), *Tej Narain Singh* v. *Ram Krishna Pandey.*

[*See* ('93) 16 Mad 319 (320) (DB), *Mallikarjuna* v. *Pullayya.*

('69) 12 Suth W R 45 (46) : 3 Beng L R A C 233, *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar.*]

[3] ('32) 19 AIR 1932 Lah 592 (594) : 140 Ind Cas 387, *Karam Singh* v. *Mt. Maya Wanti.* (Insertion of dead husband's name does not save limitation against widow.)

[4] ('27) 14 AIR 1927 Cal 880 (881) : 104 Ind Cas 623 (DB), *Makram Ali* v. *Abdul.* (Suit brought in name of two plaintiffs one of whom is dead can be amended.)

[5] ('24) 11 AIR 1924 Lah 348 (349) : 72 Ind Cas 670, *Mt. Phillo* v. *Gopi.* (Suit for damages against wrong-doers—One of them dead at the time of suit—His name may be struck off and the suit proceeded with.)

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can be amended by adding his legal representatives as parties.[6] As has been seen in Note 5, if the legal representatives are *necessary* parties to the suit, i.e., if the suit will not be a properly constituted one unless they are impleaded, their addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one only when they are made parties and inasmuch as at that time the suit is barred against all.[7] Where the legal representatives are only *proper* and not necessary parties, the suit against the other defendants will not be barred. Where the legal representatives are already on the record in some capacity or other, the name of the deceased person may be struck off and the suit can be allowed to go on with such persons as legal representatives of the deceased person.[8]

An *appeal* against a sole respondent who is dead at the time of preferring the appeal is not a valid appeal. But it has been held that as the Court is only acting in a *proceeding in the suit*, it has full powers to allow amendment of the appeal by adding the legal representatives of the deceased respondent as parties.[9] Where such addition is made after limitation, the Court can under S. 5 of the Limitation Act (which does not apply to suits) excuse the delay in filing the appeal if sufficient cause is shown.[10] The Judicial Commissioner's Courts of Nagpur[11] and Sind[12] and the Chief Court of Burma[13] have

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('26) 13 AIR 1926 Lah 153 (154) : 89 Ind Cas 661, *Firm Pala Mal Narain Mal* v. *Fauja Singh.*

[*See also* ('28) 15 AIR 1928 Cal 152 (153): 105 Ind Cas 284 (DB), *Jatindra Nath* v. *Narendra Nath.*

('28) 15 AIR 1928 Lah 359 (360): 9 Lah 526: 110 Ind Cas 281 (DB), *Roopchand* v. *Sardar Khan.*]

[6] ('27) 14 AIR 1927 Cal 880 (881) : 104 Ind Cas 623 (DB), *Makram Ali* v. *Abdul.*

('28) 15 AIR 1928 Lah 359 (360) : 9 Lah 526 : 110 Ind Cas 281 (DB), *Roopchand* v. *Sardar Khan.*

[7] ('19) 6 AIR 1919 Lah 25 (26) : 1919 Pun Re No. 86 : 52 Ind Cas 587 (DB), *Husain Bibi* v. *Hakim.* (Pre-emption suit — One of the joint vendees dead at the institution of suit — Legal representatives joined after limitation — *Held* that whole suit was barred.)

[8] ('29) 16 AIR 1929 Lah 440 (440) : 117 Ind Cas 899 (DB), *Sher Singh* v. *Mohammadi.* (Suit for pre-emption against six vendees — Sixth vendee discovered to be dead before suit—Other five vendees were the legal representatives of the sixth vendee.)

('20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager Encumbered Estates in Sind* v. *Tharumal.*

[9] ('25) 12 AIR 1925 Mad 1210 (1210) : 49 Mad 18 (FB), *Gopal Krishnayya* v. *Lakshmanarao.* (Overruling A I R 1924 Mad 56.)

('30) 17 AIR 1930 All 131 (132) : 123 Ind Cas 824, *Chatur Prasad* v. *Baijnath.*

[10] See the cases cited in Foot-Note (9).

[11] ('29) 16 AIR 1929 Nag 261 (262) : 117 Ind Cas 257, *Surajmal* v. *Raghunath.* (Appeal in name of dead person.)

[12] ('20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager Encumbered Estates in Sind* v. *Tharumal.* (31 Mad 86 followed.)

[13] ('13) 21 Ind Cas 306 (307) : (1913) 1 U B R 175, *Mi Ein Zi* v. *Mi Ni.* (Amendment that deprives a party of defence of limitation should not be allowed.)

held that an appeal by or against a dead person cannot be amended by adding his legal representatives.

13. Question of limitation to be considered, whether before or after addition or substitution. — This section does not in itself deal with the question whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as might be given in the suit as framed. If fresh parties are merely added for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination, by the application of this section of the date of institution of the suit as regards such newly joined parties does not ordinarily affect the suit by or against the original parties and would not therefore attract the operation of the general provisions of the Limitation Act.[1] The correct principle is that if a Court finds it necessary to add certain persons as parties, it must add them and *then* apply S. 22 to see the result on the relief asked for or against the parties added.[2] A Court's power to add a party is different from its *duty* to dismiss the suit as time-barred when the question of limitation falls to be considered.[3]

A different opinion is sometimes expressed, viz., that it is not *desirable* to add or substitute as parties to an action persons as regards whom the action has already become time-barred.[4] But it is submitted that the principles stated already should prevail.

Note 13

[1] ('04) 28 Bom 11 (17, 18) : 5 Bom L R 618 (DB), *Guruvayya* v. *Dattatraya.*
('21) 8 AIR 1921 Bom 152 (153, 154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivubai Rajaram* v. *Siddeswar Martand.* (Redemption suit filed in time—Other persons interested in equity of redemption may be impleaded after limitation.)
('06) 8 Bom L R 942 (945, 946) (DB), *Damodar* v. *Nainshukh.*

[2] ('29) 16 AIR 1929 All 941 (942) : 52 All 134 : 121 Ind Cas 106 (DB), *Baldeo Prasad* v. *Bhola Nath.* (Refusal to add as *defendant* merely because if he were plaintiff his suit would be barred is wrong.)
('12) 14 Ind Cas 35 (37, 38) (DB) (All), *Nathi Lal* v. *Lala.*
[*See* ('40) 27 AIR 1940 Mad 639 (641), *Sankara Menon* v. *Kuttani.* (Absence of objection to the amendment substituting new defendants cannot take away any legal defence, including that of limitation, which might be open to the fresh parties brought on the record thereby.)
('24) 11 AIR 1924 Lah 188 (188) : 4 Lah 390 : 75 Ind Cas 1028 (DB), *Ali Ahamed* v. *Said Mian.* (Minor suing as major—Plaint to be amended subject to question of limitation.)
('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa* v. *Dajiba Bhau.* (Section does not prescribe any period for joinder of a party.)]

[3] ('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imamud-din* v. *Liladhar.*
See also Article 181 Note 20.

[4] ('28) 15 AIR 1928 All 97 (97) : 108 Ind Cas 735 : 50 All 276 (DB), *Equitable Trust Co.* v. *Hafiz Muhammad Halim & Co.* (7 Bom 217; 4 Ind Cas 38; 21 Bom 580 followed.)

14. "Deemed to have been instituted." — In *Chandrika Roy* v. *Ram Kuer Thakur*,[1] the view was expressed by Mr. Justice Das that the words "deemed to have been instituted" create a statutory *fiction* that the suit, in case of an addition or substitution of parties, is instituted on the date of such addition or substitution, implying thereby that otherwise the date of the institution is the date of the original institution. He further proceeded to observe that, accordingly, in cases to which the section does not apply, *e.g.* 'applications,' the date of institution even as regards the added or substituted party is the date of the original institution. It is submitted that such a construction is not sound. The party added or substituted not being a party at the original institution of the suit, it cannot be stated that, in fact, the suit was instituted as regards him on that date. The fiction really seems to be that though a suit can be instituted only once, and that on the date of its original institution, for certain purposes it may be deemed to be "instituted" *so far as the new party is concerned* on the date of his being *impleaded*. It is not as if, so far as he is concerned, a suit really instituted against him on an earlier date is to be deemed by a fiction to be instituted at a later date. It is rather that such a suit which was never *instituted* at all against him is to be deemed as instituted as regards him on the date he is impleaded.

15. "As regards him." — It has been seen in Notes 2 and 13 that all that S. 22 says is that as regards a newly added or substituted party the suit shall be deemed to have been instituted on the date of such addition or substitution and not earlier. The section does not purport to lay down that on such date the suit as regards him is barred by limitation or not, or what the effect of such addition or substitution is on the whole suit. These questions will have to be decided with reference to the nature and frame of the suit and the law of parties relating thereto. This section refers only to the parties subsequently added and the suit cannot fail as regards the original parties *merely* because the remedy as regards the newly added party has been lost, unless such a result follows from the nature of the suit.[1]

('25) 12 AIR 1925 Mad 917 (918) : 85 Ind Cas 961, *Venkatasubbamma* v. *Pulipulla Reddy.* (Donee under will suing — Executor under will sought to be substituted as plaintiff after limitation.)

Note 14

[1] ('23) 10 AIR 1923 Pat 88 (89) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB).

Note 15

[1] ('31) 18 AIR 1931 Bom 590 (592) : 135 Ind Cas 423, *Bishamberdas* v. *Brijlal Arora.*

('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivubai Rajaram* v. *Siddeshwar Martand.* (Redemption suit filed in time—Suit should not be dismissed merely because other persons interested in equity of redemption are not joined within limitation.)

[*See* ('75) 12 Bom H C R 97 (105, 106) (DB), *Dayal Jairaj* v. *Khatav Ladha.*

('77) 1877 Bom P J 271 (277) (DB), *Nawab Muhammad Bakar* v. *Mahabu Begam.*]

In other words, the answer will depend upon whether the newly added party is a *necessary* party to the suit or only a *proper* party.

Where a party *necessary* for the constitution of the suit itself is not added in time, the suit must be dismissed in its entirety.[2] Where

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[2] ('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra* v. *Jamaluddin Mondal*. (Mortgage suit—All mortgagees must be joined as plaintiffs.)

('36) 23 AIR 1936 Cal 193 (196) : 62 Cal 324 : 162 Ind Cas 323, *Prabodhlal Mukherji* v. *Neelratan Adhikari*. (Co-widow of a deceased debtor is a necessary defendant.)

('29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Giris Chandra* v. *Ram Saran*. (Persons entitled to a share in mortgagee rights.)

('37) 24 AIR 1937 Rang 124 (125) : 170 Ind Cas 105 (DB), *Maung Tun Thein* v. *Maung Sin*. (28 Bom 11 relied on.)

('28) 15 AIR 1928 Lah 33 (34) : 100 Ind Cas 859, *Devi Dayal* v. *Narain Singh*. (A panchayat, i. e., an unregistered or unincorporated body of persons suing — Some of them not made parties — Whole suit is bad.)

('25) 12 AIR 1925 Lah 343 (344) : 88 Ind Cas 555, *Jawala Das* v. *Gopal Lal*. (Pre-emption suit—Several vendees — One vendee impleaded after time — Whole suit fails.)

('24) 11 AIR 1924 Lah 230 (231) : 73 Ind Cas 364, *Niaz Ali Khan* v. *Md. Afzal Khan*. (Do.)

('20) 7 AIR 1920 Lah 72 (73) : 57 Ind Cas 259, *Raushan Ram* v. *Sheran Khan*. (A necessary party not made respondent in second appeal—Whole appeal fails.)

('19) 6 AIR 1919 Lah 3 (3) : 51 Ind Cas 935 : 1 Lah 21 (DB), *Khaira* v. *Salem Raj*. (Necessary respondent not impleaded in appeal.)

('27) 14 AIR 1927 Mad 84 (85) : 98 Ind Cas 549, *Siluvaimuthu Mudaliar* v. *Muhamad Sahul*. (Joint promisees of a debt are all necessary parties.)

('09) 4 Ind Cas 392 (394) : 33 Mad 246 (DB), *Bhagavanulu* v. *Veeravadambu*. (Partition of joint property—Alienee from a sharer is necessary party.)

('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imam-ud-din* v. *Liladhar*. (Hundi in favour of firm—All partners are necessary parties.)

('87) 14 Cal 791 (794) (DB), *Ramdoyal* v. *Junmenjoy Coondoo*. (Suit for partnership accounts — All partners are necessary parties.)

('82) 8 Cal 42 (50) : 8 Ind App 135 : 4 Sar 254 : 5 Ind Jur 548 (PC), *Rajendronath Dutt* v. *Shaikh Mahomed Lal*. (A co-shebait who alienated *debutter* estate is a necessary defendant in a suit to recover the estate.)

('81) 6 Cal 815 (826) : 8 Cal L R 457 (DB), *Ramsebuk* v. *Ramlal Koondoo*. (Suit by members of joint Hindu family carrying on trade in partnership—All members must be joined.)

('21) 8 AIR 1921 Pat 498 (498) : 62 Ind Cas 61, *Sumitra Kuer* v. *Damri Lal*. (Auction-purchaser is necessary party to application under Order 21 Rule 92, C. P. C. — But see A I R 1929 Mad 763.)

('02) 1902 Pun Re No. 69, *Ram Chand* v. *Subban Baksh*.

('95) 18 Mad 33 (38) : 4 Mad L Jour 283, *Alagappa* v. *Vellian Chetty*. (Joint Hindu family firm — All members must join as plaintiffs.)

('20) 7 AIR 1920 Oudh 173 (175) : 56 Ind Cas 304 : 23 Oudh Cas 62, *Mahommad Ahmad* v. *Ansar Mahommad*. (Suit for partition by a Muhammadan heir—Other heirs to be parties.)

('07) 1 Sind L R 191 (196) (DB), *Relumal Devlaram* v. *Chellaram Jodharam*. (Suit on contract in name of individual partner — All partners are necessary parties.)

[*See* ('81) 3 Mad 234 (235) (DB), *Kanna Pisharody* v. *Narayanan Somayajipad*. (Co-owners — Suit to recover property.)

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the newly added party is not a necessary party but is only a *proper* party, that is to say, when he is impleaded not to *validate* the plaintiff's claim as originally laid but only for a collateral purpose, limitation cannot be pleaded in bar of the entire suit. The reason is that under this section, time is to be reckoned only "as regards him" from the date of his joinder.[3]

When the plaintiff is not entitled to any relief against the newly added defendant and does not claim any such relief, and the relief claimed against the existing defendants can be granted independently, the addition of the former after limitation will not affect the suit as against the latter.[4] In fact, where the newly added party is not a

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('86) 10 Bom 32 (34) (DB), *Balakrishna Moreshwar Kunte* v. *Municipality of Mahad*. (Do.)

('24) 11 AIR 1924 Mad 771 (772): 80 Ind Cas 139 (DB), *Kannan Kutty* v. *Elaya Veetil*. (Suit relating to *Devaswom* property—All the *Uralans* of the *Devaswom* are necessary parties.)

('01) 1901 Pun L R No. 74, p. 238, *Ganpat Mal* v. *Bhagat Ram*.]

[*See also* ('33) 20 AIR 1933 Cal 636 (636) : 60 Cal 787 : 145 Ind Cas 836 (DB), *Rajaneekanta Laha* v. *Atul Chandra Seal*. (Application for pre-emption under Ss. 26-F and 188, Bengal Tenancy Act—Cosharers not parties in time—Whole suit fails.)]

See also Note 5.

[3] ('30) 17 AIR 1930 All 436 (437) : 128 Ind Cas 7, *Abdul Haq* v. *Lallu*. (Suit by cosharer landlord for his share of rent — Other cosharers joined as defendants after time—S. 266, U. P. Tenancy Act.)

('21) 8 AIR 1921 Bom 152 (154) : 61 Ind Cas 590 : 45 Bom 1009 (DB), *Shivubai Rajaram* v. *Shiddeswar Martand*. (Suit for redemption of mortgage — Person interested in the equity of redemption may be added as defendant after limitation.)

('14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy* v. *Jung Bahadur Singh*. (Rent suit by manager of joint Hindu family — Infant nephew can be joined after limitation.)

('29) 16 AIR 1929 Lah 505 (506) : 115 Ind Cas 74, *Padam Sain* v. *Data Ram*. (*X* and *Y*, joint family payees under bond — Partition between them and bond falling to share of *X*—*X* alone suing on bond—*Y* made party after time — Suit is not affected.)

('09) 1 Ind Cas 455 (455, 456) : 1909 Pun Re No. 20 (DB), *Gohru* v. *Amira*. (Debt due to joint family—One coparcener added as defendant after time.)

('10) 8 Ind Cas 890 (890) (Cal), *Bhola Roy* v. *Jung Bahadoor*. (One of plaintiffs added only to meet possible future objection.)

[*See* ('03) 26 Mad 239 (242) : 12 Mad L Jour 267 (DB), *Jambu Ramaswami Bhagavathar* v. *Sundararaja Chetty*. (Acceptor of a bill added after limitation —Suit against drawer is not affected.)]

See also Note 5.

[4] ('30) 17 AIR 1930 All 309 (311) : 123 Ind Cas 828, *Chaudhari Jahangira* v. *Sarup*. (Suit by a cosharer for whole rent against tenants — Other cosharers impleaded as defendants after limitation—Plaintiff's claim against tenants so far as his share is concerned is not affected — Agra Tenancy Act, S. 194, sub-sections 2 and 3.)

('27) 14 AIR 1927 Cal 794 (796) : 104 Ind Cas 576 (DB), *Jadu Nath Mandal* v. *Amulya Krishna Kundu*.

('06) 6 Cal L Jour 558 (563, 570) : 12 Cal W N 84 (DB), *Mahomed Ishaq* v. *Sheikh Akramul Huq*.

('07) 1907 Pun W R No. 32, p. 92, *Bawa Nanak Singh* v. *Ali Sher*. (Claim for money maintainable against some of the representatives of a deceased debtor —

necessary party but only a proper party, no question of limitation would ordinarily arise even as regards him.[5]

See also Note 5.

16. Necessary parties. — A *necessary* party is a person who *ought* to have been joined as a party. He is a person necessary to the constitution of the suit, i.e., person *in whose absence no effective decree at all can be passed.*[1]

Addition of other representatives after period of limitation does not bar the suit against the original defendants.)

[*See* ('37) 24 AIR 1937 Lah 193 (194) : 172 Ind Cas 596, *Bishen Singh* v. *Pirthi Chand.* (1905 Pun Re No. 57 (FB) followed—Suit by some of members of Hindu joint family on pronote in favour of family — Other members impleaded as defendants but after limitation—Suit against original defendants is not barred.)

('09) 4 Ind Cas 1160 (1163) : 3 Sind L R 191, *Chelaram* v. *Baden Marine Insurance Co.*]

[*See also* ('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray* v. *Asho Singh.* (Puisne mortgagee in a suit by a prior mortgagee.)

[5] ('34) 21 AIR 1934 Cal 187 (190, 191) : 151 Ind Cas 1076 (DB), *Secretary of State* v. *Dhirendra Nath Roy.* (Suit for possession against trespasser—Secretary of State from whose settlement the trespasser claims is not necessary party though a *proper* party.)

('27) 14 AIR 1927 Cal 794 (796) : 104 Ind Cas 576, *Jadhu Nath* v. *Amulya Krishna.* (Not a necessary party and no relief claimed against him.)

('23) 10 AIR 1923 Lah 438 (438) : 75 Ind Cas 781, *Kunj Lal* v. *Hari Ram.*

('09) 1 Ind Cas 530 (533, 534) (DB) (Cal), *Dursan Singh* v. *Durbejoy Singh.* (Suit by one member of Mitakshara joint family for declaration that the family property is not liable to be taken in execution—Other members are proper and not necessary parties.)

('35) 22 AIR 1935 Mad 737 (738) : 159 Ind Cas 129, *Adi Lakshmi* v. *Durgamma.* (Case of a widow as defendant sufficiently representing husband's estate — Daughter and daughter's son claiming under will of husband impleaded after limitation—Section 22 held not to apply.)

[*See* ('26) 13 AIR 1926 Cal 737 (738) : 91 Ind Cas 657 (DB), *Amiya Pal* v. *Sharba Mangala Debi.* (Estate properly and fully represented in plaint by executors — Will being subsequently revoked, son added as plaintiff.)

('22) 9 AIR 1922 Cal 149 (149, 150) : 65 Ind Cas 367 (DB), *Sital Prosad Poddar* v. *Kaifut Shaikh.*

('29) 16 AIR 1929 Mad 763 (764) : 121 Ind Cas 855 : 52 Mad 861 (DB), *Narayana Sahu* v. *Pattamma.* (Auction-purchaser not necessary party to application under Order 21 Rules 89 and 92, C. P. C.—But see A I R 1921 Pat 498.)

('20) 7 AIR 1920 Lah 193 (194) : 57 Ind Cas 52, *Karm Narain* v. *Salamat Rai.* (Suit by claimant under O. 21 R. 63, C. P. C. — Auction-purchaser not having purchased at the date of decision of claims, is not necessary party to the suit.)

('28) 15 AIR 1928 Lah 414 (417) : 108 Ind Cas 391, *Manigir* v. *Hazarigir.* (Auction-purchaser not a necessary party under O. 21 R. 92, C. P. C.)

('19) 6 AIR 1919 Cal 510 (510) : 50 Ind Cas 5 (DB), *Ajiuddin Ahmed* v. *Khoda Bux Khondkar.* (Auction-purchaser is necessary party to application under O. 21 R. 90, C. P. C.)]

[But see ('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hason Ali* v. *Gurudas Kapali.* (Section 22 applies even to proper party — Subsequent transferees in a mortgage suit—36 Cal 675 followed.)]

Note 16

[1] ('38) 25 AIR 1938 Cal 324 (324) : 177 Ind Cas 798 (DB), *Dinesh Chandra* v. *Rajendra Chandra.* (33 All 272 (PC) followed.)

A person is a *proper* party if his *presence* before the Court is necessary to enable it to effectually and completely adjudicate upon

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(1900) 27 Cal 493 (497, 498) (DB), *Durga Charan Sarkar* v. *Jotindra Mohan Tagore*. (Two tests have been laid down to determine whether a party is a necessary party.)

('12) 17 Ind Cas 921 (924) (DB) (Cal), *Jogendra Nath Singh* v. *Secy. of State*. (Do.)

('29) 16 AIR 1929 Mad 291 (293) : 116 Ind Cas 137 (DB), *Ramakrishnayya* v. *Satyanarayana*. (Tests laid down for determining whether a party is a necessary party.)

The following cases illustrate who are necessary parties.

('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad* v. *Har Narain Singh*. (Suit by managing members of joint family business—Other members not necessary parties.)

('34) 21 AIR 1934 Pat 106 (106, 107) : 154 Ind Cas 396, *Muhamed Nazim Khan* v. *Ramjivan Sahu*.

('01) 1901 All W N 14 (14) (DB), *Jit Bhagat* v. *Seikh Hussaini*. (Suit for declaration of ownership in property sought to be sold in execution—Judgment-debtor is necessary party.)

('74) 6 N W P H C R 208 (210) (DB), *Syud Sukhawat Ali* v. *Kesho Tewari*. (Vendee of mortgaged property suing for redemption — Heirs of mortgagor are necessary parties.)

('12) 15 Ind Cas 176 (176) : 39 Cal 881 (DB), *Menajuddi Biswas* v. *Toam Mandal*. (Transferee of property sold in execution is a necessary party in setting aside sale.)

('77) 2 Bom 140 (141) : 2 Ind Jur 319 (DB), *Narayan Bharathi* v. *Laving*.

('10) 6 Ind Cas 554 (558) (DB) (Cal), *Aghore Nath* v. *Kamini Debi*. (Endowment—Suit for construction of will—Representatives of original trustees are necessary parties.)

('71) 15 Suth W R 97 (98) (DB), *Ram Taruck Ghossal* v. *Radha Bullab Sircar*. (Suit for establishing title to land—Defendant alleging land to be in possession of *S*—*S* is necessary party.)

('17) 4 AIR 1917 Lah 402 (403) : 42 Ind Cas 420, *Lal Chand* v. *Mangta Mal*. (Parties to marriage, necessary parties in suit for declaration of invalidity of marriage.)

('82) 1882 Pun Re No. 188, p. 553, *Mela Ram* v. *Narain Das*. (Appeal from order rejecting application to set aside execution sale—Auction-purchaser is necessary party.)

('26) 13 AIR 1926 Mad 991 (992) : 97 Ind Cas 551, *Vesu* v. *Kannamma*. (If interests of defendants on record are inseparable from those of necessary parties not brought on record, the decree will be wholly void.)

('23) 10 AIR 1923 Mad 81 (82) : 68 Ind Cas 901 (DB), *Appalacharyulu* v. *Ramachandracharyulu*. (In a suit to enforce registration even minor executants are necessary parties.)

('25) 12 AIR 1925 Nag 288 (288, 289) : 89 Ind Cas 888, *Pestonji* v. *Ganpat*. (Creditor of manager of joint Hindu family suing after manager's death — All members are necessary parties.)

('33) 20 AIR 1933 Pat 715 (716) : 147 Ind Cas 452 (DB), *Kamakhya Narain Singh* v. *Ramraj Singh*. (Suit for resumption of village by grantor — Minor sons of joint family are not necessary parties when represented by father.)

('32) 19 AIR 1932 Cal 337 (338) : 58 Cal 77 : 132 Ind Cas 904, *Pramathanath Sarkar* v. *Suprakash Ghosh*. (In an administration suit, the executor is the only necessary party—Other legatees are not necessary parties.)

[*See* ('83) 9 Cal 704 (710, 711) : 10 Ind App 39 : 12 Cal L R 595 : 4 Sar 419 : 7 Ind Jur 215 (PC), *Omrao Begum* v. *Government of India*. (Navab Nazim's Debts' Act, XVII of 1873.)]

and settle all the questions involved in the suit.[2] In other words, the expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue.[3] It is not necessary that any *relief* should be asked against him,[4] the object of adding him being to avoid needless multiplicity of suits[5] and to protect his interests or the interests of a party already on record.[6]

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[2] ('05) 30 Bom 156 (161): 7 Bom L R 811 (DB), *Keshavram Dulavram* v. *Ranchhod Fakira.*

('27) 14 AIR 1927 All 315 (315) : 100 Ind Cas 679 (DB), *Muhammad Said Khan* v. *Indarpati Singh.* (Persons having no interest in suit property but whose names appear in the Record of Rights are proper parties.)

('80) 2 All 738 (744) (DB), *Narain Kuar* v. *Durjan Kuar.*

('27) 14 AIR 1927 Bom 470 (473) : 51 Bom 800: 104 Ind Cas 764 (DB), *Nathu Bhai Ichharam* v. *Narayancharya.* (Administration suit—Claim for account of partnership carried on by the deceased with the executor and other partners combined—Other partners are neither necessary nor proper parties.)

('84) 8 Bom 323 (336) : 8 Ind Jur 680, *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy.* (Assignee *pendente lite.*)

('68-69) 5 Bom H C R (OC) 83 (93), *Bank of Hindustan, China and Japan* v. *Premchand Raichand.* (Suit by owner against purchaser of property which has been wrongfully attached and sold in execution of decree—Execution creditor is proper party.)

('12) 17 Ind Cas 917 (917) (DB) (Cal), *Digambarnanda* v. *Secretary of State.* (Plaintiff suing for declaration that he was not a tenure-holder but a raiyat — Other persons recorded as raiyats of plaintiff were held proper parties.)

('11) 11 Ind Cas 183 (184) (DB) (Cal), *Upendra Chandra* v. *Sheikh Subhan.* (Rent suit—Defendant pleading *jus tertii*—Such third party is a proper party.)

('08) 1908 Pun W R No. 59, *Mrs. Fox* v. *Secretary of State.*

('34) 21 AIR 1934 Cal 187 (190, 191) : 151 Ind Cas 1076 (DB), *Secretary of State* v. *Dhirendra Nath Roy.* (Suit for possession against trespasser — Secretary of State from whose settlement trespasser claims is proper party.)

('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray* v. *Asho Singh.* (Suit by prior mortgagee — Puisne mortgagee is a proper party.)

('14) 1 AIR 1914 Mad 272 (275) : 22 Ind Cas 826 : 38 Mad 837 (DB), *Annamalai Velan* v. *Murugappa Velan.* (Suit to set aside rent sale — Person at whose instance sale was brought about is proper party.)

('17) 4 AIR 1917 Cal 330 (343) : 39 Ind Cas 409 (DB), *Secretary of State* v. *Jadav Chandra.* (Bengal Tenancy Act — Suit for declaration of status as tenant — Under-raiyats may be proper parties.)

('34) 21 AIR 1934 Cal 795 (795) : 151 Ind Cas 1088, *Ananda Charan De* v. *Mahalakshmi De.* (Pre-emption — Landlords petitioning under S. 26F, Bengal Tenancy Act, are proper parties to proceedings for setting aside sale.)

[3] ('25) 12 AIR 1925 Cal 1257 (1258) : 89 Ind Cas 57 (DB), *Baikuntha Kumar* v. *Sarat Chandra Nath.*

[*See also* ('98) 1898 Pun Re No. 75, p. 257, *Arur Singh* v. *Mt. Lachmi.*]

[4] ('97) 21 Bom 229 (233, 234) (DB), *Kashi* v. *Sadashiv.*

('34) 21 AIR 1934 Lah 328 (328): 150 Ind Cas 670, *Punjab Co-operative Bank Ltd.* v. *Lyallpur Bank Ltd.* (Pronote in favour of liquidated Bank endorsed in favour of another — Suit by latter against original debtor—Bank may be joined as defendant.)

('06) 29 Mad 106 (110) : 15 Mad L Jour 475 (DB), *Chidambaram Chettiar* v. *Sri Rangachariar.* (12 Mad L Jour 355 followed.)

('94) 18 Mad 53 (58) : 4 Mad L Jour 237 (DB), *Gurulingaswamy* v. *Rama Lakshmamma.*

('90) 13 Mad 32 (33) (DB), *Thirthasamy* v. *Gopala.*

As stated in Pomeroy on *Remedies:* "Necessary parties defendants are those without whom no decree at all can be rendered : proper parties defendants are those whose presence renders the decree more effectual : and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."[7]

This subject of necessary and proper parties has been dealt with in these Notes with reference to cases decided under the Limitation Act. For a further and fuller treatment of the subject, see Authors' Commentary on O. 1 R. 10 of the Code of Civil Procedure, 3rd Edition, Notes 13 to 27, both inclusive, where the subject of necessary and proper parties has been discussed with reference to various classes of suits.

[*See* ('14) 1 AIR 1914 Lah 187 (192) : 1915 Pun Re No. 3 : 25 Ind Cas 480 (DB), *Shib Nath* v. *Alliance Bank of Simla, Ltd.*]

[5] ('10) 6 Ind Cas 570 (571) (DB) (Cal), *Basli Bibi* v. *Hanif-ud-din.* (Rent suit against some of the tenants—Other tenants may be joined.)

('87) 11 Bom 425 (428) (DB), *Bhaudin* v. *Sheik Ismail.* (All persons interested in property which it is sought to be redeemed on payment of charge should be joined.)

('27) 14 AIR 1927 Cal 352 (353) : 101 Ind Cas 539 (DB), *Hashim Ibrahim* v. *Secretary of State.* (Reference under S. 18 of the Land Acquisition Act for determining valuation of waqf property—Mutwallis can be added as parties.)

('34) 21 AIR 1934 Cal 187 (190) : 151 Ind Cas 1076 (DB), *Secretary of State* v. *Dhirendra Nath.* (Suit for possession from 1st defendant of land as forming part of permanently settled estate—Secretary of State added after limitation for determining the question of revenue as between 1st defendant and Secretary of State under whose *settlement* 1st defendant claimed.)

[6] ('08) 31 Mad 236 (250) : 35 Ind App 176 : 12 Cal W N 946 : 8 Cal L Jour 230 : 10 Bom L R 781 : 18 Mad L Jour 387 : 4 Mad L Tim 101 (PC), *Shankaralinga Nadan* v. *Raja Rajeswara Dorai.* (Worshippers added as proper parties, where trustee did not conduct litigation in the interest of the trust.)

('89) 13 Bom 22 (24) (DB), *Lakshimibai* v. *Santappa Revappa.*

('02) 26 Bom 301 (304) : 3 Bom L R 932 (DB), *Purshotam Devjishet* v. *Kala Govindji Thaker.* (Suit by one legatee for legacy— Executor can join other legatees.)

('23) 10 AIR 1923 Mad 521 (522) : 72 Ind Cas 156, *Rajaratnam Iyer* v. *Kalasyasundaram Iyer.* (Suit against Hindu widow—Plaintiff's adoption in question—Reversioners can be joined.)

[*See* ('37) 24 AIR 1937 Lah 193 (194) : 172 Ind Cas 596, *Bishen Singh* v. *Pirthi Chand.* (Suit by some members of Hindu joint family on pronote in favour of family—Other members impleaded as defendants but after limitation—Suit against original defendants not barred.)

('71) 15 Suth W R 6 (6) (DB), *Kristo Sunker Dutt Roy* v. *Koylashnath Dutt Roy.*]

[7] ('06) 30 Bom 156 (161) : 7 Bom L R 811 (DB), *Keshavram Dulavram* v. *Ranchhod Fakira.* (Passage from Pomeroy quoted.)

17. Joinder of parties in mortgage suits.—The principles referred to in Note 15 are of general application and consequently apply to mortgage suits as well. Order 34 Rule 1 of the Code of Civil Procedure specifies the persons who shall be made parties to a suit relating to a mortgage. The rule is, however, "subject to the other provisions of the Code" and is therefore subject to O. 1 R. 9 which enacts *inter alia* that no suit shall be defeated by reason of the *nonjoinder* of parties and that the Court may, in every suit, *deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

There are, however, certain cases where the Court cannot, by reason of the nonjoinder of certain parties, deal with the matter in controversy even so far as regards the rights and interests of the parties actually before it.[1] A case arising under S. 45 of the Contract Act where the interests of *joint promisees* are involved, is an instance of the class of cases mentioned above. In such a case a claim cannot be enforced by only one of several joint promisees. A suit by one only of such promisees, without making the other promisees parties, whether as plaintiffs or as defendants, is not a validly constituted suit at all, and no relief can be given to any of the parties. The suit will have to be dismissed, not on the ground of misjoinder, but on the ground that no valid decree can be passed in the suit as constituted.[2] See also Note 23.

Where the mortgagee-right under a mortgage is vested in several persons jointly, one of them alone cannot, on the principles referred to above, institute a suit on mortgage without impleading the others also as parties, either as plaintiffs or defendants.[3] A suit instituted in contravention of this rule is not a validly constituted one and must be dismissed.[4] If the persons omitted in the first instance are added as

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Note 17

[1] See Notes 13 and 41 to Order 1 Rule 10 in Authors' Commentary on the Code of Civil Procedure, Third Edition.

[2] ('19) 6 AIR 1919 Bom 135 (136) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabdur-alli* v. *Sadasiv Supde.*
('22) 9 AIR 1922 Pat 651 (652) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray* v. *Asho Singh.*

[3] ('22) 9 AIR 1922 Pat 651 (652) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray* v. *Asho Singh.*
('16) 3 AIR 1916 Pat 310 (311) : 36 Ind Cas 542 (543) : 1 Pat L Jour 468 (DB), *Girwar Narain* v. *Makbulunissa.*
[See however ('40) 27 AIR 1940 Mad 412 (416) : 190 Ind Cas 657, *Sornammal* v. *Thangavelu Mudaliar.* (Entire mortgagee right becoming vested in plaintiff before suit comes on for hearing—Suit may be decreed though at the time when the plaintiff becomes solely entitled to the mortgagee right the period of limitation for the suit has expired—This is not a case of substitution or addition of a *new* party and S. 22 does not apply—See Note 6.)]

[4] ('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra Ghose* v. *Jamaluddin Mondal.*

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parties subsequently, but at that time the suit is barred against them, the whole suit must be dismissed,[5] the reason being that the suit becomes a validly constituted one only when all the omitted persons are made parties, and at that time the suit is barred by limitation. It has, however, been held in the undermentioned cases[6] that a suit by some only of several mortgagees to enforce a mortgage cannot be considered not to be a validly constituted suit in the sense that no relief can be given to the plaintiffs. It was accordingly held that the subsequent addition of the other co-mortgagees as defendants after limitation does not necessitate the dismissal of the suit. It is submitted that this view is incorrect. Section 45 of the Contract Act has not been adverted to and the decision is clearly contrary to the principle involved in that section.

On the same principle, a mortgagor cannot, in a suit for redemption, implead only *some* of the mortgagees. The suit will not be a properly constituted one, and no relief can be given even so far as the parties actually on record are concerned, without affecting parties not on record.[7] The addition of the other mortgagees after the expiry of the period of limitation will not prevent the dismissal of the whole suit.[8]

The absence in a suit to enforce a mortgage of all the persons *interested in the equity of redemption*, does not make the suit not a duly constituted one. A decree *can* be given so far as the interests of the parties actually on the record are concerned, and such decree will

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('14) 1 AIR 1914 Nag 31 (31) : 10 Nag L R 72 : 24 Ind Cas 831, *Nagorao* v. *Nago.*

('16) 3 AIR 1916 Pat 411 (413, 414) : 36 Ind Cas 77 (DB), *Baghela Koer* v. *Abdul Rahman.*

('14) 1 AIR 1914 Cal 455 (456) : 41 Cal 727 : 22 Ind Cas 570, *Sidheshuri Pershad Narain Singh* v. *Dharamjit Narain Singh.* (Suit by manager of joint Hindu family without joining nephew.)

[5] ('29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Girish Chunder* v. *Ram Saran.*

('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra Ghose* v. *Jamaluddin Mondal.*

('16) 3 AIR 1916 Pat 310 (311, 312) : 36 Ind Cas 542 (543) : 1 Pat L Jour 468 (DB), *Girwar Narain* v. *Makbulunnissa.*

[6] ('29) 16 AIR 1929 All 941 (942) : 121 Ind Cas 106 : 52 All 134 (DB), *Baldeo Prasad* v. *Bhola Nath.* (He can be added as pro forma defendant.)

[*See also* ('32) 19 AIR 1932 Cal 34 (35, 36) : 134 Ind Cas 1068, *Haider Ali Khondkar* v. *Muhammad Shajuddin Kazi.* (*Obiter*—All the necessary parties were added in the case.)]

[7] ('18) 5 AIR 1918 Pat 154 (155) : 45 Ind Cas 650, *Dhuri Patak* v. *Timal Singh.* (Claim withdrawn against one of the mortgagees.)

('14) 1 AIR 1914 All 109 (111) : 24 Ind Cas 25, *Saeeduddin* v. *Hira Lal.*

('27) 14 AIR 1927 All 290 (290) : 100 Ind Cas 198, *Karrar Hussain* v. *Jai Narain Rai.* (But it will not be fatal if a decree can be passed which will not injuriously affect absent party.)

[8] ('27) 14 AIR 1927 All 290 (290) : 100 Ind Cas 198, *Karrar Hussain* v. *Jai Narain Rai.*

not in any way affect the interests of the persons who have not been made parties.[9] The addition of such persons after the period of limitation has expired against them will bar the suit *as against them*, but will not necessitate the dismissal of the whole suit.[10]

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[9] ('24) 11 AIR 1924 All 928 (928) : 84 Ind Cas 262, *Sheo Kumar Pandey* v. *Babu Nandan Dube*.

('24) 11 AIR 1924 All 107 (108) : 74 Ind Cas 943, *Prashadi Lal* v. *Laiq Singh*. (Subsequent mortgagee not added.)

('33) 20 AIR 1933 Cal 325 (328) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Umesh Chandra* v. *Hemanga Chandra*. (One of the defendants owning the equity of redemption dying and *all* his heirs not being brought on the record.)

('31) 18 AIR 1931 Pat 164 (167) : 10 Pat 341 : 132 Ind Cas 100 (DB), *Mt. Waleyatunnissa Begum* v. *Mt. Chalakhi*. (One of the heirs of the mortgagor not impleaded.)

('25) 12 AIR 1925 Pat 59 (61) : 3 Pat 829 : 80 Ind Cas 34 (DB), *Parameshwar Pandey* v. *Raj Kishore Prasad Narayan Singh*. (Suit on mortgage by karta of joint Hindu family—Some members of the family not added as defendants.)

('22) 9 AIR 1922 Pat 450 (473) : 66 Ind Cas 945 : 1 Pat 506 (DB), *Hari Prasad Singha* v. *Babu Sourendra Mohan Sinha*. (Per Bucknill, J.)

('21) 8 AIR 1921 Cal 554 (554) : 66 Ind Cas 312 (DB), *Har Chandra Roy* v. *Mahumed Husein*. (33 Cal 613 followed.)

('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray* v. *Asho Singh*. (Subsequent mortgagee not added.)

('19) 6 AIR 1919 Bom 135 (136) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabduralli* v. *Sadashiv Supde*. (Some heirs of mortgagor not made parties.)

('25) 12 AIR 1925 Cal 152 (153) : 82 Ind Cas 638 (DB), *Kherodamoyi Dasi* v. *Habib Shaha*. (One heir of mortgagor not impleaded.)

('27) 14 AIR 1927 All 488 (488) : 101 Ind Cas 775 (DB), *Jwala Prasad* v. *Sher Singh*. (Subsequent mortgagee not added.)

('23) 10 AIR 1923 Nag 234 (235) : 72 Ind Cas 458, *Hirasa* v. *Onkar*. (Some heirs of mortgagor not added.)

('12) 13 Ind Cas 38 (39) (DB) (All), *Bala Prosad* v. *Partap Singh*. (Sons of mortgagor not impleaded.)

('31) 18 AIR 1931 All 235 (236) : 132 Ind Cas 31 (DB), *Haibat Shah* v. *Bohra Tarachand*. (Legal representative of deceased mortgagor not impleaded in time.)

('13) 19 Ind Cas 614 (614) : 35 All 247, *Ganesh Lal* v. *Charan Singh*. (Some of the mortgagors holding distinct share not added.)

('13) 21 Ind Cas 271 (272) : 35 All 484 (DB), *Alam Singh* v. *Gokal Singh*. (Subsequent mortgagee not added.)

('08) 12 Cal W N 911 (914) (DB), *Basiruddin Biswas* v. *Debendro Nath Biswas*. (Some of the heirs of a deceased vendee of a portion of mortgaged property not impleaded in time.)

('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hason Ali* v. *Gurudas Kapali*. (Do—36 Cal 675 followed.)

('32) 1932 Mad W N 330 (331), *Bhaskrunni Bangaru* v. *Punnayya*. (The suit is barred as against the puisne mortgagee added after limitation.)

('06) 33 Cal 1079 (1093) (DB), *Thakur Mani Singh* v. *Dai Rani Koeri* (Purchaser of small portion of mortgaged property not added till limitation.)

('13) 20 Ind Cas 41 (43) : 35 All 441 (DB), *Sanwale Singh* v. *Ganeshi Lal*. (Mortgagor dead—His two sons dividing hypotheca—Suit for entire mortgage amount against only one son and his share of property—*Held* suit not bad.)

('14) 1 AIR 1914 Nag 79 (80) : 10 Nag L R 173 : 26 Ind Cas 720, *Narayan* v. *Mahadev*. (Foreclosure suit — Subsequent mortgagee joined after time — Suit against him fails even though he was impleaded on his own application.)

[10] ('19) 6 AIR 1919 Bom 135 (137) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabduralli* v. *Sadashiv Supde*.

Where there are several persons entitled to redeem, each one of them is entitled to sue on the whole mortgage. Consequently, the failure to implead all such persons is not fatal to the constitution of the suit. Relief can be given in such suit so far as the parties actually before the Court are concerned.[11] The addition of the other persons after limitation will not result in the dismissal of the whole suit. Where the parties on the record represent in law the absent persons interested in the mortgage right or equity of redemption, the latter are constructively parties and their nonjoinder does not affect the validity of the suit and even if they are added, their addition is not the addition of *new* parties.[12] As to suits relating to mortgages by or against the manager of a joint Hindu family, see Note 11 and the undermentioned cases.[13]

18. Necessary parties in suits relating to firms. — A firm is not an artificial person distinct from the members composing it. In this respect it differs from a company incorporated under the statute, such a company being a corporation separate in law from its shareholders. The word 'firm' is a short collective name for the individuals constituting the partnership. The law of procedure, however, has provided a convenient mode of instituting suits against or on behalf of firms. Order 30 Rule 1 of the Civil Procedure Code prescribes that suits by or against firms of two or more persons may be brought in the name of the firm. A suit so brought in the name of the firm is in the eye of law a suit by or against all the partners thereof.[1]

('06) 33 Cal 613 (621) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali* v. *Baij Nath Ram Sahu.*

('15) 2 AIR 1915 Bom 272 (272) : 39 Bom 729 : 31 Ind Cas 180 (DB), *Virchand* v. *Kondu.*

('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivu Bhai* v. *Shidheswar.* (28 Bom 11 followed.)

[11] ('34) 21 AIR 1934 Oudh 220 (221) : 148 Ind Cas 903 : 10 Luck 70 (DB), *Mohammad Ali Khan* v. *Ali Mirza Khan.* (A I R 1932 Cal 34 relied on.)

[12] See Note 41 to Order 1 Rule 10 in Authors' Commentary on the Civil Procedure Code, Third Edition.

[13] ('12) 15 Ind Cas 126 (129) : 34 All 549 (FB), *Hori Lal* v. *Nimman Kunwar.* (Manager represents other members.)

('12) 15 Ind Cas 138 (139) : 34 All 572 (FB), *Madan Lal* v. *Kishen Singh.* (Do.)

('12) 13 Ind Cas 38 (39) (DB) (All), *Bala Proshad* v. *Partab Singh.* (Do.)

('13) 18 Ind Cas 848 (852) : 9 Nag L R 1, *Gore* v. *Kashiram.* (Do.)

('12) 13 Ind Cas 197 (200) (DB) (All), *Gendan Lal* v. *Babu Ram.* (Contra.)

('12) 14 Ind Cas 35 (38) (DB) (All), *Nathi Lal* v. *Lala.* (Contra.)

('86) 10 Bom 592 (594) (DB), *Govind Bhaichand* v. *Kalnak.* (Contra.)

Note 18

[1] ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratab Brijmohan Das* v. *Gavrishankar.*

('24) 11 AIR 1924 Bom 155 (156) : 77 Ind Cas 1055 (DB), *Motilal Jasraj* v. *Chandmal Hindumal.*

('85) 7 All 284 (287) : 1885 All W N 40 (DB), *Pragi Lal* v. *Maxwell.*

[But see ('89) 1889 Pun Re No. 140, *Naubat Rai* v. *Seva Ram.* (All partners must sue in time — Before Civil Procedure Code of 1908.)]

Section 22
Note 18

Accordingly where a suit is brought in the name of the firm by one of its members as its agent, the fact that the other partners are made co-plaintiffs after limitation will not mean the addition of *new* parties.[2]

In the case of a Mitakshara joint family carrying on business as a firm, the managing member or members thereof can sue, in their own name, on contracts entered into with them, without impleading the other members.[3]

Where there is really no firm but it is the case of only a single individual trading under the name and style of a firm, a suit with the firm name and not the individual as the party, is not properly constituted and in case the individual happens to have died before the suit, it is a suit by or against a dead man and is a nullity.[4]

If the intention to implead the firm is clear, a misdescription in the cause title is immaterial.[5]

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2. ('16) 3 AIR 1916 Mad 649 (649) : 28 Ind Cas 210, *Marayya Chetty* v. *Swami Chetty.*
('93) 17 Bom 413 (416, 417) (DB), *Kasturchand Bahiravdas* v. *Sagarmal Shriram.* (Suit in name of firm — One of the partners suing as manager.)
[*See* ('29) 16 AIR 1929 Rang 310 (311) : 7 Rang 558 : 120 Ind Cas 910 (DB), *Maung Shwe Htein* v. *Ma Lon Ma Gale.*]
[But see ('92) 14 All 524 (527, 528) : 1892 All W N 104 (DB), *Imam-ud-din* v. *Liladhar.* (Before Civil Procedure Code of 1908.)
('77) 1 All 453 (454) (DB), *Dulurchand* v. *Balram Dass.* (Do.)]

3. ('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad* v. *Har Narain Singh.* (29 All 311 reversed.)
('12) 13 Ind Cas 873 (874) (DB) (Lah), *Badri Das* v. *Santa Singh.*
('12) 17 Ind Cas 193 (195) : 37 Bom 340 (DB), *Lalji Nensey Ludha* v. *Keshoji Punja.* (Necessary parties are those who actually contracted with defendant.)
('04) 27 All 361 (362, 363) : 2 All L Jour 3 : 1904 All W N 282 (DB), *Gopal Das* v. *Badri Nath.* (Do.)
('99) 26 Cal 349 (355, 356): 3 Cal W N 190, *Lutchmanen Chetty* v. *Siva Prokasa.*
('82) 1882 Pun Re No. 58, *Sadulla Khan* v. *Bhana Mal.*
[*See also* ('10) 5 Ind Cas 767 (768) : 32 All 183 (DB), *Durga Parshad* v. *Damodar Das.* (Joint family firm — One member suing on contract entered in his name only — Others not necessary parties.)
('03) 27 Bom 157 (161) : 4 Bom L R 968 (DB), *Vadilal Lallubhai* v. *Shah Khushal Dalpatram.* (Fact that person carrying on business is coparcener does not necessarily mean that other coparceners are his partners in the business.)]
[But see ('83) 7 Bom 217 (220) : 7 Ind Jur 428, *Kalidas Kevaldas* v. *Nathu Bhagwan.*
('06) 1906 Pun L R No. 118, p. 385, (390, 392): 1906 Pun Re No. 69 (DB), *Rattan Chand* v. *Ram Parshad.*
(95) 18 Mad 33 (36, 37) : 4 Mad L Jour 283 (DB), *Alagappa* v. *Vellian.*]

4. ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratab Brijmohan Das* v. *Gavrishankar.*
[*See* ('28) 15 AIR 1928 Nag 319 (320, 321) : 109 Ind Cas 785, *Deo Lal* v. *Tularam Ramsukh.*]

5. ('24) 11 AIR 1924 Bom 155 (156) : 77 Ind Cas 1055 (DB), *Motilal Jasraj* v. *Chandmal Hindumal.* (Cause title mentioning name of manager and owner of firm.)

Where a partnership is re-constituted and it files a suit in respect of a contract with the old firm, a substitution of the old firm after limitation is substitution of a new party.[6]

In a suit against a dissolved partnership, the date of the institution of the suit, for purposes of limitation, is the date of the suit and not the date of the service of summons on individual partners subsequent to the suit.[7]

A suit by one partner for a dissolution of partnership or for accounts must be laid against all the other partners. If one or more of the other partners[8] or one or more of the legal representatives of a deceased partner[9] is or are not made parties to the suit within time, the whole suit must fail. A contrary view has, however, been expressed in the undermentioned case.[10] (See also section 7 Note 23.)

19. Necessary parties in suits relating to firms — Disclosure of partners' names. — It has been seen in Note 18 that a firm can sue or be sued in the name of the firm without the partners being named or mentioned in the plaint. But under O. 30, R. 2, Civil Procedure Code, in the case of a suit instituted by partners in the name of a firm, where there is an application for the disclosure of the partners and the declaration is made, the partners so declared are

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[*See* ('28) 15 AIR 1928 Nag 319 (321) : 109 Ind Cas 785, *Deolal* v. *Tularam Ramsukh.* (This was a case of a sole proprietor trading in style of a firm—It is not clear how it was taken to be a firm by the Court.)]

[6] ('24) 11 AIR 1924 Sind 47 (48) : 76 Ind Cas 119 : 17 Sind L R 263 (DB), *Manghumal Jethanand* v. *Aratmal Satramdas.* (A I R 1922 Sind 13 affirmed in appeal.)

[7] ('28) 15 AIR 1928 Sind 57 (60) : 105 Ind Cas 854 : 23 Sind L R 54, *Detaram Ratumal* v. *Vishindas Tarachand.*

See also Order 30 Rule 3 Proviso of the Civil Procedure Code.

[8] ('33) 20 AIR 1933 Sind 121 (122) : 143 Ind Cas 900 (DB), *Pahloomal* v. *Paramanand.*

('87) 14 Cal 791 (794) (DB), *Ramdoyal* v. *Junmenjoy Coondoo.*

[*See also* ('18) 5 AIR 1918 Cal 294 (299) : 43 Ind Cas 893 (DB), *Kali Das Chaudhuri* v. *Danpadi Sundaree Dassee.*

('86) 1886 Pun Re No. 8, *Dallu Ram* v. *Nibahu Mal.*]

See also Note 5.

[9] ('14) 1 AIR 1914 Cal 132 (132) : 19 Ind Cas 963 (DB), *Ambika Charan Guha* v. *Tarini Charan Chanda.* (Some of the legal representatives alone cannot fully represent the deceased partner's interests—Ignorance of a legal representative immaterial.)

('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 564 (DB), *Bavachutty* v. *Kunhi Pathumma.* (Heirs of deceased partner as plaintiffs.)

('07) 7 Cal L Jour 266 (267) (DB), *Srinath Pal* v. *Hari Charn Pal.*

[10] ('37) 24 AIR 1937 All 502 (503, 504) : 170 Ind Cas 743, *Mt. Jamna Kunwar* v. *Kunj Behari Lal.* (Necessary partner could be impleaded as *pro forma* defendant after claim against him was barred — Limitation against contesting partners not affected—Submitted not correct — A necessary party is *ipso facto* not a *pro forma* defendant—See also Note 5.)

deemed to be parties to the suit from the date of suit.[1] If a partner's name is omitted from such a declaration the Court may allow a fresh declaration to be made. But if at the time of the fresh declaration the period of limitation has elapsed, the partner will be deemed to be a *newly* added party within the meaning of this section.[2]

20. Necessary parties in pre-emption suits. — All the vendees are necessary parties to a suit for pre-emption in the sense that in the absence of any of them, no relief could be given to the plaintiff. If therefore any one of them is not impleaded in time, the whole suit should fail,[1] unless from the evidence in the case and the nature of the transaction it is possible to give relief against the party impleaded,[2] as for example where the share and the price paid by each vendee is separately specified in the sale deed.[3]

As to an *application* for pre-emption under S. 26F and S. 188 of the Bengal Tenancy Act, 1885, by some only of the cosharers entitled to pre-empt, without impleading all the cosharers as parties, see the undermentioned cases.[4] See also Article 10 Note 14.

Note 19

1. ('35) 22 AIR 1935 Sind 225 (227) : 159 Ind Cas 933, *Hampson* v. *Jeewanmall Bros.*

2. ('34) 21 AIR 1934 Cal 253 (255) : 60 Cal 1217 : 149 Ind Cas 22, *Bhairobux Mangilal* v. *Deo Karan.*

Note 20

1. ('21) 8 AIR 1921 Oudh 252 (254) : 24 Oudh Cas 320 : 63 Ind Cas 558, *Jai Jai Ram* v. *Darshan Lal.* (Legal representatives of one of the vendees joined after limitation.)

('24) 11 AIR 1924 Lah 230 (231) : 73 Ind Cas 364, *Nais Ali Khan* v. *Md. Afzal Khan.* (Minority of plaintiff and carelessness of his next friend no excuse.)

('19) 6 AIR 1919 Lah 25 (26) : 52 Ind Cas 587 : 1919 Pun Re No. 86 (DB), *Mt. Hussain Bibi* v. *Hakim.* (Legal representatives of one of vendees not brought on record before limitation.)

('25) 12 AIR 1925 Lah 343 (344) : 88 Ind Cas 555, *Jawala Das* v. *Gopal Lal.* (Omission due to error in copy of sale deed supplied to plaintiff.)

('11) 11 Ind Cas 938 (939) (DB) (All), *Mamraj* v. *Hirday Ram.* (Third person wrongly named as vendee—Correct vendee brought on record after limitation.)

('81) 4 All 145 (147) : 1881 All W N 153 : 6 Ind Jur 486, *Habib-ul-lah* v. *Achaibar Pandey.* (Vendee purchasing in his own name and as guardian of minor — Minor impleaded after limitation.)

('89) 1889 Pun Re No. 149, *Ram Chand* v. *Rana.* (If one of them is dead, all his legal representatives must be impleaded.)

2. ('25) 12 AIR 1925 Oudh 369 (370) : 87 Ind Cas 17, *Ram Pher* v. *Ajudhia Singh.* See also Section 45, Transfer of Property Act.

3. ('09) 1 Ind Cas 91 (92) (DB) (Lah), *Brij Lal* v. *Massan.* (1903 Pun Re No. 25 distinguished.)

4. ('38) 25 AIR 1938 Cal 324 (325) : 177 Ind Cas 798 (DB), *Dinesh Chandra* v. *Rajendra Chandra.* (All cosharer landlords are necessary parties.)

('33) 20 AIR 1933 Cal 636 (636) : 60 Cal 787 : 145 Ind Cas 836 (DB), *Rajanikanta Laha* v. *Atulchandra Seal.* (Application for pre-emption without joining other cosharers within limitation is not maintainable.)

('33) 20 AIR 1933 Cal 460 (460, 461) : 145 Ind Cas 121 (DB), *Barkatulla Pramanik* v. *Ashutosh Ghose.* (Do.)

21. Necessary parties in suits by or against clubs and corporations. — A suit by or against a club not being a body incorporated under law must be laid by or against *all its members* and not its Secretary or Managing Board unless the latter have become personally entitled or liable.[1] In an old case of the Punjab Chief Court[2] where an unregistered body was sued by its manager, the Court held that as the intention was to implead the whole body of members as defendant, all the members were comprised in the designation of the institution and that the addition of the names of the members after time was not the addition of new parties. This view was followed recently by the Lahore High Court.[3] It is submitted that this view of the law cannot be supported except on a straining of the rule of "misdescription" of parties. See also Note 6.

As regards corporations, see Note 10 and also Note 18.

22. Necessary parties in suits between landlord and tenant. — As to who are and who are not necessary parties in suits for rent, see the Authors' Commentary on the Civil Procedure Code, 3rd Edition, Order 1, Rule 10, Note 20.

In a suit for ejectment of a sub-tenant's sub-tenant, if the former is not impleaded in time the whole suit should fail.[1] The reason is that without the first sub-tenant, there is no cause of action against his sub-tenant. The cause of action is only against the first sub-tenant and if he is made a party after limitation, the suit is barred against him.

Under the Tenancy Acts of some provinces, anything which a landlord is required or authorised to do must be done by the whole body of the landlords or by an agent acting duly on their behalf. Some of them alone cannot maintain an application or a suit in respect of such acts.[2]

Note 21

1. ('98) 20 All 497 (498) : 1898 All W N 138 (DB), *The N. W. P. Club* v. *Sadullah.*
('99) 21 All 346 (347) : 1899 All W N 123 (DB), *Ganesha Singh* v. *Mundi Forest Company.*

2. ('96) 1896 Pun Re No. 29, *Moti* v. *Syed Ahmad Shafi.*

3. ('24) 11 AIR 1924 Lah 495 (497) : 5 Lah 109 : 83 Ind Cas 180 (DB), *Gokal Chand* v. *Sanwal Das.*

Note 22

1. ('15) 30 Ind Cas 795 (795, 796) (DB) (U P B R), *Fakhrunissa Bibi* v. *Imdad.* See also Note 5.

2. ('21) 8 AIR 1921 Nag 12 (14) : 63 Ind Cas 352, *Deokaran* v. *Nathu.* (C. P. Tenancy Act 1898—18 C P L R 113 followed.)
('11) 11 Ind Cas 397 (398) (DB) (Cal), *Kirtibash Das* v. *Umesh Chandra Datta.* ("Common manager" under the Bengal Tenancy Act represents co-owners.)
('08) 8 Cal W N 214 (216) (DB), *Sibo Sundari Ghose* v. *Raj Mohan Guhoo.* (Bengal Tenancy Act — Common manager can sue on behalf of all co-owners for possession of land.)
('81) 7 Cal 751 (752) (DB), *Gopal* v. *Macnaghten.* (Bengal Tenancy Act—Suit for enhanced rent—All sixteen annas proprietors must be made parties.)

Section 22
Note 23

23. Joint promisors and promisees and owners of joint right of action. — The general rule of law is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiff, he must be added as defendant.[1] For a detailed discussion of the subject of necessary parties to a suit in respect of property owned by several persons jointly, see Note 18 to O. 1 R. 10 in the Authors' Commentary on the Civil Procedure Code, 3rd Edn. and also the undermentioned cases.[1a] If a suit is brought to recover a debt due to joint promisees, all of them must, as has been seen in Note 17, be impleaded and the suit must be for the entire debt. If one or more of such persons are impleaded after limitation the whole suit must fail.[2]

('78) 3 Cal 26 (28) : 2 Ind Jur 213 (DB), *Boydonath Bag* v. *Girish Chunder Roy.*

('97) 21 Bom 154 (158, 159), *Balakrishna Sakharam* v. *Moro Krishna.* (One cosharer alone cannot sue for enhanced rent and possession, though he may be manager with consent of other cosharers.)

('21) 8 AIR 1921 Cal 591 (592, 593) : 61 Ind Cas 549 (DB), *Sati Prosad Garga* v. *Sanaton Dhara.*

[*See also* ('16) 3 AIR 1916 Pat 251 (251) : 36 Ind Cas 197 : 1 Pat L Jour 154 (DB), *Mohammad Sadiq* v. *Khedan Lal.* (*Quære* — Whether manager of Mitakshara joint family can sue alone under Bengal Tenancy Act for possession against trespasser.)

Note 23

[1] ('22) 9 AIR 1922 Mad 317 (318) : 70 Ind Cas 645 (DB), *Thina Shanmugha Moopanar* v. *Subbayya Moopanar.* (Joint trustees—Suit to recover properties of temple.)

('23) 10 AIR 1923 Mad 337 (337) : 72 Ind Cas 63 (DB), *Mohana Velu Mudaliar* v. *Annamalai Mudaliar.* (Joint executors as plaintiffs.)

[*See* ('85) 7 All 313 (315) : 1885 All W N 34 : 9 Ind Jur 314 (FB), *Kandhiya Lal* v. *Chandar.*]

[*See also* ('21) 8 AIR 1921 Mad 124 (124) : 62 Ind Cas 360 (DB), *Saminatha Pillai* v. *Rajagopala Mudaliar.* (Joint trustee.)

('21) 8 AIR 1921 Mad 528 (529) : 63 Ind Cas 104 (DB), *Sreeranga Thanni* v. *Vaithiliaga Mudaliar.* (Co-executors of a will.)]

[See however ('05) 1905 Pun L R No. 76, p. 298 : 1905 Pun Re No. 57 : 1905 Pun W R No. 42 (FB), *Labhu Ram* v. *Kanshi Ram.* (One co-promisee can sue without impleading others in time even as defendants.)]

[1a] ('97) 1897 All W N 36 (36), *Behari Lal* v. *Girdhari Lal.* (Suit against some only of several persons in joint possession—Other defendants joined after limitation—Plaintiff can get decree jointly with latter.)

('81) 7 Cal 284 (287) (DB), *Obhoy Churn Nundi* v. *Kritarthamoye Dossee.* (Suit for possession of land held by numerous persons—Only one of them made defendant in time—Suit dismissed against rest.)

('94) 18 Bom 505 (506) (DB), *Krishnaji Malji* v. *Vithu.* (Suit by purchaser at execution sale of cosharer's interest—Other cosharers impleaded after limitation —He can get a decree for joint possession with them.)

[2] ('27) 14 AIR 1927 Mad 84 (85) : 98 Ind Cas 549, *Siluvaimuthu* v. *Muhammad Sahul.* (Even where the debt has been divided as between the joint promisees— 36 Mad 544 relied on.)

('32) 19 AIR 1932 Mad 583 (588) : 137 Ind Cas 274 (DB), *Sobhanadri Appa Rao* v. *Parthasarathi Appa Rao.* (Tort arising out of contract—One of the promisees not impleaded in time.)

('16) 3 AIR 1916 Pat 411 (414) : 36 Ind Cas 77 (DB), *Bhagela Koer* v. *Abdul Rahman.* (All heirs of mortgagee must join in a suit on mortgage debt.)

Section 22
Notes 23-24

In the case of joint promisors their liability is, under S. 43 of the Contract Act *joint and several* and any one or more of such promisors may be compelled to perform the whole of the promise. Any one of them may therefore be sued for the whole debt at the option of the promisee.[3]

24. Torts.—Where several persons are entitled to sue in respect of a wrong, independent of contract, done to them jointly, it is not necessary for all of them to join as plaintiffs. Any one of them is entitled to sue separately in so far as he is damnified by the alleged

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('25) 12 AIR 1925 Sind 181 (182) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram* v. *Budhuram Parmanand.* (One partner suing for his share of money from dealer—Other partner joined after limitation—Claims being joint, whole suit to fail.)

('81) 6 Cal 815 (824) : 8 Cal L R 457 (DB), *Ramsebuk* v. *Ramlal Koondoo.*

('02) 25 Mad 26 (35) (DB), *Ahinsa Bibi* v. *Abdul Kader Saheb.* (The legal representatives of a deceased obligee are joint claimants.)

('38) 25 AIR 1938 Oudh 61 (62) : 172 Ind Cas 542, *Ram Singh* v. *Radha Krishna.* (Joint promisees—Suit by one—Other promisee joined after period of limitation —Suit is time-barred.)

[*See* ('21) 8 AIR 1921 Mad 528 (529) : 63 Ind Cas 101 (DB), *Sreerangathanni* v. *Vaithilinga Mudaliar.* (Co-executor of a will added as party defendant after limitation—Whole suit fails.)

('20) 7 AIR 1920 Pat 464 (468) : 5 Pat L Jour 151 : 55 Ind Cas 841 (DB), *Banamali Satpathi* v. *Talua Ramhari.* (Joint heirs of mortgagee—Payment to one without concurrence of others does not amount to discharge.)

('83) 7 Bom 217 (220) : 7 Ind Jur 428 (DB), *Kalidas Kevaldas* v. *Nathu Bhagwan.* (Suit by one member of joint Hindu family for recovery of joint debt—Suit not maintainable without joining other members within limitation.)

('06) 1906 Pun Re No. 79 : 1906 Pun W R No. 124, *Motan Mal* v. *Kripa Mal.*]

[*See also* ('99) 26 Cal 409 (412) : 3 Cal W N 271 (FB), *Pyari Mohun Bose* v. *Kedarnath Roy.*]

[See however ('32) 19 AIR 1932 Lah 652 (653) : 141 Ind Cas 190, *Khairatti Shah* v. *Diwan Singh.* (Only one of the legal representatives of a deceased creditor suing for whole amount—Other legal representatives impleaded after time as plaintiffs—*Held* suit not bad—1905 Pun Re No. 57 (FB) relied on.)

('37) 24 AIR 1937 Lah 193 (194) : 172 Ind Cas 596, *Bishen Singh* v. *Pirthi Chand.* (Suit by members of Hindu joint family on pro-note executed in favour of joint family—Other members added as defendants after limitation—Suit not barred—1905 Pun Re No. 57 (FB) followed.)

('09) 1 Ind Cas 455 (456) : 1909 Pun Re No. 20 (DB), *Gohru* v. *Amira.* (Suit by members of Hindu joint family for debt due to family—One coparcener made defendant after limitation — Suit not barred — 1905 Pun Re No. 57 (FB) followed.)]

See also Note 5.

[3] ('98) 21 Mad 256 (257) (DB), *Narayana Chetty* v. *Lakshmana Chetty.* (Any one partner of a firm may be sued.)

('05) 1905 Pun L R No. 116, p. 439 : 1905 Pun Re No. 81 : 1905 Pun W R No. 100 (DB), *Jawahir* v. *S. Hari Singh.* (Suit against one co-promisor not bad because others impleaded after time.)

Section 22
Notes 24–25

tort.[1] Similarly, where there are several joint tort-feasors it is not necessary to join all of them as defendants in a suit for damages, because their liability is joint and several.[2]

24a. Necessary parties in suit for specific performance of contract to sell. — A agrees to sell certain property to X and thereafter sells the property to B who has notice of the agreement in favour of X. X sues A for specific performance of the contract within three years of the breach of contract. On objection by A, B is also impleaded, but more than three years after the breach of the contract. Is the suit barred? It has been held by the High Court of Madras that it is not barred.[1] Their Lordships observed as follows :

> "It is not necessary for us to decide whether he is a necessary party or merely a proper party, for, even on the supposition that he is a necessary party, we do not see how it can be said that the suit is barred against him unless he is able to show that it has been instituted against him more than three years after the refusal on *his* part to join in the conveyance in performance of the contract. He is not the person who is primarily the party to perform the contract. He is joined under the provisions of S. 27, Specific Relief Act, in order that the plaintiff may have full reliefs and may not be driven to a separate suit against him."

25. Objection to non-joinder of parties.—It has been seen already that where a necessary party is added after the expiry of the period of limitation, the whole suit will have to be dismissed.

Note 24

[1] ('12) 14 Ind Cas 478 (479) (DB) (Cal), *Fatik Chandra Rai* v. *Atlas Bibi.* (Suit by a cosharer landlord against an occupancy raiyat for damages for value of trees improperly cut and appropriated.)

('98) 25 Cal 285 (289) (DB), *Jagdeo Singh* v. *Padarath Ahir.* (Suit for compensation for illegal distraint of crops.)

('04) 2 Cal L Jour 496 (498) (DB), *Ram Gopal Dey* v. *Raghu Nath Ghosal.* (Even where the tort is damage done to land owned jointly.)

('07) 6 Cal L Jour 383 (388, 392) (DB), *Harihar Pershad* v. *Bholi Parshad.* (Similarly, anyone of joint tort-feasors may be sued without the others being impleaded.)

('97) 2 Cal W N 80 (80) (DB), *Hrisikes Singha* v. *Sadhu Charan Lahar.* (Suit by cosharer in a mahal for damages for the cutting down of trees by tenant.)

[*See* ('08) 35 Cal 495 (509) : 12 Cal W N 490 (DB), *A. S. Barrow* v. *Hem Chandra Lahiri.* (Suit for libel—More than one plaintiff—All but one struck off—No question of limitation as regards the one.)

('98) 21 Mad 373 (380, 381) : 8 Mad L Jour 139 (DB), *Mahabala Bhatta* v. *Kunhanna Bhatta.*

('68) 9 Suth W R 279 (281) (DB), *Gopee Kishen Gossain* v. *W. H. Ryland.* (One member of joint Hindu family can sue for compensation for wrongful demolition of house.)]

[*See also* ('28) 15 AIR 1928 Mad 1215 (1219) : 114 Ind Cas 636, *Subramaniya Iyer* v. *United India Life Insurance Co. Ltd., Madras.*]

[2] ('24) 11 AIR 1924 Lah 348 (349) : 72 Ind Cas 670, *Mt. Phillo* v. *Gopi.*

Note 24a

[1] ('20) 7 AIR 1920 Mad 96 (96) : 55 Ind Cas 533 (DB), *Kesavalu* v. *Rajaram.*

Order 1 Rule 13 of the Civil Procedure Code runs as follows :

> "All objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

Where the nonjoinder is of persons who are proper but not necessary parties, the objection, if raised at a late stage, will, under the above Rule, be disregarded and relief will be given so far as the parties on the record are concerned.[1]

Does this rule apply to nonjoinder of *necessary* parties? In other words, does this rule apply to cases where the constitution of the suit is itself invalid in the absence of parties and no relief could be given even so far as the parties actually before the Court are concerned? There is a conflict of decisions on the point. In *Dursan Singh* v. *Durbejoy Singh*,[2] the learned Judges of the Calcutta High Court observed as follows :

> "This provision does not entitle the plaintiff to a measure of relief larger than the right he really possesses. For instance, if A sues for recovery of possession upon the allegation that he is the *exclusive owner* of the property but it is established by the evidence that he is entitled to only a half share and that the other half belongs to a co-owner, B, who is not a party to the suit, the mere omission of the defendant to take the objection, that B ought to have been joined as a party defendant, would not entitle the plaintiff to obtain a decree for the whole . . . . . . There is a well marked distinction between nonjoinder of *necessary or indispensable* parties, and nonjoinder of proper but not indispensable parties; and where, as here, the parties omitted are necessary only for the purpose of protecting the defendant from further litigation, the Court may, in its discretion, disregard the objection, if not raised at the proper stage."

In the case of nonjoinder of indispensable parties, the result, according to the above decision, would be otherwise. The failure to object to the nonjoinder at the proper stage would not mean that the plaintiff would be entitled to a decree. The suit would nevertheless have to be dismissed as the constitution of the suit, in the absence of

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Note 25

[1] ('04) 26 All 528 (535) : 1904 All W N 119 (DB), *Pateshri Partab Narain Singh* v. *Rudra Narain Singh*. (Suit by one co-owner against trespasser—Nonjoinder of others does not affect constitution of suit—Failure to object as to nonjoinder will amount to waiver—Affirmed in 6 Ind Cas 981 (PC).)

('08) 30 All 538 (540) : 5 All L Jour 554 : 1908 All W N 246 : 4 Mad L Tim 447 (DB), *Hasarimal* v. *Bhawani Ram*.

[2] ('09) 1 Ind Cas 530 (531, 532, 533) (DB) (Cal).

the necessary parties, would be such that no relief could be given even so far as the parties actually on the record are concerned. In *Heiniger* v. *Droz*,[3] Mr. Justice Batty observed that S. 34 of the Civil Procedure Code of 1882 corresponding to the present O. 1 R. 13 referred to objections to want of parties or nonjoinder or misjoinder, and not to objections on the ground of a cause of action or the right of suit in the plaintiff which might not be disclosed until the case had been proceeded with and evidence had been taken. In *Mata Din* v. *Kazzim Hussain*,[4] where in a mortgage suit certain parties held to be indispensable under S. 85 of the Transfer of Property Act corresponding to O. 34 R. 1 of the Civil Procedure Code, had not been made parties, and no objection had been taken to the nonjoinder, Sir John Edge, Chief Justice, observed : "Notwithstanding S. 34 of that Code, (now O. 1 R. 13) I am of opinion that we must act upon the imperative words in S. 85 of Act IV of 1882." The principle of the decision will, it is submitted, even now become applicable in the case of nonjoinder of parties without whose presence no effective decree can be passed at all even so far as the parties actually on the record are concerned.

In *Kasiyanna Goundan* v. *Thimma Naicken*,[5] the High Court of Madras seems to have taken a different view, namely, that even where the case is one of nonjoinder of indispensable parties the failure to object on the part of the defendant will enable a decree to be passed in favour of the plaintiff. The reasoning of the decision is not clear, and the decision cannot be accepted as correct. See also the undermentioned case.[6]

26. "When he was so made a party." — When a person is added as a party on an application made for the purpose, the addition must be deemed to take effect from the date of the presentation of the *application*.[1] It is so even when the final order impleading

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3. ('01) 25 Bom 433 (467) : 3 Bom L R 1.

4. ('91) 13 All 432 (465) (FB).

5. ('18) 5 AIR 1918 Mad 535 (536, 537) : 41 Ind Cas 527 (DB). (Order 1 Rule 13 applies even to cases where plaintiff claims a joint right with others but does not make them parties.)

6. ('91) 15 Bom 297 (298, 299) : 1890 Bom P J 300 (DB), *Shirekuli Timapa Hegade* v. *Ajjibal Narashinv Hegade*. (A suit is not time barred because the proper parties were not joined in time to prevent the claim being barred, if the objection for the want of parties was not taken at any stage of the proceedings and no issue was raised for that purpose.)

Note 26

1. ('27) 14 AIR 1927 Mad 468 (469) : 100 Ind Cas 680 : 50 Mad 372 (DB), *South India Industrials Ltd.* v. *Narasimha Rao*. (AIR 1925 Mad 487 dissented from; 17 Bom 29 followed.)

('30) 17 AIR 1930 Sind 259 (260) : 128 Ind Cas 675 : 32 Cri L Jour 174 : 25 Sind L R 107 (DB). *Hassanand* v. *Nandi Ram*. (Do.)

('27) 14 AIR 1927 Nag 95 (96) : 98 Ind Cas 658, *Shakurkhan* v. *Sheikh Budhan*. (Amendment of plaint is retrospective at least from date of application.)

him is made only on revision or appeal.[2] (See also Note 5.) A different view has been held in some cases.[3] It has been held that as regards a newly added party, limitation ceases to run only when he is *made* a party and not on the date of the application to implead him, the reason being that the language of sub-s. (2) which says "when he was *so made a party*" is clear on the point. But it is submitted that these words are not irreconcilable with the principle that when an application is made to Court for a particular order, the order when made is to be deemed to have been made on the date on which the jurisdiction of the Court is rightly invoked. For, otherwise, the party will have to be held responsible for the delay caused by the time necessarily to be taken by the Court before passing an order, especially where the final order happens to be made by a Court of final appeal or revision long after the date of the application.

The rule in O. 1 R. 10 (5) that the proceedings against a newly added defendant should be deemed to have begun on the service of summons on him is subject to S. 22 of the Limitation Act as the said rule itself provides.[4] Hence, although for purposes other than those of limitation, a suit must be deemed to have been instituted against a newly added defendant on the date of the service of summons on him, for purposes of *limitation*, the suit must be deemed to have been instituted when he is made a party.

27. Sub-section (2).—In the corresponding sections of the old Acts, there were two provisos to the effect that where a party died

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('37) 24 AIR 1937 Rang 175 (177) : 171 Ind Cas 876 (DB), *Mohomed Sultan* v. *Abdul Rahman*. (Written statement asking for addition of parties was treated as an application and the parties added were taken to have been made parties on the date of the written statement.)
[*See* ('93) 3 Mad L Jour 53 (53) (Jour). (Critical Note on 17 Bom 29, *Ramkrishna* v. *Ramabai*.)
('10) 5 Ind Cas 931 (931) : 33 Mad 115 (DB), *Subbaraya* v. *Vathinatha*. (Such amendment could not be dated earlier than the date of application.)]

[2] ('27) 14 AIR 1927 Mad 468 (469) : 50 Mad 372 : 100 Ind Cas 680 (DB), *South India Industrials Ltd.* v. *Narasimha Rao*. (Revision — A I R 1925 Mad 487, dissented from.)
('93) 17 Bom 29 (32) (DB), *Ramkrishna Moreshwar* v. *Ramabai*. (Appeal.)

[3] ('25) 12 AIR 1925 Mad 487 (488) : 86 Ind Cas 187, *Ammaya Pillai* v. *Narayana Chetty*. (The question whether the date is the date of 'order' impleading him or the date the applicant is actually *placed on record* or the date on which he is *served*, left open—Dissented from in AIR 1927 Mad 468.)
('96) 1896 Bom P J 553 (555), *Ganesh* v. *Kamalabai*.
('96) 20 Bom 767 (776), *Rampartab Samrathrai* v. *Foolibai*. (Material date is when party was brought on record and not when order was passed.)
('85) 9 Bom 1 (9), *Fisher* v. *Pearse*. (They are not parties till date of order.)
('66) 6 Suth W R 298 (299) (DB), *Raj Kishori Dassi* v. *Buddun Chunder Shaw*.
[*See also* ('18) 5 AIR 1918 Mad 1122 (1123) : 38 Ind Cas 169, *Paramasivan Pillai* v. *Aristotle Chakona*.]

[4] ('27) 14 AIR 1927 Mad 468 (468) : 50 Mad 372 : 100 Ind Cas 680 (DB), *South India Industrials, Ltd.* v. *Narasimha Rao*.
('11) 12 Ind Cas 586 (587) (DB) (Bom), *Mahomed Bhai* v. *Ismail Haji Halimbhai*.

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Note 27

and the suit was continued by or against his *legal representatives*, the suit must be deemed to have been instituted by or against such legal representatives when it was instituted by the deceased plaintiff or against the deceased defendant as the case may be. There was a difference of opinion as to whether the substitution of a person on whom the interests of a party devolve or to whom they are assigned *pendente lite*, is the substitution of a *new* party within the meaning of the section.[1] The present sub-section now makes it clear that it is not.[2]

A transferee *pendente lite* who acquires an interest in the subject-matter of suit in *conflict* with the rights of the plaintiff cannot plead limitation on the ground that the suit should be deemed to have been instituted against him only on the date he was impleaded.[3]

This sub-section is not, however, intended to interfere with the discretion of the Court in rejecting an application for addition or substitution of assignees on the ground of *laches*.[4]

See also Notes 28 and 29.

Note 27

[1] ('10) 5 Ind Cas 115 (116) (DB) (Cal), *Mohamed Mehdihasan Khan* v. *Phul Kuar Mahton.* (Yes.)
('98) 25 Cal 409 (412) (DB), *Harak Chand* v. *Deo Nath Sahay.* (Yes.)
('07) 34 Cal 612 (616) : 5 Cal L Jour 486 : 11 Cal W N 521 : 2 Mad L Tim 312 (FB), *Abdul Rahman* v. *Amir Ali.* (Yes.)
('09) 36 Cal 675 (688) : 1 Ind Cas 626 (DB), *Mathewson* v. *Ram Kanai Singh Deb.* (Yes.)
('81) 1881 Bom P J 304 (DB), *Narayana Rao* v. *Rajya.* (Doubted.)
('01) 23 All 331 (335) : 1901 All W N 91 (DB), *Chunni Lal* v. *Abdul Ali Khan* (No.)
('08) 12 Cal W N 8 (11) (DB), *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani.* (No.—Executors of an estate which was represented by a limited owner impleaded pending suit against the latter.)
('80) 5 Cal 720 (724) : 6 Cal L R 62 (DB), *Suput Singh* v. *Imrit Tewari.* (No.)
('08) 1908 Pun L R No. 3, p. 7 : 1907 Pun Re No. 3 : 1906 Pun W R No. 153 (Vol. 1), *Fatteh Muhammad* v. *Said Ahmad.* (No.)
('69) 12 Suth W R 122 (123) (DB), *Wilson* v. *The Government.* (No.)
('72) 18 Suth W R 438 (439) (DB), *Troyluckhonath Banerjee* v. *Brindabun Chunder Sirkar.* (No.)
('16) 3 AIR 1916 Mad 1029 (1033, 1034) : 40 Mad 722 : 29 Ind Cas 634, *Arunachala Ambalan* v. *R. G. Orr.* (Decision under the Act of 1877 — No.)
[*See also* ('16) 3 AIR 1916 P C 202 (205, 206) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty* v. *Supramaniyan Chetty.* (No — Case under S. 22 of the Straits Settlement Limitation Ordinance, VI of 1896, corresponding to S. 22 of the old Act of 1877.)]

[2] *See* ('09) 1 Ind Cas 626 (629, 630) : 36 Cal 675 (DB), *Mathewson* v. *Ram Kanai Singh.*

[3] ('30) 17 AIR 1930 All 597 (599) : 133 Ind Cas 23 (DB), *Zahural Hasan* v. *Badri Narain.* (Wakf of property by mortgagor after final decree.)
[*See* ('30) 17 AIR 1930 Oudh 51 (52) : 119 Ind Cas 366, *Harnarain Das* v. *Gajraj Singh.*]

[4] *See* ('25) 12 AIR 1925 Lah 574 (575) : 94 Ind Cas 926, *Allah Jawaya* v. *Lajpat Rai.* (Assignment disputed and long delay in application.)

28. "Assignment or devolution." — An assignment or devolution must, in order to fall under sub-section (2), be "during the pendency of a suit." An assignee from a successful claimant under O. 21 R. 58, Civil Procedure Code, who takes the transfer after the claim is allowed and attachment raised and before a suit by the defeated decree-holder is laid under Order 21 Rule 63, is an assignee during the pendency of the suit, as the claim suit is deemed to be a continuation of the claim petition for the doctrine of *lis pendens*.[1] Consequently, such assignee if made a party after limitation for the suit under O. 21 R. 63 has expired, cannot take the plea that the suit is barred against him under the provisions of cl. (1) of this section.[2]

An assignment must also be from a person who is already a party to the suit. In a suit for the recovery of property, the third defendant was impleaded originally in the plaint under the impression that he was the owner of one of the items of the property. Subsequently, it was however found that the third defendant had transferred his interests therein to another person even *before* the suit. An application was made to implead that other person as the fourth defendant. During the pendency of that application the said item of property was again transferred to a third person. A further application was made to implead the last person as the fifth defendant. By that time the period of limitation had expired. The last assignment was held not to be from a party to the suit but only from a person who was only sought to be made a party.[3]

29. Transposition of parties. — Sub-section (2) says *inter alia* that nothing in sub-s. (1) shall apply where a plaintiff is made a defendant or *vice versa*. These words are plain and are not subject to any conditions. In some cases, however, a restriction has been sought to be imposed on the language of the section. It has thus been held that the rule in regard to transposition can be availed of only in cases where the plaintiff and the defendant to be transposed have a joint cause of action,[1] that is to say, where the claim is identically the

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Note 28

[1] ('39) 26 AIR 1939 Pat 138 (139) : 17 Pat 588 : 180 Ind Cas 983 (DB), *Bas Kuar* v. *Gaya Municipality*. (A I R 1915 Mad 495 followed.)
('15) 2 AIR 1915 Mad 495 (498, 500) : 25 Ind Cas 11 : 38 Mad 535 (DB), *Krishnappa Chetty* v. *Abdul Khader Sahib*. (35 Cal 202 (PC) followed.)

[2] ('40) 27 AIR 1940 Lah 497 (498) : 192 Ind Cas 663, *Sardar Begum* v. *Harsukh Rai*. (A I R 1915 Mad 495 referred.)
('39) 26 AIR 1939 Pat 138 (139) : 17 Pat 588 : 180 Ind Cas 983 (DB), *Bas Kuar* v. *Gaya Municipality*. (A I R 1915 Mad 495 followed.)
('15) 2 AIR 1915 Mad 495 (498) : 38 Mad 535 : 25 Ind Cas 11 (DB), *Krishnappa Chetty* v. *Abdul Khader*.

[3] ('25) 12 AIR 1925 Mad 487 (488) : 86 Ind Cas 187, *Ammiaya Pillai* v. *Narayana Chetty*.

Note 29

[1] ('35) 22 AIR 1935 Mad 240 (243) : 156 Ind Cas 455, *Periakaruppan Chetty* v. *Mottaiya Mudali*.

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same whether preferred by the plaintiff or the defendant.[2] Looking, however, at the plain language of the section, the rule that the transposition of a person from the rank of a defendant to that of the plaintiff or *vice versa* stands as an absolute rule and not subject to any qualifications,[3] and no question of limitation arises in a case of transposition.[4] As regards the party so transposed, the date of the suit is still the date of its institution.[4a] In some cases this rule is sought to be supported on the ground that a defendant transposed as a plaintiff is not a "new plaintiff" under sub-s. (1).[5] Such a person may not be a new *party* to the suit but it is difficult to see how he is not a new 'plaintiff,' having been, before the transposition, only a 'defendant.' However this may be, it is unnecessary to support the rule on any other ground than the plain meaning of the enactment.

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[2] *See* ('35) 22 AIR 1935 Mad 95 (96) : 154 Ind Cas 747, *Koman Nair* v. *Moolacheri Nair*. (Suit by assignee of rent — Assignor originally made a defendant and subsequently transposed after limitation.)

[3] ('15) 2 AIR 1915 Cal 759 (759) : 30 Ind Cas 34 (DB), *Dwarka Nath Dass* v. *Monmothan Topedar*.
[*See* ('19) 6 AIR 1919 Mad 30 (30) : 49 Ind Cas 139, *Bhimanagoud* v. *Easwaragoud*. (Administration suit—Defendant, entitled to share in property, transposed as plaintiff.)]

[4] ('09) 4 Ind Cas 249 (251) : 34 Bom 91 (DB), *Narsinha Krishnaji* v. *Vaman Venkatesh*. (4 Ind Cas 369 (Cal) followed.)
('27) 14 AIR 1927 Mad 204 (204): 99 Ind Cas 687 (DB), *Ponnammal* v. *Pichai*.
('32) 19 AIR 1932 Pat 304 (305) : 139 Ind Cas 535, *Rambeas Tewari* v. *Akhauri Raj Mohan*.
('16) 3 AIR 1916 Mad 310 (313) : 28 Ind Cas 45 (DB), *Municipal Council of Kumbakonam* v. *Veeraperumal Padayachi*.
('34) 21 AIR 1934 Oudh 462 (463, 464) : 10 Luck 203 : 151 Ind Cas 452 (DB), *Bhagat* v. *Madho Prasad*.
('27) 14 AIR 1927 Oudh 484 (485) : 105 Ind Cas 473 : 3 Luck 241 (DB), *Mool Chand Gupta* v. *Bhup Singh*.
('26) 13 AIR 1926 Pat 28 (28, 29): 90 Ind Cas 82, *Raj Kishore Lal Nand Keolyar* v. *Alam Ara Begum*. (Being 'party' on the date of the institution of the suit, law of limitation will not bar the suit.)
('30) 17 AIR 1930 All 786 (787) : 133 Ind Cas 17 (DB), *Gopinath* v. *Rupram*.
[*See* ('31) 18 AIR 1931 All 725 (726) : 133 Ind Cas 410 (DB), *Mangal Sen* v. *Prag Das*. (Section 22 does not apply to applications for filing awards but principle of the section is applicable—There is no limitation in case of application for transposition.)
('94) 17 Mad 12 (13) : 3 Mad L Jour 176 (DB), *Khadir Moideen* v. *Rama Naick*. (Section does not apply where Court *suo motu* orders defendant to be made plaintiff.)
('21) 8 AIR 1921 Mad 124 (124) : 62 Ind Cas 360 (DB), *Saminatha Pillai* v. *Rajagopala Mudaliar*. (Co-trustees — One trustee suing, adding the other as defendant—Plaintiff dies—Co-trustee defendant transposed as plaintiff.)
('24) 11 AIR 1924 All 605 (609) : 80 Ind Cas 737 (DB), *E. I. Ry. Co.* v. *Janki Prasad*.]
[*See also* ('37) 24 AIR 1937 Cal 333 (333, 334): 173 Ind Cas 896 (DB), *Bhujanga Bhusan* v. *Kalidas Das*. (Co-sharer defendant made co-plaintiff under S. 148A Ben. Ten. Act.)]
[But see ('95) 18 Mad 189 (192) : 4 Mad L Jour 106 (DB), *Srirengachariar* v. *Ramaswami Iyengar*.
('87) 10 Mad 44 (51) (DB), *Krishna* v. *Mekam Peruma*l.]

[4a] ('12) 14 Ind Cas 566 (568) : 1912 Pun Re No. 84 (DB), *Bhagwan Das* v. *Bhana Mal*. (This is expressly so after the Act of 1908.)

[5] ('09) 4 Ind Cas 369 (370) : 35 Cal 1065 (DB), *Nagendra Bala* v. *Tarapada Acharjee*. (Suit for rent by a fractional co-sharer making the other co-sharer a *pro forma* defendant—Latter transposed.)

The benefit of this rule is rightly extended even to the case of transposition of a defendant, as co-plaintiff, when the original plaintiff has no right to sue at all.[5a] Where, in a suit by an assignee from an Official Receiver of certain claims to damages in favour of the insolvent, it was objected that a claim for damages not being assignable, the assignee plaintiff had no right to sue at all, the Court allowed the Official Receiver, who was a *pro forma* defendant, to be transposed as the rightful plaintiff after limitation.[6] Where a promissory note stood in the name of a *benamidar* and a suit was instituted by the beneficial owner on the note making the *benamidar* a defendant, the latter was allowed to be transposed as a plaintiff.[6a]

But the transposition of a person from the category of a defendant to that of a plaintiff which has the effect of bringing on record a new plaintiff with a cause of action and a relief entirely distinct from that in the original plaint is not saved by sub-section (2).[7]

The fact that by the transposition the plaint claim is enhanced is, however, no ground against the operation of sub-section (2). For example, in a suit by an eight-anna sharer for his share of rent making the other sharer a defendant, the latter was transposed as plaintiff and allowed to claim his share of the rent also.[8] If on such transposition the value of the suit should exceed the jurisdiction of

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('10) 8 Ind Cas 837 (841) : 38 Cal 342 (DB), *Hussainara Begum* v. *Rahmannessa Begum*. (*Pro forma* defendant transposed as plaintiff.)

[5a] ('23) 10 AIR 1923 Mad 180 (180) : 69 Ind Cas 413 (DB), *Parappan Kidavu* v. *Karuppala Thottala*. (A defendant transposed as co-plaintiff, original plaintiff in Court's view being not entitled to sue.)

[6] ('21) 8 AIR 1921 Sind 59 (60) : 66 Ind Cas 873 : 16 Sind L R 71, *Firm Gerimal Hari Ram* v. *Firm Rughnath Kalianji*. (Provided there was *bona fide* mistake in instituting suit in wrong person's name.)

[6a] ('32) 19 AIR 1932 Pat 346 (349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad* v. *Sadanand Misra*. (A I R 1928 Pat 24 held not to have decided this point—A I R 1928 Pat 24 overruled on the point whether transposition of defendant should be allowed after expiry of time.)

[7] ('25) 12 AIR 1925 Sind 207 (211, 215) : 78 Ind Cas 23 : 18 Sind L R 149 (DB), *Usman* v. *Asat*. (The defendant so transposed was himself a party added subsequent to plaint and who asserted a title independently of the original plaintiff.) [*See also* ('06) 5 Cal L Jour 527 (533, 534) (DB), *Kokilasari Dasi* v. *Mohunt Rudranund Goswami*. (Plaintiff suing as sole shebait making his brothers defendants—Plaintiff and brothers found to be joint shebaits—Transposition of brothers as co-plaintiffs disallowed as the original plaintiff had not admitted any title in the brothers.)]

[8] ('32) 19 AIR 1932 Pat 304 (305) : 139 Ind Cas 535 (DB), *Rambeas Tewari* v. *Akhauri Raj Mohan*. (The plaint as originally laid asked alternatively for a decree for the whole rent in case such defendants paid court-fee for it and claimed it.)

the Court, the proper course is to return the plaint to be presented to the proper Court.[9]

Where a defendant seeks transposition as a plaintiff and where a separate suit by him against other defendants on the same cause of action would be barred by limitation, the Court must not disallow such transposition. The object of sub-s. (2) is to provide for cases of this nature and if transposition is not allowed on the ground that it would affect limitation the provisions of sub-s. (2) would be rendered nugatory.[10]

Section 23

23.* In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh

Continuing breaches and wrongs.

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* **Act of 1877 : S. 23.**
Same as above.

Act of 1871 : Ss. 23 and 24.

Computation where there are successive breaches of contract.

Computation where the breach is continuing.

23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

Illustrations.

(a) *A* contracts to pay an annuity to *B* for his life by quarterly instalments. *A* fails to pay any of the instalments. Here, upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run : and this Act may bar the remedy on the earlier breaches, without affecting the remedy on the later breaches.

(b) *A*, a tenant, covenants with *B*, his landlord, to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and *B* retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Continuing nuisance.

24. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nuisance continues.

Illustration.

A diverts *B*'s water-course. At every moment of the time during which the diversion continues and *B* retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Act of 1859.
No corresponding provision.

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[9] ('26) 13 AIR 1926 Pat 28 (29) : 90 Ind Cas 82, *Raj Kishore Nand Keolyar* v. *Alam Ara Begum.*

[10] ('33) 20 AIR 1933 Pat 239 (241) : 149 Ind Cas 760, *Devji Goa* v. *Tricumji Jivandas.* (A I R 1932 Pat 346 relied on.)

('32) 19 AIR 1932 Pat 346 (349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad* v. *Sadanand Misra.* (Overruling A I R 1928 Pat 24.)

period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Synopsis

1. Scope of the section.
2. Section does not apply unless there is a wrong and the wrong is a continuing one.
3. Continuance of the effect of wrong is not a continuing wrong.
4. Applicability of section to declaratory suits.
5. Breach of contract to keep building in repair.
6. Breach of covenant for title.
7. Breach of covenant for quiet possession.
8. Non-payment of money under a contract.
9. Breach of obligation to give possession.
10. Breach of continuing guarantee.
11. Other cases of breaches of contracts.
12. Obstruction to watercourse and to the flow of water.
13. Obstruction to right of way.
14. Obstruction to right of ferry.
15. Refusal of conjugal rights.
16. Trespass and ouster.
17. Procuring wrongful attachment under Section 146 of the Criminal Procedure Code.
18. Other cases of continuing wrongs independent of contract.
19. Successive breaches of contract.
20. Successive wrongs independent of contract.

Other Topics (miscellaneous)

Continuing cause of action. See Notes 2 and 3.

Continuing wrong—Test. See Note 1.

Infringement of trade mark. See Note 18.

Wrong entry in village papers against a person's right. See Note 18.

Wrong and not right to be continuing one. See Note 2.

Wrongful seizure of property under legal process. See Note 16.

1. Scope of the section. — A right, in jurisprudence, is an interest, respect for which is a *duty* and the violation or disregard of which is a *wrong*.[1] Rights and duties are necessarily correlative. There can be no right without a corresponding duty or duty without a corresponding right. Similarly, duties and wrongs are correlative. The commission of a wrong is a breach of a duty and the performance of a duty is the avoidance of a wrong.[2]

Where rights and duties are created by the terms of a *contract* between parties, a breach of such a duty is a wrong arising out of contract. Where they are created otherwise than under a contract the breach of a duty is a *wrong independent of contract.* A breach of either of these duties is thus a wrong and the tests applicable to find out what is a "continuing wrong" are equally applicable to find out what is a "continuing breach of contract."

Section 23 — Note 1

[1] Salmond's "Jurisprudence," 8th Edition, pages 236, 237.
('10) 6 Ind Cas 881 (882) : 3 Sind L R 228 (FB), *Goverdhandas* v. *Naraindas.* (Per Crouch A. J. C.)

[2] Salmond's "Jurisprudence," 8th Edition, page 240.

Where the wrong consists of a breach of *positive duty*, i. e., to do something, the test to find out whether there is a continuing wrong is to see whether the duty is *to continue to do that thing.*[2a] If so, the omission to do that thing is a continuing wrong during the time the omission lasts.

Where the wrong consists of a breach of *negative duty*, i. e., to refrain from doing something, the test to find out whether there is a continuing wrong is to see whether the wrongful act *produces a state of affairs, every moment's continuance of which is a new wrong (i. e., which is a continuing source of injury) and is of such a nature as to render the doer of it responsible for the continuance.* If the wrongful act is of such a nature, it is a continuing wrong.[3] Where the wrongful act does not produce such a state of affairs but is a fleeting or evanescent act like a slander uttered or a slap on the cheek, it is not a continuing wrong.[4] In *Gaya Prasad* v. *Jagadish Chandra*,[5] the test suggested by one of the learned Judges was that where the wrong is capable of being corrected and is not corrected it is a wrong which continues. In *Secretary of State* v. *Venkaya*[6] the Madras High Court laid down that the test whether a breach of contract was a continuing one or not was to see whether the person committing the breach was entitled to resume performance and compel the other party to accept such performance, after the breach.

In the case of *negative duties*, the fact that the correlative *right is a continuing* one, such as the right of a co-owner of common property to partition of the joint property,[7] does not necessarily make the breach of it a "continuing wrong," though every such breach being a wrong will give rise to a fresh cause of action.[8]

[2a] (1928) 1 K B 421 (426): 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier* v. *Goodman Ltd.* (There can be no continuing negligence without a continuing duty.)

See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

[3] ('41) 28 AIR 1941 Pat 181 (182) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain.*

See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

('16) 3 AIR 1916 Cal 751 (754) : 31 Ind Cas 242 (DB), *Brojendra Kishore* v. *Bharat Chandra Roy.*

('35) 22 AIR 1935 Mad 967 (972, 973) : 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar* v. *Kumaru Reddiar.* (26 Mad 410 followed.)

('33) 20 AIR 1933 Pat 224 (233) : 12 Pat 261 : 149 Ind Cas 561 (DB), *Jurawan Singh* v. *Ramsarekh Singh.* (Following AIR 1915 Cal 661.)

[4] See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

('35) 22 AIR 1935 Mad 967 (972) : 161 Ind Cas 653 : 59 Mad 75, *Ponnu Nadar* v. *Kumaru Reddiar.*

[5] ('40) 27 AIR 1940 Pat 561 (561) : 19 Pat 844 : 188 Ind Cas 495 (DB). (Per Agarwala, J.—For instance where an obstruction to water course is caused, the wrong to the persons entitled to the use of the water continues until the obstruction is removed.)

[6] ('17) 4 AIR 1917 Mad 465 (470) : 40 Mad 910 : 35 Ind Cas 254 (DB). (Per Srinivasa Iyengar, J.—The test laid down by Coutts-Trotter, J., although differently worded, amounts to the same—For a full discussion of this case, see Note 7.)

[7] ('15) 2 AIR 1915 All 1 (2) : 37 All 155 : 27 Ind Cas 694 (DB), *Kanhai Lal* v. *Mul Chand.*

The articles of the first schedule of the Act prescribe the period of limitation for a suit or other proceeding in respect of various causes of action that may arise from the wrongful acts of parties. This section provides that in the case of a *continuing breach of contract*, or of a *continuing wrong independent of contract*, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. By virtue of section 3 of the Act, all the articles in the first schedule must be read subject to this section.[9] The contrary view held in *Dhanjibhoy Bomanji* v. *Hirabai*,[10] that if there is a repugnancy between a particular article and this section, the article being a special provision

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('05) 1 Cal L Jour 73 (76) (DB), *Mohabharat Shaha* v. *Abdul Hamid Khan.* **(*Obiter.*)**

('06) 10 Cal W N 839 (840) (DB), *Madon Mohan Mondul* v. *Baikunta Nath.* **(13 All 309 followed.)**

('20) 7 AIR 1920 Lah 184 (186) : 56 Ind Cas 701 (DB), *Ziaul Haq* v. *Muhammad Ibrahim.*

('26) 13 AIR 1926 Mad 1018 (1018) : 97 Ind Cas 622 : 49 Mad 939 (DB), *Madhura Gramani* v. *Sesha Reddi.*

('22) 9 AIR 1922 Pat 489 (490, 491) : 1 Pat 228 (DB), *Mt. Ram Dei* v. *Mt. Bahu Rani.*

[8] **('38) 25 AIR 1938 Lah 227 (228, 229) : 181 Ind Cas 199 (DB),** *Rura* v. *Banta.* **(Fresh invasion of right amounting to repetition of old invasion—No distinction between new invasion and repetition of old one and plaintiff is entitled to a fresh period of limitation.)**

('27) 14 AIR 1927 Lah 119 (119) : 8 Lah 22 : 100 Ind Cas 732 (DB), *Smail* v. *Bahab.* **(Suit for declaration that entire property belonged to plaintiff and that defendant was not entitled to demand partition — Application for partition is an act of invasion which gives new cause of action.)**

('81) 1881 Bom P J 106, *Divakor* v. *Harbhat.* **(The right of officiating as Upadhyaya is a continuing right.)**

('18) 5 AIR 1918 Lah 265 (266) : 44 Ind Cas 31 (DB), *Harnam Singh* v. *Makhan Singh.* **(Every fresh appropriation of the income of property by one cosharer to the exclusion of others gives rise to a fresh cause of action to the other cosharers for a suit for a declaration of their rights.)**

('33) 20 AIR 1933 Lah 920 (922) : 146 Ind Cas 136 (DB), *Ram Lal* v. *Thakurji Mandir.* **(Every denial of existing title gives rise to a fresh cause of action.)**

('33) 20 AIR 1933 Mad 699 (700) : 145 Ind Cas 961 : 57 Mad 250, *Rangappaiya Aithala* v. *Shiva Aithala.* **(Widow's right to maintenance is a continuing right.)**

('08) 2 Low Bur Rul 113 (114, 115) (DB), *Aga Muhammad* v. *Edward Peltzer.* **(Every infringement of a trade mark gives rise to a fresh cause of action.)**

('09) 4 Ind Cas 159 (159) :12 Oudh Cas 320, *Jevanand* v. *Beni Madho.* **(20 All 35 and 1898 All W N 215 relied on.)**

[9] **('40) 27 AIR 1940 Pat 561 (562, 563) : 19 Pat 844 : 188 Ind Cas 495 (DB),** *Gaya Prasad* v. *Jagadish Chandra.*

[10] **('01) 25 Bom 644 (648, 649) : 3 Bom L R 371 (FB).**

[*See also* ('39) 26 AIR 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum* v. *Ramsahaigir.* **(Section 23 should be so construed as not to conflict with the provisions of Articles 142 and 144.)]**

See also Note 3 to Article 41.

will prevail, is, it is submitted, not correct. Their Lordships did not in that case advert to section 3 of the Act.[11]

At the same time, it must be noted that the section does not apply to every case in which the cause of action for a suit is based on a continuing wrong or in which relief is claimed in respect of a continuing wrong. The words "in the case of a continuing wrong" refer to cases in which limitation has to be reckoned from the time when a continuing wrong is committed, i. e., to cases in which the law simply provides that limitation is to run from the time of the commission of a continuing wrong but does not say anything as to from what point of time in the course of such commission limitation must be computed. The section does not apply to cases in which a specific point of time in the course of the commission of the continuous wrong is given as the starting point of limitation. Thus, though Arts. 19 and 41 deal with suits based on a continuing wrong this section does not create a recurring starting point of limitation in such cases, because a specific point of time is given as the starting point of limitation under the above articles.[11a] But under Art. 37 which deals with a suit for compensation for obstructing a way or watercourse the period of limitation is directed to run from "the date of the obstruction." In cases in which the obstruction may be of a continuous character, the article does not provide that limitation must be reckoned from any particular point of time in such obstruction. This section is intended to apply to such cases and under it, a fresh period of limitation will begin to run at every moment of the time during which the obstruction continues.

Though a wrong may be a continuing wrong and the plaintiff may be entitled to a recurring start of limitation under this section, the plaintiff's right itself may be extinguished in some cases after the lapse of a certain period from the time when the wrong was first committed. Thus, the obstruction of an ancient light may be a continuing wrong liable to be compensated in damages but continued for twenty years it will create a right in the old wrong-doer to continue the act. But such extinguishment of the plaintiff's right has nothing to do with the determination of the question whether the wrong itself was a continuous one.[12]

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[11] *See* ('35) 22 AIR 1935 Cal 405 (406) : 156 Ind Cas 390 (DB), *Sarat Chandra Mukerjee* v. *Nerode Chandra.*

[11a] See Art. 19 Note 2 and Art. 41 Note 2. It is not correct to say that the reason for the non-applicability of the section to cases coming under Art. 41 is that in such cases, the suit is one to restrain *future* acts of waste and no relief is asked for in respect of any wrong actually committed. For the suits covered by Art. 19 are clearly suits in which relief is asked for in respect of a continuing wrong (the suit being one for compensation for false imprisonment) and yet the the section does not apply to such cases. Hence, neither the test as to the cause of action being a continuing wrong nor that as to relief being claimed in respect of a continuing wrong seems to be the correct test in determining the applicability of the section. The only correct test seems to be that given above.

In this connection, reference may be made to the observations of Jenkins, C. J., in *Dhanjibhoy's case* (above referred to) in which his Lordship observed that there is nothing repugnant in the imposition of a bar on a suit for a particular remedy, even though the cause of action be continuing, and cited Art. 41 as an illustration of this. This shows that in his Lordship's opinion also, the mere fact that the *cause of action* for a suit is a continuing wrong is not sufficient to furnish a recurring start of limitation.

The section makes no distinction between private suits and public or representative suits and applies to both kinds of suits.[13]

The section applies to suits under the Chota Nagpur Tenancy Act.[14]

2. Section does not apply unless there is a wrong and the wrong is a continuing one. — Where the act complained of is not a wrong at all, or ceases to be a wrong, obviously there cannot be a cause of action and there is no scope for the applicability of this section.[1] Thus, where a Magistrate acting on a police report passes an order prohibiting certain persons from taking processions along particular routes until they get an order from the civil Courts affirming their right, it cannot be said that any wrong has been committed. If the plaintiffs try to disobey that order and are obstructed by the defendants, the latter cannot be said to obstruct the plaintiffs in the exercise of a *subsisting right* and consequently they cannot be said to commit any wrong, much less a continuing wrong.[2] Again, the violation of a continuing right need not, as has been seen in Note 1, be a continuing wrong. The criterion for the applicability of the section is not whether the *right* or its corresponding obligation is a continuing one, but whether the *wrong* is a continuing one.[3]

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[12] ('93) 3 Mad L Jour (Journal) pages 8, 9.

[*See* ('40) 27 AIR 1940 Pat 449 (453, 455) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadev Asram.* (Where a right is completely extinguished, there is no question of any wrong continuing—If the wrong ceases to be a wrong it cannot be said any longer to continue — Such rights may arise under Part IV of the Act.)]

[13] ('40) 27 AIR 1940 Pat 449 (452, 454) : 19 Pat 208 : 190 Ind Cas 46 (DB) *Bibhuti Narayan Singh* v. *Mahadev Asram.* (There is nothing in S. 23 on which to base a distinction between public, quasi public and private rights — Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the land over which it is committed.)

('41) 28 AIR 1941 Pat 181 (182) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain.*

[14] ('40) 27 AIR 1940 Pat 561 (563) : 19 Pat 844 : 188 Ind Cas 495 (DB), *Gaya Prasad* v. *Jagadish Chandra.* (Section not inconsistent with provisions of the Act.)

Note 2

[1] ('38) 25 AIR 1938 Lah 369 (385, 386) : 175 Ind Cas 945 (FB), *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.* (Sikhs acquiring by adverse possession right to Muhammadan mosque—Muhammadans refused right to pray — No wrong is committed.)

('09) 2 Ind Cas 107 (110) : 1909 Pun Re No. 53 (DB), *Yad Ali* v. *Mubarak Ali.* (Change of religion by Imam of mosque is not a wrong constituting the invasion of the civil rights of the worshippers.)

('06) 4 Cal L Jour 568 (572, 573) : 11 Cal W N 186 (DB), *Shyamanand Das* v. *Raj Narain Das.* (1 Cal L Jour 73 followed.)

[*See* ('97) 21 Bom 394 (396), *Gopalrao* v. *Mahadeorao.* (Plaintiff's right to land lost by twelve years' adverse possession.)]

[2] ('35) 22 AIR 1935 Mad 967 (972, 973) : 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar* v. *Kumaru Reddiar.* (26 Mad 410 followed.)

3. Continuance of the effect of wrong is not a continuing wrong. — The continuance of the *effect* of a wrong is itself not a continuing wrong.[1] Thus, where A throws sulphuric acid on B's face with the result that B after some time loses one of his eyes, A's act cannot be said to be a continuing wrong, though the effect continues, inasmuch as it cannot be said that the state of affairs produced by the act gives rise from moment to moment, to a *fresh wrong* (i.e., an infringement of right). The cause of action arises once and for all on the throwing of the acid.[2] Where, as a result of the defendant (a District Board) heaping stones on the roadway, the plaintiff's trap dashed against it as a result of which the plaintiff's leg had ultimately to be amputated, it was held that the cause of action for the plaintiff arose on the date when his trap dashed against the heap of stones and that the continuance of the effect of the injury did not make the defendant's act a continuing wrong.[3] See also the undermentioned cases.[4] See also Note 16.

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[3] ('03) 26 Mad 410 (416) (DB), *Rajah of Venkatagiri* v. *Subbiah*. (20 Cal 906 dissented from.)

('35) 22 AIR 1935 Mad 967 (972, 973): 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar* v. *Kumaru Reddiar*.

('30) 17 AIR 1930 Bom 61 (63) : 54 Bom 4 : 124 Ind Cas 773 (DB), *Krishnaji* v. *Annaji*.

Note 3

[1] ('40) 27 AIR 1940 Lah 359 (360) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan* v. *Mt. Jannat*. (Injury must be distinguished from the effect of the injury—Erection of *chabutra* on common land held not to be a continuing wrong — According to Tek Chand, J., in this case, an encroachment on land by means of a *permanent* structure will not be a continuing wrong while an obstruction which is not of a permanent nature may be a continuing wrong — *Thorpe* v. *Brumfitt*, (1873) 8 Ch A 650 referred.)

('40) 27 AIR 1940 Pat 449 (452) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadev Asram*. (A distinction must be made between the continuance of a legal injury and the continuance of its injurious effects — Encroachment by an act such as the building of a wall which is over and done with when once it is completed is not continuing wrong.)

[2] ('24) 11 AIR 1924 Bom 290 (291, 293) : 84 Ind Cas 796 (DB), *Abdulla Mahomed* v. *Abdulla M. Zulaikhi*.

See also Note 3 to Article 22.

[3] ('20) 7 AIR 1920 Pat 324 (327, 328) : 5 Pat L Jour 359 : 58 Ind Cas 749 (DB), *Allan Mathewson* v. *District Board of Manbhum*.

See also Note 1 to Section 24.

[4] ('40) 27 AIR 1940 Lah 359 (360) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan* v. *Mt. Jannat*. (Encroachment by joint owner by building chabutra on common land claiming it as his own is not continuing wrong — Suit for injunction is governed by Art. 120 and not by S. 23.)

('30) 17 AIR 1930 Pat 528 (529) : 122 Ind Cas 153, *B. & N. W. Ry. Co. Ltd.* v. *Mohammad Abdul Halim*. (A subsequent aggravation of the damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action.)

Section 23
Note 4

4. Applicability of section to declaratory suits. — There is nothing in the section itself preventing its applicability to any particular kind of suits. The section is quite general in its application to all kinds of suits, provided they are based on a continuing breach of contract or on a continuing wrong independent of contract. The section will therefore apply to declaratory suits also if they are based on a wrong which can be said to be a continuing one as explained in Note 1. In *Chukkun Lal Roy* v. *Lalit Mohun Roy*,[1] which was reversed by the Privy Council on another point,[2] it was held that a suit by Hindu reversioners, after the death of the widow of the testator, for the construction of his will and for a declaration of the plaintiffs' rights, cannot be barred so long as the right to the property in respect of which the declaration is sought is a subsisting and continuing right, and that the right may be claimed within the statutory period from the time when the plaintiffs become entitled to the consequential relief. In that case the cause of action actually arose within six years of the suit. In *Rajah of Venkatagiri* v. *Isakapalli Subbiah*,[3] their Lordships of the Madras High Court observed with reference to *Chukkun Lal Roy's case*[1]:

> "If the ruling of the Calcutta High Court . . . . be that a suit for a declaration of title to immovable property cannot be held to be barred so long as the plaintiff's right to such property is a subsisting right and that for purposes of limitation, the right to bring such a suit is a continuing right so long as the right to the property in respect of which declaratory relief is prayed for is not extinguished, we are unable to concur in it. The criterion is not whether the *right* is a continuing one but whether the *wrong* is a continuing one."

See also the undermentioned case,[3a] in which the above opinion was concurred in.

In *Moulvi Muhammad Fahimal Huq* v. *Jagat Ballav Gosh*,[4] it was held that the principle of S. 23 could have no application to a declaratory suit. It is submitted that this view cannot be accepted as correct. The infringement of a right giving a cause of action for a declaratory suit may or may not be a continuing wrong. If it is not, then S. 23 cannot apply; but if it is, then S. 23 will apply. In each case, therefore, the question would be whether the wrong on which the suit

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('91) 18 Cal 91 (96) (DB), ***Dwarka Nath Gupta* v. *The Corporation of Calcutta*.** **(All damages resulting from one and the same cause of action must be recovered at one and the same time.)**

Note 4

[1] **('93) 20 Cal 906 (924, 925) (DB).**

[2] **('97) 24 Cal 834 : 24 Ind App 76 : 7 Sar 155 : 1 Cal W N 387 (PC),** ***Lalit Mohan Roy* v. *Chukkun Lal Roy*.**

[3] **('03) 26 Mad 410 (416) (DB).**

[3a] **('05) 1 Cal L Jour 73 (81) (DB),** ***Mohabharat Shaha* v. *Abdul Hamid*.**

[4] **('23) 10 AIR 1923 Pat 475 (480) : 2 Pat 391 : 74 Ind Cas 403 (DB).**

is based is a continuing wrong or not. See the undermentioned cases[5] in which S. 23 was applied to declaratory suits. See also Note 17.

5. Breach of contract to keep building in repair. — The wrong in this class of cases is a breach of a *positive* duty to *continue to do something*, viz., to keep the building in repair. A violation of this duty is, therefore, a continuing breach of contract within the meaning of this section so long as the building is out of repair.[1]

6. Breach of covenant for title. — A covenant for title is a contract by the seller with the buyer of property that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.[1] It cannot be said in this class of cases that the duty of the seller is to continue to do something under the contract. The case is not one of continuing wrong and the breach occurs once and for all where on the date of the sale the seller has no title to the property sold or the title is defective.[2]

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5. ('26) 13 AIR 1926 Cal 1022 (1025) : 97 Ind Cas 73 (DB), *Rohini Nandan* v. *Jadunandan*. (Suit to establish fishery rights.)

('05) 1 Cal L Jour 73 (76) (DB), *Mohabharat Shaha* v. *Abdul Hamid*. (Suit for declaration of title to immovable prorerty.)

('16) 3 AIR 1916 Cal 751 (754) : 31 Ind Cas 242 (DB), *Brojendra Kishore* v. *Bharat Chandra*. (Property attached under S. 146, Criminal Procedure Code — Suit for declaration of title.)

('33) 20 AIR 1933 Pat 224 (233) : 12 Pat 261 : 149 Ind Cas 561 (DB), *Jurawan Singh* v. *Ramsarikh Singh*. (Order passed under S. 145, Criminal Procedure Code — Suit for declaration of title.)

('22) 9 AIR 1922 Cal 419 (420) : 65 Ind Cas 200 : 49 Cal 544 (DB), *Panna Lal Biswas* v. *Panchu Ruidas*. (Case of attachment under S. 146, Cr. P. C.)

('16) 3 AIR 1916 Cal 733 (734) : 29 Ind Cas 385 (DB), *Nazimulla* v. *Wazidulla*. (Wrongful interference with a right of way constitutes a continuing nuisance.)

('34) 21 AIR 1934 Pat 34 (34, 35) : 146 Ind Cas 408, *Bhagwan Dutt* v. *Asharfi Lal*. (Obstruction to public way is continuing wrong.)

('35) 22 AIR 1935 Cal 201 (202): 155 Ind Cas 75, *Aptabuddin Khan* v. *Johar Ali*. (Limitation does not apply in a case of obstruction to a right of way.)

('35) 22 AIR 1935 Cal 405 (406): 156 Ind Cas 390 (DB), *Sarat Chandra* v. *Nerode Chandra*. (A I R 1923 Cal 356 relied on.)

('19) 6 AIR 1919 Cal 807 (808) : 49 Ind Cas 93 (DB), *Ashutosh Sadukhan* v. *Corporation of Calcutta*. (*Held* that the right of the Municipal Corporation was barred under Art. 146.)

Note 5

1. ('87) 10 All 85 (91) : 1887 All W N 292 (DB), *Mansab Ali* v. *Gulab Chand*.

('17) 4 AIR 1917 Mad 465 (470) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State* v. *Venkayya Garu*.

(1900) 2 Ch D 156 (162) : 69 L J Ch 493 : 83 L T 191, *Jacob* v. *Down*.

Note 6

1. See Section 55 (2) of the Transfer of Property Act, 1882.

2. ('78) 2 Bom 273 (293) : 2 Ind Jur 762, *Raju Balu* v. *Krishnarav*.

('01) 25 Bom 593 (603) : 3 Bom L R 190 (DB), *Ardesir* v. *Vajesingh*.

('02) 26 Bom 750 (754) : 4 Bom L R 571 (DB), *Tulsiram* v. *Murlidhar*.

('15) 2 AIR 1915 Mad 766 (766, 767) : 21 Ind Cas 740 (DB), *Ramanatha Iyer* v. *Raman Nambudripad*.

7. Breach of covenant for quiet possession.—A covenant for quiet possession is a contract by the covenantor with the covenantee that the latter's possession will not be disturbed by any one.[1] The duty of the covenantor is a negative one and has a continuous operation throughout the period of the contract. The covenant presupposes that possession has been given to the covenantee. Where, therefore, no possession is given in the first instance to the covenantee, the covenant for quiet enjoyment does not come into play at all and consequently the covenantee cannot sue upon the covenant.[2]

But even where possession has been given to the covenantee and he is subsequently dispossessed, it is conceived that on the principles discussed in Note 16, the case will not be one of a *continuing* breach of contract.[2a] As seen in Note 1, the question whether a wrong is a continuing one depends on the same principles whether the wrong is based on a breach of contract or is independent of contract.

Where possession has not been given to the transferee at all, he cannot, as has been said already, sue on the covenant for quiet enjoyment. In the case cited below[3] in which a lessee had not been

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('16) 3 AIR 1916 Mad 480 (481) : 31 Ind Cas 179, *Samu Pathan* v. *Chidambara Oadayan*.

('17) 4 AIR 1917 Mad 465 (467, 470) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State* v. *Venkayya Garu*. (*Obiter—Turner* v. *Moon*, (1910) 2 Ch 825 followed.)

('15) 2 AIR 1915 Nag 46 (47) : 31 Ind Cas 877 : 11 Nag L R 186, *Pirbhu* v. *Mt. Vazirbi*.

See also Dait on "Vendors and Purchasers," Chapter XIV, Section 5.

[But see ('87) 10 All 85 (91, 92) : 1887 All W N 292 (DB), *Mansabali* v. *Gulabchand*. (Submitted not correct.)

('19) 6 AIR 1919 Mad 849 (850) : 47 Ind Cas 924 (DB), *Venkataramayya* v. *Ramabrahman*. (Injured party not bound to sue at once — He can exhaust possible means of reparation and then sue—It is a continuing covenant.)]

Note 7

[1] See Section 108 (c) of the Transfer of Property Act, 1882.

[2] ('01) 25 Bom 593 (596, 598) : 3 Bom L R 190 (DB), *Ardesir* v. *Vajesingh*.

(1893) 41 W R (Eng) 471 (474) : L R 2 Ch 75 : 62 L J Ch 586 : 68 L T 428, *Wallis* v. *Hands*.

('02) 26 Bom 750 (754, 755) : 4 Bom L R 571 (DB), *Tulsiram* v. *Murlidhar*. (19 Cal 123 followed.)

[2a] *See* ('17) 4 AIR 1917 Mad 465 (471) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Venkayya Garu*. (Per Srinivasa Iyengar, J.—Eviction of lessee by landlord or by third party claiming paramount title will not amount to continuing breach of covenant for quiet possession — The view proceeds on the ground that a continuing breach implies the right of the person committing the breach to resume performance of the contract and that after eviction, the landlord cannot insist on resuming the relationship of landlord and tenant.)

[3] ('17) 4 AIR 1917 Mad 465 (468, 470) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Venkayya Garu*. (Per Srinivasa Iyengar, J.—Coutts-Trotter, J., lays down the test whether the lessee would be entitled, on the breach, to sue for the whole of the damage accrued and prospective or only to sue for the damages actually accrued upto the date of suit and says that in the former case the breach is not a continuing one while in the latter case it is a

given possession under the lease, the Madras High Court, while not dissenting from the above proposition, considered the question whether even if the position were otherwise, the failure to give possession would be a continuing breach of the covenant for quiet possession. It was held that such failure would not be a continuing breach. The decision proceeds on the ground that a continuing breach necessarily implies the right of the person committing the breach to resume performance of the contract and that in cases of failure to deliver possession, the lessor, if he fails to deliver possession at the commencement of the term, cannot subsequently insist on performance. The view can also be supported on the other tests suggested in Note 1. For the obligation in such a case is a positive one, viz., to put the lessee in possession and not to *continue* to put him in possession.[4]

In *Raju Balu* v. *Krishnarav*,[5] the Bombay High Court had to deal with a covenant for quiet enjoyment which provided *inter alia* that the premises conveyed should be enjoyed by the grantee "free and discharged from all estates and encumbrances" etc., created by the grantor. It was found that the property had already been gifted by the grantor, at the time of the grant, to another person. In a suit for damages based on the above covenant, Green, J., observed as follows :

> "As to the second branch of the covenant (the relevant portion of which has been referred to above), it would seem to be one of those covenants admitting of a continuing breach, so that under S. 23 of the Limitation Act a suit would not be barred so long as the breach continues, and that, therefore, the suit, if otherwise maintainable, would not be barred by reason of the Limitation Act."

It is submitted that the above view is not correct. The above clause in the covenant is virtually only a covenant for title, a breach of which, the same learned Judge held in the same case, would not be a continuing breach. (See Note 6.) Moreover, the fact that a covenant is of a continuous nature or "admits of a continuing breach," does not necessarily mean that the particular breach is a continuing breach. The question whether the breach is a continuing one or not depends on the nature of the breach in each case.[6] See also Note 2.

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continuing one—As will be clear from the remarks of the learned Judge further down, the above is, in substance, only the test as to the right of the person committing the breach to resume performance of the contract—For, if he has such a right, the covenantee cannot sue for the whole of the damage.)

[4] *See* ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Venkayya Garu.* (Per Srinivasa Iyengar, J.—From the nature of the obligation, it is clear that there cannot be a continuing breach; for, the covenant or contract is not a continuing one.)

[5] ('77-78) 2 Bom 273 (293) ; 2 Ind Jur 762.

[6] ('17) 4 AIR 1917 Mad 465 (467, 470, 471) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Venkayya Garu.* (Per Coutts-Trotter, J. — Nature of remedy available to a tenant under a covenant for quiet enjoyment depends upon the *nature of the breach*—Per Srinivasa Iyengar, J.—A breach of a covenant

8. Non-payment of money under a contract. — In the case of contracts for the payment of money, the duty to pay is a positive one, but it cannot be said that the duty of the obligor is to *continue to pay* the amount to the obligee. The non-payment of the money, therefore, is not a continuing breach of the contract. The cause of action arises once and for all on the non-payment on the date fixed for payment.[1] A contrary view, has, however, been held in the undermentioned case,[2] namely that such a breach is a continuing one. It is submitted that the view is not correct. Where a mortgage bond did not specifically provide for the payment of interest after the date fixed for the payment of the principal and the lower Court had held that there was no contract to pay *post diem* interest, their Lordships of the Privy Council observed as follows:

> "Supposing the construction put by the Courts below on the deed to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why. The principal debt was not time-barred, and it was not paid. Every day that it remained unpaid there was a breach of contract, and the bar of time applies only to breaches occurring six years before suit."[3]

These observations of their Lordships cannot be taken to mean that non-payment of the amount under the contract is a continuing breach of the contract to pay. The words "the principal debt was not time-barred" imply that their Lordships assumed that notwithstanding the debt remained unpaid the principal debt may become barred, which would not be the case if the breach of the contract is a continuing one. It is, however, somewhat difficult to understand what

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for quiet enjoyment does not necessarily constitute a continuing breach, though such a covenant is a continuing covenant . . . . . . The dictum of Green, J., in (1877-78) 2 Bom 273 does not apply to every case of a breach of the covenant for quiet enjoyment irrespective of the fact as to whether the breach consists in mere disturbances in the enjoyment by the landlord or in a wrongful eviction by the landlord or by a third party by virtue of a paramount title.)

Note 8

[1] ('87) 10 All 85 (91, 92) : 1887 All W N 292 (DB), *Mansab Ali* v. *Gulab Chand.* (The decision as to the liability for interest, has however been overruled by the Privy Council in 19 All 39.)

('89) 11 All 416 (423): 1889 All W N 165 (DB), *Bhagwant Singh* v. *Daryao Singh.* (Do.)

('21) 8 AIR 1921 All 73 (74) : 64 Ind Cas 447 (DB), *Ram Kumar* v. *Nem Chand.* (Money paid for illegal object being returnable to person who paid it — Cause of action for return arises as soon as the money was paid.)

('25) 12 AIR 1925 All 488 (490) : 87 Ind Cas 804, *Ram Narain* v. *Nihal Singh.* (Vendee undertaking to clear prior mortgage—Non-performance on date of sale is breach of covenant—Breach is not continuous one.)

[2] ('84) 6 All 457 (460) : 1884 All W N 168 (DB), *Imdad Ali* v. *Nijabat Ali.*

[3] ('97) 19 All 39 (47) : 23 Ind App 138 : 6 Mad L Jour 214 : 1 Cal W N 52 : 7 Sar 88 (PC), *Mathura Das* v. *Raja Narindar Bahadur.*

their Lordships meant by stating "every day that it remained unpaid there was a breach of the contract." The case was decided on another ground also that there was an *agreement* to pay *post diem* interest.

9. Breach of obligation to give possession. — Where A is bound under a contract to give possession to B of certain properties, it cannot be said that the duty of A is to *continue to give possession.* The failure to give possession is therefore not a continuing breach of the contract.[1] Where on redemption being made, a usufructuary mortgagee was bound to give back possession to the mortgagor but failed to do so, it was observed in the undermentioned case[2] as follows: "The mortgagee was under an obligation . . . . . to put the mortgagor in possession of the property and that is in the nature of a continuing obligation which cannot be said to cease so long as the mortgagor's right to redeem is not barred. That being so, this case falls under Arts. 115 and 116 of the Limitation Act read with S. 23 of that Act." It is submitted that this view is not correct. As has been seen in Note 2, the mere fact that a *right* or its corresponding obligation is a continuing one does not make the section applicable. The question in each case is whether the *wrong* is a continuing one. As stated already in the beginning of this Note, the failure to give possession is not a continuing wrong.

10. Breach of continuing guarantee. — Under S. 129 of the Contract Act a guarantee which extends to a *series* of transactions is called a continuing guarantee. It will be clear from this that a breach of this contract can only be at *successive* intervals as and when the guarantee is broken in respect of each transaction in the series.[1] It is not a case of continuing breach of contract within the meaning of this section.

11. Other cases of breaches of contracts. — Where the directors of a company registered under the Companies Act, 1913, omitted to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board of Directors, it was held that the obligation was one arising out of contract implied in the Articles of Association and that the breach of duty is a

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Note 9

[1] ('17) 4 AIR 1917 Mad 465 (467, 468, 469) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State* v. *Venkayya Garu.*

('88) 1888 All W N 15 (17) (DB), *Bal Gobind Das* v. *Barkat Ali.* (This was a suit for foreclosure of a mortgage by a registered deed of conditional sale.)

See also Note 16 and Article 116, Note 10.

[2] ('09) 3 Ind Cas 433 (434) : 33 Mad 71 (DB), *Shiva Chidambara Mudeley* v. *Kamakshi Ammal.* (Case under Act of 1877.)

Note 10

[1] ('28) 15 AIR 1928 Cal 204 (205) : 55 Cal 154 : 109 Ind Cas 752 (DB), *Durga Priya* v. *Durga Pada.* (A I R 1920 P C 35 distinguished.)

continuing one so long as the decision is deferred.[1] It is submitted that the decision is not correct. There is no duty to *continue to come to a conclusion*, which is the test to be applied. Once the Board comes to a conclusion, there would be no further duty of the same kind. It is therefore not a case of a continuing breach.

The failure on the part of a lessee to plant certain trees within the time fixed in the contract is not a continuing breach of the contract; there is a failure to perform the contract only if on the last day it is found that the trees have not been planted.[2] So also, the failure of a lessee to build within the time fixed in the covenant is not a continuing breach of contract but the contract is broken once for all at the expiry of the time limited.[2a]

Where A contracts with B to allow B to take forest produce for a certain period from certain forests, A is under a duty to continue to allow B to take the produce during the period. A breach of this obligation is therefore a continuing breach of the contract during the period fixed in the contract.[3]

Where under the Articles of Association of a company registered under the Companies Act, 1913, a director was under a positive duty to cause true accounts to be kept by his agents and he negligently failed to do so, it was held that the wrong committed by the director was a continuing one.[4]

The erection and maintenance of huts for the occupation of workmen on an occupancy holding contrary to the terms of the tenancy are a continuing wrong which continues so long as the huts remain standing.[5]

Marriage, under the Mahomedan law, is a civil contract and

Note 11

[1] ('33) 20 AIR 1933 Sind 103 (109, 110) : 143 Ind Cas 713, *Karachi Bank Ltd.* v. *Shewaram.*

[2] (1869) 11 Suth W R 452 (452) : 3 Beng L R App 47 (DB), *Kalee Komul Mojoomdar* v. *Jumut Ali.*

[2a] (1900) 2 Ch D 156 (161) : 69 L J Ch 493 : 83 L T 191 : 48 W R 441 : 64 J P 552, *Jacob* v. *Down.* (Cited in A I R 1917 Mad 465.)

[3] ('99) 1899 Pun Re No. 16, *Gurmuck Singh* v. *Secretary of State.*

[4] ('30) 17 AIR 1930 Bom 572 (585) : 54 Bom 226 : 127 Ind Cas 305 (DB), *Govind Narayan* v. *Rangnath Gopal.*

[5] ('40) 27 AIR 1940 Pat 561 (562, 563) : 19 Pat 844 : 188 Ind Cas 495 (DB), *Gaya Prasad* v. *Jagadish Chandra.* (Case under Chota Nagpur Tenancy Act.)
[*See also* ('39) 26 AIR 1939 Pat 149 (150) : 179 Ind Cas 482, *Surja Gorain* v. *Gnanendra Nath.* (Case under Chota Nagpur Tenancy Act — Tenant building house on holding contrary to terms of tenancy—*Held* building was a continuing wrong and limitation did not begin to run from the moment the first operation of the building was commenced but began to run when the building was finally erected—NOTE: The latter part of the decision is not correct — The wrong will not cease on the completion of the building but will continue so long as the building remains standing—See A I R 1940 Pat 561 cited above.)]

a husband's impotency is a continuing breach of the contract of marriage.[6]

12. Obstruction to watercourse and to the flow of water. — Where A has got a right to the unobstructed flow of water in a watercourse, there is a corresponding duty on all others not to obstruct the watercourse. If B puts a dam across it or otherwise obstructs the flow of water, there is a change in the state of affairs (the duty being a negative one), every moment's continuance of which is a fresh wrong for which the obstructor is responsible. The wrong is therefore a continuing one. The leading case on the point is *Rajrup Koer* v. *Abdul Hossein.*[1] That was a case where the defendants had obstructed a watercourse thereby committing an infringement of the plaintiff's right, and the suit was for the removal of the obstruction. Their Lordships observed as follows: "The obstructions which interfered with the flow of water to the plaintiff's *mehal* were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interference were allowed to continue." And this view has been taken in numerous decisions.[2]

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[6] ('39) 26 AIR 1939 Lah 454 (454) : 185 Ind Cas 744, *Mt. Sahibzadi* v. *Abdul Ghafoor.*

Note 12

[1] ('81) 6 Cal 394 (404) : 7 Ind App 240 (248) : 4 Sar 199 : 7 Cal L R 529 : 4 Ind Jur 530 : 3 Suth 816 : 4 Shome L R 7 (PC).

[2] ('82) 6 Bom 20 (23) (DB), *Punja Kuvarji* v. *Bai Kuvar.* (6 Cal 394 (PC) followed.)

('86) 1886 Bom P J 79 (DB), *Vinayak* v. *Bhiva.* (The erection of a dam causing a deficiency of water is a continuing wrong.)

('89) 1889 Bom P J 280 (DB), *Krishnarao* v. *The President of the City Municipality, Ahmednagar.* (Putting a plug in plaintiff's water-pipe running from an aqueduct is an obstruction of the nature of a continuing nuisance.)

('19) 6 AIR 1919 Lah 119 (120) : 50 Ind Cas 299, *Kania Lal* v. *Narain Singh.* (Defendant wrongfully irrigating from a watercourse.)

('77) 1 Mad 335 (340): 1 Ind Jur 802 (DB), *Subramaniya Iyer* v. *Ramchandra.*

('05) 28 Mad 72 (77, 82) : 15 Mad L Jour 32 (DB), *Sankaravadivelu Pillai* v. *Secretary of State.* (Calingula constructed by Government—Necessary effect was to cause water to flood plaintiff's lands—It is a continuing wrong.)

('66) 3 Mad H C R 111 (113) (DB), *Rajendra Devu Garu* v. *Charana Samantaraya Garu.* (A suit to recover damages for loss caused by interference with plaintiff's right to the flow of water from a canal.)

('68) 5 Mad H C R 6 (24) (DB), *Ponnusamy Tevar* v. *Collector of Madura.*

('35) 22 AIR 1935 Mad 668 (668, 669) : 158 Ind Cas 987, *Muthalagappa Chettiar* v. *Navaneetheswara Gurukkal.* (5 Mad 253 and A I R 1916 Mad 1001 distinguished.)

('25) 12 AIR 1925 Nag 189 (190) : 82 Ind Cas 482, *Sona Patil* v. *Laxman.*

('17) 4 AIR 1917 Pat 65 (68) : 43 Ind Cas 235 : 3 Pat L Jour 51 (DB), *Krishna Dayal Gir* v. *Mt. Bhawani Koer.*

('10) 6 Ind Cas 881 (882, 885) : 3 Sind L R 228 (FB), *Goverdhandas* v. *Naraindass.* (Affirming 1 Sind L R 238.)

('38) 25 AIR 1938 Mad 180 (183, 184) : 174 Ind Cas 229 (DB), *Secretary of State* v. *Zamindar of Saptur.* (Obstruction to water by accumulation of silt due to construction of dam—Injury to lower riparian owner is continuous.)

On the same principle the following also will be continuing wrongs:

(1) An obstruction to the plaintiff's right to the discharge of surface water of the plaintiff's land over the defendant's land.[3]

(2) The closing of a drain by the defendant through which the plaintiff is entitled to throw the water from his house.[4]

(3) Obstruction of the passage in which the plaintiff is entitled to discharge the rain water of his house as well as the water from his *moris* (drains).[5]

(4) Obstruction caused by closing the main sluice of a tank through which the plaintiff takes water to his lands.[6]

13. Obstruction to right of way. — There is no distinction in principle between the obstruction to a watercourse and obstruction to a right of way so far as the applicability of this section is concerned.[1] An obstruction to a right of way is, therefore, a continuing nuisance as to which a cause of action will be renewed *de die in diem* so long as the obstruction continues.[2]

('27) 14 AIR 1927 Nag 85 (86) : 98 Ind Cas 679, *Hardeo* v. *Ramchandra*. (Obstruction from taking water from well is continuing injury—Where damage consequent on an act is actionable rather than the act itself, every damage is actionable.)

[3] ('18) 5 AIR 1918 Cal 422 (423) : 41 Ind Cas 863 (DB), *Kaseswar Mukherjee* v. *Annoda Prosad Patra*.

[4] ('26) 13 AIR 1926 Lah 242 (243) : 92 Ind Cas 994 (DB), *Chiranji Lal* v. *Shib Lal*.

[5] [*See* ('17) 4 AIR 1917 Bom 14 (15) : 42 Bom 260 : 44 Ind Cas 913 (DB), *Ramchandra Gangadhar* v. *Mahadev Moreshvar*.]
[*See also* (1928) 1 K B 421 (426) : 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier* v. *Goodman Ltd.* (Building operation—Rubbish and debris falling on roof of next house—License permitting this — Failure to remove the rubbish within a reasonable time made it a continuing trespass and when the rubbish was washed down by rain and found its way into a gully in the basement of the next house and blocked the gully so that the basement became flooded in rain, an action for damages on the basis of the continuing trespass was maintainable.)]

[6] ('25) 12 AIR 1925 Nag 189 (190) : 82 Ind Cas 482, *Sona Patil* v. *Laxman*.

Note 13

[1] ('16) 3 AIR 1916 Cal 733 (734) : 29 Ind Cas 385 (DB), *Nazimulla* v. *Wazidulla*. (1 C W N 96 followed.)

[2] ('34) 21 AIR 1934 Pat 34 (35) : 146 Ind Cas 408, *Bhagwan Dutt* v. *Asharfi Lal*. (A I R 1927 Pat 265 relied on.)
('35) 22 AIR 1935 Cal 201 (202) : 155 Ind Cas 75, *Aptabuddin Khan* v. *Johar Ali*. (A I R 1916 Cal 733 followed.)
('35) 22 AIR 1935 Cal 405 (406) : 156 Ind Cas 390 (DB), *Sarat Chandra* v. *Nerode Chandra*. (6 Cal 394 (P C) relied on.)
('96-97) 1 Cal W N 96 (97, 98), *Sreemati Soojan Bibi* v. *Shamed Ali*. (6 Bom 20 followed.)
('09) 2 Ind Cas 410 (412) (DB) (Cal), *Nerode Kanta* v. *Bharat Chandra*.
('23) 10 AIR 1923 Cal 356 (358) : 76 Ind Cas 328 (DB), *Dwarkanath Sen* v. *Taraprasanno Sen*. (Cosharers—Common way—Obstruction by one—Section 23 applied.)

At the same time, if the obstruction to the right of way amounts to a complete *dispossession* of the plaintiff as where a permanent building is constructed blocking the land which has been in the enjoyment of both the parties and which they have set apart for their common use as a pathway, the defendant's act will not be a continuing wrong.[3] (See Note 16.) In this view, the undermentioned decisions[4] require re-consideration.

In *Khair Mohammad Khan* v. *Mt. Jannat*,[5] Tek Chand, J., seemed inclined to think that the question whether an obstruction to a right of way amounted to a continuing wrong or not depended on whether the obstruction is of a *permanent* nature or not. It is submitted that this view is not correct.[6] The true test is not whether the obstruction is permanent or not but whether the plaintiff has been ousted from possession. If the obstruction amounts to ouster, the defendant's act is not a continuing wrong.

In *Bibhuti Narayan* v. *Mahadev Asram*,[7] the Patna High Court expressed the view that the obstruction of a watercourse which was in question in the Privy Council decision in *Rajrup Koer* v. *Abdul Hossein*[8] was not analogous to the obstruction of a right of way and so the above decision of the Privy Council cannot rightly be cited—as is usually done — as authority for the proposition that an obstruction to a right of way is a continuing wrong.[9] At the same time, it was conceded that an obstruction to a right of way which is continued by the wrongdoer will be a continuing wrong. But it was not accepted that there was any distinction between cases where the obstruction amounted to a dispossession of the plaintiff and those in which it did not amount to such dispossession. At the same time, it was pointed out that the right of suit under S. 23 cannot be perpetual and that

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('21) 8 AIR 1921 Cal 405 (406) : 69 Ind Cas 910, *Harish Chandra* v. *Prannath Chakraverty*. (Article 144 applied.)

('37) 24 AIR 1937 Lah 94 (94) : 171 Ind Cas 509, *Mehar Chand* v. *Sain Gaman*. (Obstruction to plaintiff's access to high way.)

[3] ('40) 27 AIR 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Mohammad Khan* v. *Mt. Jannat*.

[4] ('23) 10 AIR 1923 Cal 356 (358) : 76 Ind Cas 328 (DB), *Dwarakanath Sen* v. *Taraprasanno Sen*.

('09) 2 Ind Cas 410 (412) (DB) (Cal), *Nerode Kanta* v. *Bharat Chandra*.

[5] ('40) 27 AIR 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB)

[6] *See* ('35) 22 AIR 1935 Mad 668 (668, 669) : 158 Ind Cas 987, *Muthalagappa Chettiar* v. *Navaneetheswara Gurukkal*. (Even a *permanent* obstruction may be a contiuning wrong—Case relating to watercourse.)

[7] ('40) 27 AIR 1940 Pat 449 (454, 455) : 19 Pat 208 : 190 Ind Cas 46 (DB).

[8] ('81) 6 Cal 394 (405) : 7 Ind App 240 : 4 Sar 199 : 7 Cal L R 529 (PC).

[9] *See* ('40) 27 AIR 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan* v. *Mt. Jannat*. (In this case also, the correctness of the view that there is no distinction between an obstruction to a watercourse and one to a way was doubted.)

where by virtue of the provisions of Part IV the defendant acquired a right by lapse of time, the plaintiff's right of action would come to an end.[10]

In considering the question whether the obstruction of a right of way is a continuing wrong, the question whether the right is a public or a private one is irrelevant. The section applies whether the right infringed is public or private. (See Note 1.)

14. Obstruction to right of ferry.—The violation of a right of ferry by setting up another ferry is, on the same principle, a continuing wrong so long as the latter ferry is allowed to remain.[1]

15. Refusal of conjugal rights. — A husband or wife has a right to the society of his or her spouse. The duty of the latter is a continuing duty inasmuch as it is a duty to *continue to give* the society. A breach of this obligation is a continuing wrong within the meaning of this section and time will begin to run at every moment of the time during which the society is withheld.[1]

Under the Acts of 1871 and 1877, there were two articles prescribing the periods of limitation for suits for the recovery of a wife and for suits for the restoration of conjugal rights.[2] In the former class of suits time ran from the day the possession was *demanded and refused* and in the latter from the day when the restitution was demanded and refused, the parties being of full age and sound mind. There were differences of judicial opinion on the question whether S. 23 applied to suits falling within the scope of the said articles. In the undermentioned cases[3] it was held that the articles must be confined to suits in cases where a demand is an essential element of the cause of action and that S. 23 could be applied to other cases of restitution of conjugal rights. In other cases it was held that the articles were overridden by the provisions of this section.[4] In a third class of cases it was held that S. 23 would apply normally to suits for restitution of conjugal rights not based on any demand and refusal, but not to suits based on such demand and refusal.[5] The conflict arose from the fact that the result of giving section 23 its normal effect was to render the articles entirely inoperative, a result assumed not to have been intended by the Legislature. The said articles have not been reproduced in the present Act. There is, under the present Act, no difficulty in holding that S. 23 read with Art. 120 would apply to a suit for restitution of conjugal rights.

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[10] For a fuller discussion of the question whether dispossession is a continuous wrong, and also the question of the extinguishment of the plaintiff's right of action by lapse of time in the case of continuing wrongs, see Note 16.

Note 14

[1] ('91) 18 Cal 652 (664) (DB), *Nityhari Roy* v. *Dunne.* (A case under the Act of 1877.)
('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat* v. *Hem Chandra Roy Choudhary.* (6 Cal 394 (P C) followed.)

Note 15

[1] ('22) 9 AIR 1922 Oudh 109 (111, 112) : 65 Ind Cas 452, *Muhammad Hamid-ullah Khan* v. *Mt. Fakhri Jahan Begum.* (But the cause of action for *dissolution of marriage or for divorce* is not a continuing cause of action.)

[2] See Articles 41 and 42 of the Limitation Act, 1871 and Articles 34 and 35 of the Limitation Act 1877.

[3] ('91) 13 All 126 (148, 149, 150, 151, 153) : 1891 All W N 18 (DB), *Binda* v. *Kaunsilia.* (A case under the Act of 1877.)
[*See also* ('92) 1892 Pun Re No. 80, *Khair-ud-din* v. *Mt. Budhi.* (Do.)
('92) 16 Bom 714 (716) (DB), *Bai Sari* v. *Hirachand.* (13 All 126 followed.)]

See also Note 11.

16. Trespass and ouster. — Where A is entitled to the possession of a certain property and he is in such possession, there is a corresponding negative duty on all other persons to refrain from interfering with his possession. A trespass on the property is a breach of this duty and is a wrong. It may or may not be a *continuing* wrong. If it is a fleeting act as where A walks across B's flower garden, it is no doubt a trespass but is not a continuing wrong.[1] If on the other hand the trespass creates a state of affairs, every moment's continuance of which is a wrong for which the trespasser is responsible, it is a continuing wrong. Thus, if A throws a heap of stones or builds a wall or plants posts or rails on B's land and there leaves them, it is a continuing wrong.[1a] Where, however, the trespass amounts to a

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[4] ('79) 1879 Pun Re No. 60, *Ghizani* v. *Mt. Mehran*. (Section 23 overrides Article 35.)
[*See also* ('99) 23 Bom 307 (310, 311) : 1896 Bom P J 369 (DB), *Fakirgauda* v. *Gangi*. (Quære.)]

[5] ('01) 25 Bom 644 (648, 649, 654) : 3 Bom L R 371 (FB), *Dhanjhibhoy* v. *Hirabai*. (A suit under the Parsi Marriage and Divorce Act of 1865 by a wife for the restitution of conjugal rights is barred by lapse of time when restitution has been demanded and refused more than two years prior to suit.)
('78) 1878 Bom P J 6 (DB), *Basapa* v. *Ningi*.
('07) 34 Cal 79 (81, 82) : 11 Cal W N 437 (DB), *Asirunnissa Khatun* v. *Buzloo Meah*.
('04) 28 Mad 436 (437) (DB), *Saravanai Perumal Pillai* v. *Poovayi*. (13 All 126 dissented from.)
('12) 17 Ind Cas 629 (631, 632) : 37 Bom 393 (DB), *Mohammad Mehdi Faya* v. *Sakinabai*.
[*See* ('01) 28 Cal 37 (45, 46): 5 Cal W N 195 (DB), *Surajyamoni* v. *Kali Kanta*.]
[*See also* ('10) 8 Ind Cas 412 (413, 414) : 34 Mad 398 (DB), *Krishna Iyer* v. *Balammal*.]

Note 16

[1] ('40) 27 AIR 1940 Pat 449 (454) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadeo Asram*. (Single acts of obstruction or trespass are not continuing wrongs.)
('25) 12 AIR 1925 Nag 189 (190) : 82 Ind Cas 482, *Sona Patil* v. *Laxman*.
[*See* ('41) 28 AIR 1941 Pat 181 (182, 183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain*. (Trespass or nuisance may or may not be continuing wrong, according to circumstances.)]

[1a] Addison on "Torts" 5th Edition, p. 50 and pp. 331, 332 cited in 10 All 498 (504, 505).

complete ouster or dispossession, it is not a continuing wrong.[2] The reason is this. Both trespass and dispossession are wrongs committed in respect of the plaintiff's *possession*. The wrong consists in the violation of the defendant's duty not to interfere with the plaintiff's

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[*See* ('75) 24 Suth W R 97 (98), *Ramphul Sahoo* v. *Misree Lall.* (If no adverse possession is taken by the defendant then each act of trespass on plaintiff's land would constitute a fresh cause of action.)]

[*See also* (1928) 1 K B 421 (426) : 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier* v. *Goodman Ltd.* (Defendant throwing rubbish on the roof of plaintiff's house — It is a continuing trespass—In this case, the defendant was originally acting under the license of the occupier of the house—But it was held that the failure to remove the rubbish within a reasonable time made it a continuing trespass.)]

[But see ('40) 27 AIR 1940 Pat 449 (452) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadev Asram.* (Building of wall on defendants' land is not continuing wrong.)]

[2] ('21) 8 AIR 1921 Lah 242 (243) : 60 Ind Cas 20, *Lal Singh* v. *Hira Singh.* (S. 23 would not apply to a case where the defendant has erected a *chhappar* on plaintiff's land and taken possession of the land adversely to the plaintiff, as the cause of action is complete as soon as the *chhappar* is erected.)

('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain.* (Dispossession can be of the public as well as that of a private individual.)

('40) 27 AIR 1940 Lah 359 (363) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan* v. *Mt. Jannat.* (Encroachment by joint owner by building chabutra on common land claiming it as his own is not continuing wrong.)

('39) 26 AIR 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum* v. *Ramsahaigir.* (The decision proceeds on the ground that to hold otherwise would defeat the provisions of Arts. 142 and 144—There are two flaws in this : (1) Under S. 3, the provisions of the schedule are controlled by Section 23; (2) It is not a correct assumption that if dispossession were held to be a continuing wrong, a suit for possession would never become time-barred.)

('14) 1 AIR 1914 All 531 (532) : 25 Ind Cas 185, *Sheo Prasad Sonar* v. *Mangar Manhar.* (Door opened in wall for passage to defendant's house through plaintiff's land — Each act of trespass gives new cause of action — But it will not be so if the defendant's act amounted to dispossession of the plaintiff from any portion of the land.)

('03) 27 Bom 515 (539, 540) : 5 Bom L R 274 (DB), *Fatesingji* v. *Bamanji.*

('75) 24 Suth W R 97 (98), *Ramphul Sahoo* v. *Misree Lall.*

('32) 19 AIR 1932 Lah 220 (221) : 135 Ind Cas 681, *Wadhawa* v. *Allah Ditta.* (The exclusive occupation of a building meant for common purposes.)

('96) 19 Mad 154 (156, 157) (DB), *Municipal Commissioners, Madras* v. *Sarangapani Mudaliar.* (Completed trespass by adverse possession.)

('12) 15 Ind Cas 285 (286, 287) : 1912 Pun Re No. 124, *Achar Singh* v. *Badhawa Singh.* (1899 Pun Re No. 8 followed.)

('19) 6 AIR 1919 Cal 807 (807, 808) : 49 Ind Cas 93 (DB), *Ashutosh Sadukhan* v. *Corporation of Calcutta.* (In this case however the right of the Corporation had been *extinguished* under S. 28 — So there was no need to refer to Section 23.)

('29) 16 AIR 1929 Pat 624 (625, 626) : 117 Ind Cas 636 (DB), *Ram Lakhan Singh* v. *Chathusahi.* (AIR 1919 P C 44 relied on.)

[*See also* ('17) 4 AIR 1917 Mad 465 (471) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Venkayya Garu.* (Per Srinivasa Ayengar, J. — Dispossession of lessee by landlord or person claiming paramount title is not a continuing breach of contract by the lessor — His Lordship distinguishes between mere disturbances of the possession of the tenant and eviction of the tenant.)]

possession. In the case of a trespass not amounting to dispossession, the property continues to be in the possession of the plaintiff and at every moment during which the trespass continues it can be conceived of as a fresh wrong committed in respect of the plaintiff's possession. But where there has been complete dispossession, the defendant's action cannot, thereafter, amount to a fresh wrong committed in regard to the plaintiff's possession, for the simple reason that such possession does not exist. In some decisions, however, it has been held that a complete dispossession will be a continuing wrong.[3] It is submitted that this view is not correct and is against the weight of authority.

The principle that dispossession is not a continuing wrong applies whether the dispossession is from land in the exclusive possession of the plaintiff or from land which is in the joint possession of both the plaintiff and the defendant.[4] Similarly, the principle applies whether the dispossession is of an individual or a community or the public[5] or a Municipality.[6] Even assuming that dispossession is a continuing wrong, this does not mean that the plaintiff will have a perpetual right to sue in respect of it. Because, under S. 28, at the end of the period of limitation for a suit for possession calculated from the date of dispossession, the plaintiff's right to the property will be extinguished and the defendant will acquire a right to the property, with the result that the defendant's act will cease to be a wrong from that moment.[7] The reason is that S. 23 is based on the principle that there arises a fresh cause of action at every moment of the time during which the wrong continues and on the expiry of the period of limitation in respect of the cause of action which arises immediately on the dispossession, the plaintiff's right to the property will be extinguished and the defendant will acquire a right to it.

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[3] ('40) 27 AIR 1940 Pat 449 (455) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadeo Asram.* (Where the trespasser goes on asserting acts of possession over the land by cultivation or the obstructionist continues inhabiting the house built, the wrong *continues.* But the right of suit gets barred by the plaintiff's right to the property becoming extinguished by lapse of time under Part IV.)

('14) 1 AIR 1914 Cal 29 (31, 32) : 20 Ind Cas 910 (DB), *Barhamdat Missir* v. *Krishna Sahay.* (Occupation of land coupled with denial of title of owner may be regarded as a continuing wrong.)

('83) 6 Mad 176 (178) (DB), *Narasimhacharya* v. *Raghupathyacharya.* (Trespass and occupation of a well to the exclusion of plaintiffs held to be a continuing wrong.)

('26) 13 AIR 1926 Nag 260 (261, 262) : 92 Ind Cas 75, *Yado* v. *Ambashankar.* (Dispossession of tenant — Suit for damages — Wrong is a continuing one and damages can be claimed only up to date of suit and not prospective damages.)

[4] ('40) 27 AIR 1940 Lah 359 (361) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan* v. *Mt. Jannat.* (Defendant constructing chabutra on common land of both the parties and appropriating it to his exclusive use.)

[5] ('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain.* (Dispossession of the public is also not a continuing wrong.)

('39) 26 AIR 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum* v. *Ramsahaigir.* (Whether the land belongs to a community or not, if one person takes sole and exclusive possession of it, or some portion of it, and excludes all others who have a right to occupation from possession, then the trespass is not a continuing trespass.)

[6] ('96) 19 Mad 154 (156) (DB), *Municipal Commissioners* v. *Sharangapani Mudaliar.*

The occupation for private residence of a balakhana *over a mosque* was held in the undermentioned case,[8] to be a desecration of a place of worship and a continuing wrong. The decision can be supported on the view that the occupation was only a trespass and not a complete ouster.

17. Procuring wrongful attachment under Section 146 of the Criminal Procedure Code. — Where, by reason of the defendant's act in attempting to interfere with the plaintiff's possession, the Magistrate is compelled to intervene and attach the property, the act of the defendant must, according to the High Court of Calcutta be taken to have created a state of affairs, every moment's continuance of which is a new wrong against the plaintiff for which the defendant is responsible. The wrong is therefore a *continuing* one and limitation for a suit for a declaration of title begins to run at every moment of the time during which the wrong continues.[1] The right to the declaration is based on the infringement of the *negative* duty of not interfering with the plaintiff's right to actual possession. The case must be distinguished from a case where the defendant has *ousted* the plaintiff from possession and the plaintiff sues for possession as the effect of an attachment under S. 146 is not the *dispossession* of the rightful owner, the legal possession still continuing in him notwithstanding the attachment;[1a] so that the defendant's act may be treated as amounting to a fresh interference with the plaintiff's possession at every moment of the time during which the attachment continues. (see Note 16.)

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[7] ('40) 27 AIR 1940 Pat 449 (455): 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh* v. *Mahadeo Asram.*

[*See also* ('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant* v. *Deo Narain.* (In this case it is held that in case of dispossession, a suit for possession will not lie under S. 28 after 12 years from the dispossession—But it is not clear whether this will be so even on the assumption that dispossession *is* a continuing wrong — The trend of the judgment seems to be to the effect that as the plaintiff's right to the property will be extinguished under S. 28 after 12 years from the dispossession the dispossession is not a continuing wrong — It is difficult to follow the reasoning.)]

[But see ('40) 27 AIR 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan* v. *Mt. Jannat.* (Submitted not correct.)

('39) 26 AIR 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent, Leprosy Asylum* v. *Ramsahaigir.* (The assumption that if dispossession is held to be a continuing wrong, a suit for possession would never become barred and Arts. 142 and 144 would be reduced to a dead letter, is not correct.)]

[8] ('17) 4 AIR 1917 Lah 160 (161, 162) : 39 Ind Cas 116 : 1917 Pun Re No. 31 (DB), *Muhammad Ahamad* v. *Muhammad Fazal.* (1909 Pun Re No. 53 distinguished.)

Note 17

[1] ('22) 9 AIR 1922 Cal 419 (421) : 49 Cal 544 : 65 Ind Cas 200 (DB), *Panna Lal Biswas* v. *Panchu Ruidas.* (Plaintiff dispossessed by defendant — Subsequent attachment by Magistrate under S. 146 constructively restores possession to plaintiff—Case can be treated as one of continuing wrong.)

('16) 3 AIR 1916 Cal 751 (754) : 31 Ind Cas 242 (DB), *Brojendra Kishore Roy* v. *Bharat Chandra Roy.*

The High Court of Patna has also taken the same view as that of the Calcutta High Court.[1b]

The High Court of Madras has, however, held that the defendant's act resulting in an order of attachment under S. 146, Criminal Procedure Code, is not a continuing wrong and that a suit for a declaration must be brought within six years of the date of attachment.[2] The decision does not say why it is not a continuing wrong, and does not advert to the principles and tests applicable for finding out whether a wrong is a continuing one or not. As has also been observed in the undermentioned case,[3] the decision of the Madras High Court leads to an obvious anomaly, namely, that if the suit is not brought within six years of the attachment, neither of the claimants can obtain a declaration of title, and yet the title continues unaffected in the true owner, the Magistrate thus continuing as a stakeholder for an indefinite period.

In the undermentioned case[4] where the facts did not show that the attachment of the property by the Magistrate was caused by the wrongful denial of the plaintiff's title by the defendants, it was held that the defendant was not guilty of any wrong and consequently no fresh period of limitation began to run under this section, and that the right to a declaration accrued on the date of the attachment by the Magistrate which gave rise to the cause of action for declaration.

18. Other cases of continuing wrongs independent of contract. — A wrongful seizure of moveable property under a legal process is not a continuing wrong.[1] So also, the withholding of the property seized is not a continuing wrong.[2] The contrary view taken in the cases cited below[3] is not correct.

[1a] ('22) 9 AIR 1922 Cal 419 (421) : 49 Cal 544 : 65 Ind Cas 200 (DB), *Panna Lal Biswas* v. *Panchu Ruidas.*

('16) 3 AIR 1916 Cal 751 (752) : 31 Ind Cas 242 (DB), *Brojendra Kishore* v. *Bharat Chandra.*

('03) 26 Mad 410 (415) (DB), *Rajah of Venkatagiri* v. *Isakapalli Subbiah.*

[1b] ('38) 25 AIR 1938 Pat 212 (215) : 175 Ind Cas 256, *Ghamandi Misser* v. *Jagarnath Misser.* (A I R 1933 Pat 224 followed.)

[2] ('03) 26 Mad 410 (416) (DB), *Rajah of Venkatagiri* v. *Isakapalli Subbiah.* (20 Cal 906 dissented from.)

[3] ('16) 3 AIR 1916 Cal 751 (753) : 31 Ind Cas 242 (DB), *Brojendra Kishore Roy* v. *Bharat Chandra Roy.*

[4] ('25) 12 AIR 1925 Nag 236 (236) : 20 Nag L R 195 : 85 Ind Cas 631, *Yeknath* v. *Bahia.*

Note 18

[1] ('40) 27 AIR 1940 Rang 276 (277) : 1941 Rang L R 1 : 192 Ind Cas 625 (FB), *Eng Gim Moh Firm* v. *Chinese Merited Banking Co. Ltd.* (In execution of decree decree-holder wrongfully attaching property of stranger—Suit by stranger for compensation for wrongful seizure is governed by Art. 29 — Such wrongful seizure is not continuing wrong within S. 23.)

Where Swetambari Jains placed *charans* or impressions of footprints of saints on a sacred hill, and such placing constituted the infringement of a right of the Digambari Jains, it was held by the Privy Council that the wrong committed was a continuing one within the meaning of S. 23.[4] The duty in the above case was to refrain from placing any such thing on the hill. The placing of it effected a change in the condition of things which was a continuing source of injury for which the Swetambaris were responsible.

A wrong entry in the village papers against the rights of the plaintiff is not a continuing wrong. The wrong, if at all, is committed once and for all when the entry is made.[5]

Where an order of injunction is issued against A restraining him from building a certain wall, and A in breach of the order builds up the wall, there is a continuing wrong, and an application under O. 21, R. 32, Civil Procedure Code, is not barred as long as the wall remains.[6]

('37) 24 AIR 1937 Mad 117 (117) : I L R (1937) Mad 491 : 167 Ind Cas 495 *Commissioner, Salem Municipality* v. *Bakthavatsalu.* ((1905) 1 Ch 205 relied on.)
('30) 17 AIR 1930 Mad 635 (637) : 53 Mad 621 : 126 Ind Cas 721 (DB), *Paunaji Devi Chand & Co.* v. *Sanaji Kapurchand.*
('14) 1 AIR 1914 Mad 135 (136, 137) : 38 Mad 655 : 24 Ind Cas 754 (DB), *N. Venkataramier* v. *Vythilinga Thambiran.* (25 Mad 540 followed.)
('07) 29 All 615 (618) : 4 All L Jour 548, *Ram Narain* v. *Umrao Singh.* (Semble.)
('75) 24 Suth W R 298 (299) (DB), *Ram Singh Mohapattur* v. *Bhottro Manjee.*
See also Note 8 to Article 29.

[2] ('02) 25 Mad 540 (542) (DB), *Pamu Sanyasi* v. *Zamindar of Jayapur.* (24 Mad 339 distinguished — But the distinction does not seem to be one which makes any difference in principle.)
('73) 19 Suth W R 339 (341) (DB), *Hughes* v. *Municipal Commrs. Howrah.*

[3] ('25) 12 AIR 1925 All 131 (132) : 81 Ind Cas 1038, *Manga* v. *Changa Mal.* (The detention of property is a continuing wrong.)
('23) 10 AIR 1923 All 146 (148) : 45 All 208 : 73 Ind Cas 299 (DB), *Jhabbu* v. *Mt. Batul.* (Suit for damages for wrongful distraint — Limitation — U. P. Tenancy Act, S. 146 — Unlawful distraint continues and is renewed every day that the distraint lasts—Limitation must be calculated from the date when the distraint ends.)
('01) 24 Mad 339 (341) (DB), *Yamuna Bai* v. *Solayya Kavundan.* (Detention is a continuing wrong.)

[4] ('33) 20 AIR 1933 P C 193 (197) : 60 Ind App 313 : 12 Pat 681 : 144 Ind Cas 346 (P C), *Hukum Chand* v. *Maharajah Bahadur Singh.* (6 Cal 394 (P C) relied on.)

[5] ('97) 20 All 35 (37) : 1897 All W N 193 (DB), *Francis Legge* v. *Rambaran.*
('06) 4 Cal L Jour 568 (572, 573) : 11 Cal W N 186 (DB), *Shyamanand Das* v. *Raj Narain Das.* (It is not a wrong at all.)
('10) 5 Ind Cas 115 (116) (DB) (Cal), *Mohamed Mehdi Hasan Khan* v. *Phul Kuar.*
('37) 24 AIR 1937 Oudh 291 (293) : 13 Luck 143 : 166 Ind Cas 774 (DB), *Bank of Upper India* v. *Mt. Hira Kuer.*

[6] ('36) 23 AIR 1936 Lah 334 (334, 335) : 162 Ind Cas 303 (DB), *Moti Ram* v. *Hans Raj.* (Reversing A I R 1935 Lah 702.)

The infringement of a trade mark is a continuing wrong so long as the infringement continues.[7]

Where A is entitled under the law to a water-connection to his house from the municipal main pipes and the municipality cuts off the connection, there is clearly a continuing wrong so long as the connection is withheld.[8]

The causing of a nuisance by throwing latrine-water through a hole in the wall is a continuing wrong.[9]

The refusal of the public authority to follow the prescribed procedure under the Land Acquisiton (Mines) Act of 1885 and to pay compensation is not a continuing wrong.[10]

Where Sikhs had acquired title by adverse possession over a mosque, it was held that all rights of the Muhammadans in the mosque, including the right to pray, were extinguished and hence the refusal of the Sikhs to allow the Muhammadans to pray could not constitute a continuing wrong.[11]

19. Successive breaches of contract. — This section does not apply to *successive* as opposed to continuing breaches of contract. Section 23 of the Act of 1871 did not provide for continuing breaches of contract, but for *successive* breaches of contract and continuing wrongs and nuisances. As to successive breaches of contract, it was provided that a fresh right arose and a fresh period of limitation began to run upon every fresh breach,[1] but it was also provided that this did not apply to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole became due.[2]

The provision as to successive breaches has not been re-enacted in the corresponding section in the succeeding Acts. This, however, cannot be taken to mean that successive breaches of contract do not give rise to successive causes of action. Article 115 of the Act makes it clear that in the case of successive breaches of contract, time begins to run upon every breach. Where, therefore, a party has recurring or successive causes of action under the terms of a contract, each cause of action will give a fresh start to the period of limitation and the mere fact that a party has not availed himself of the earlier cause of action will not prevent him from availing himself of a later one.[3]

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[7] ('12) 15 Ind Cas 116 (117): 1913 Pun Re No. 97 (DB), *Abdul Salam* v. *Hamid Ullah.*

[8] ('29) 16 AIR 1929 All 870 (871) : 118 Ind Cas 713 (DB), *Municipal Board, Allahabad* v. *Sardar Bahadur Johari.*

[9] ('21) 60 Ind Cas 529 (529) (Lah), *Rukn-ud-Din* v. *Altaf Ahmad.*

[10] ('36) 23 AIR 1936 Pat 513 (518) : 15 Pat 510 : 164 Ind Cas 860 (DB), *Secy. of State* v. *Lodna Colliery Co., Ltd.*

[11] ('38) 25 AIR 1938 Lah 369 (385, 386): 175 Ind Cas 945 (FB), *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.*

Note 19

[1] ('75) 7 N W P H C R 53 (54, 55) (DB), *Sadha* v. *Mt. Bhagwani.* (Mortgagee undertaking to pay annuity — Condition of forfeiture on default — Each default gives a fresh cause of action.)

[2] ('75) 24 Suth W R 20 (20) (DB), *Raghoo Nath Doss* v. *Ranee Shiromonee Pat Mohadebee.*

A contrary view was, however, held in the undermentioned case.[4] In that case A, who purchased land from B, agreed to pay certain fees annually to B in respect of such land, and further stipulated that in default of payment as agreed to, B should be entitled to the possession of a portion of the land. A never made any payment and twelve years after the first default, B sued for possession of the said portion. It was held that time ran only from the date of the first default and that the suit was barred under Art. 143 of the Act. A similar view was held in the undermentioned case.[5] The decisions, it is submitted, do not seem to be supported on principle. See also the undermentioned case.[6] At the same time, it should be remembered that if a breach of contract gives the plaintiff a cause of action to sue for possession his right to the property will, under S. 28, be extinguished notwithstanding that subsequent breaches may give him fresh causes of action. (See Note 16.)

Where A stands surety for B, a judgment-debtor who has been arrested in execution of a decree, and according to the terms of the surety bond, A undertakes but fails to produce B on each date of hearing of the case, the case is one of *successive* breaches and is not one of a continuing breach.[7] Similarly, where A executes an instalment bond in favour of B, his judgment-creditor, stipulating that he will pay monthly a certain sum of money, and that if five consecutive instalments are not paid, B might call for payment of the whole amount and execute the decree, the case is one of successive breaches. The non-payment of instalments is a constantly recurring cause of action and the decree-holder B can treat as his cause of action *any* of the defaults.[8] Where under a compromise the defendant undertook to deliver a certain quantity of grain to the plaintiff yearly, it was held that the failure to pay each year gave rise to a fresh cause of action and that the plaintiff could enforce his right to the grain for as many years back as were within the period of limitation.[9]

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[3] **('31) 18 AIR 1931 Pat 285 (290, 291) : 134 Ind Cas 609 : 11 Pat 112 (DB), *Mukhdeo Singh* v. *Harakh Narayan Singh*.**

[4] **('82) 4 All 493 (496) : 1882 All W N 125 (DB), *Bhojraj* v. *Gulshan Ali*.**

[5] **('97) 1897 Pun Re No. 28, *Achhar Mal* v. *Hukman*. (Plaintiff's cause of action arose on the date of the first default in paying interest.)**

[6] **('16) 3 AIR 1916 Lah 403 (404) : 35 Ind Cas 235 (236), *Locha Ram* v. *Jindwadda Khan*. (Denial of landlord's title — Landlord can condone forfeiture of right—He is entitled to sue on subsequent act occasioning forfeiture.)**

[7] **('35) 22 AIR 1935 Lah 174 (175) : 153 Ind Cas 459, *Jalaldin* v. *Mehanga Ram*.**

[8] **('69) 12 Suth W R 71 (72) : 3 Beng L R App 112 (DB), *Mt. Khedu* v. *Kalu*.**

[9] **('04) 1904 Pun L R No. 106, p. 393, *Rattan Das* v. *Gopal Das*. (Words 'continuing breach' were however used. This is not correct.)**

Section 23
Note 20

20. Successive wrongs independent of contract. — The section does not apply to *successive* wrongs. Where there are successive infringements of an existing or continuing right, each infringement is a wrong thus giving rise to successive wrongs, affording successive causes of action. As in the case of successive breaches of contract, the mere fact that a party has not availed himself of an earlier cause of action will not prevent him from availing himself of a later one. Thus, each act of trespass gives a new cause of action for a proceeding to restrain the trespass.[1] Similarly, where plaintiff sued for a perpetual injunction restraining the defendant from discharging rain-water on the roof of the plaintiff's shop through a *parnala*, it was held that on each occasion when the defendant discharged water through the *parnala* on the plaintiff's roof, the plaintiff got a fresh cause of action and that the last occasion when this was done may be availed of as the cause of action for a suit.[2] In *Jalandhar Thakur* v. *Jharula Das*,[3] where X was appropriating for himself without any right the daily surplus income from the offerings made to a Hindu temple, and ten years after X had begun to do so the *shebait* of the temple sued X for a declaration that he was entitled to the said income, it was held by their Lordships of the Privy Council that the suit was not barred by limitation. Their Lordships observed : "On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait."

See also the undermentioned cases.[4]

Note 20

[1] ('14) 1 AIR 1914 All 531 (532) : 25 Ind Cas 185, *Sheo Prasad Sonar* v. *Mangar Manhar*. (Door opened in wall for passage to defendant's house through plaintiff's land.)

[2] ('20) 7 AIR 1920 Lah 195 (196) : 56 Ind Cas 1003, *Nur Muhammad* v. *Gauri Shankar*. (A I R 1914 All 531 followed.)

See also Note 10 to Article 120.

[3] ('14) 1 AIR 1914 P C 72 (74) : 42 Cal 244 : 41 Ind App 267 : 24 I. C. 501 (PC).

[4] ('99) 23 Bom 659 (665) : 1 Bom L R 118 (DB), *Jugal Kishore* v. *Lakshmandas*. (Every breach of constructive trust gives a fresh cause of action.)

('20) 7 AIR 1920 Cal 558 (560) : 57 Ind Cas 805 (DB), *Dhanpat Singh* v. *Mohesh Nath*. (Every denial of the right to an account from a trustee will give rise to a fresh cause of action.)

('09) 1 Ind Cas 289 (302) (DB) (Cal), *Baroda Prosad Banerjee* v. *Gajendra Nath Banerjee*. (Do.)

('18) 5 AIR 1918 All 102 (104, 105) : 44 Ind Cas 980 : 40 All 461 (DB), *Debi Prasad* v. *Badri Prashad*. (Each invasion of right to take fallen wood gives rise to a fresh cause of action and suit for declaration can be brought within six years of each invasion.)

('83) 7 Bom 323 (327) : 7 Ind Jur 613 (DB), *Anandrao Bhikaji* v. *Shankar Daji*. (Infringement of right of exclusive worship.)

('75) 24 Suth W R 97 (98), *Ramphul Sahoo* v. *Misree Lall*. (A suit to have a drain closed on the ground that it passed through plaintiff's land—*Held* that the claim was not barred by limitation.)

Suit for compensation for act not actionable without special damage.

24.* In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field. *B* owns the sub-soil. *B* digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by *A* against *B* runs from the time of the subsidence.

Synopsis

1. Scope of the section.
2. Breach of contract.
3. "Specific injury."
4. "Act."
5. Starting point of limitation.

1. Scope of the section. — This section applies only where the act of the defendant does not, *of itself*, constitute a legal injury, but an injury subsequently results therefrom.[1] In such cases, time will

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* **Act of 1877 : S. 24.**

Same as above except Illustration *(b)* (now repealed) which was as follows :

(b) *A* speaks and publishes of *B* slanderous words not actionable in themselves without special damage caused thereby. *C* in consequence refuses to employ *B* as his clerk. The period of limitation in the case of a suit by *B* against *A* for compensation for the slander does not commence till the refusal.

Act of 1871 : S. 25.

Suit for compensation for act becoming unlawful.

25. In the case of a suit for compensation for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when damage accrues.

Illustration.

A owns the surface of a field. *B* owns the sub-soil. *B* digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

Act of 1859.

No corresponding provision.

Section 24 — Note 1

[1] ('24) 11 AIR 1924 Bom 290 (292, 294) : 84 Ind Cas 796 (DB), *Abdulla Mahommed Jabli* v. *Abdulla Mahomed Zulaikhi*. (It is only where it is necessary to consider the act plus the consequences as cause of action that the time runs from the consequences where those consequences are injurious.)

[*See also* ('27) 14 AIR 1927 Nag 85 (86) : 98 Ind Cas 679, *Hardeo* v. *Ramchandra*.

run only from the time when the injury results. The illustration to the section makes this clear. B's act in digging coal does not constitute a legal injury inasmuch as he owns the sub-soil and is entitled to dig coal. But the subsidence resulting from this act is itself an interference with A's enjoyment of his property and is an injury.[2] Where the act of the defendant *itself constitutes a legal injury*, this section has no application and the mere fact that the plaintiff suffers damage subsequently will not enable him to compute the period of limitation for a suit for compensation in respect of such act, from the date of the damage. Thus, where A threw sulphuric acid on the face of B, as a consequence of which B, after some time, lost his eyes, and sued A for damages, it was held that the act of A in throwing sulphuric acid was an assualt, in itself constituting a legal injury; that S. 24 did not therefore apply, and that time would run, not from the date when the plaintiff B lost his eyes, but from the date when the act was committed.[3] Similarly, where owing to the wrongful omission of the defendant District Board, the plaintiff's trap dashed against a heap of road gravel and the plaintiff injured himself, as a result of which his leg had subsequently to be amputated, and he sued the District Board for damages, it was held that this section did not apply to the case, that the illustration made it clear as to the class of cases to which the section applied, and that time ran not from the date of the amputation of the leg, but from the date of the accident.[4]

The corresponding section of the Act of 1877 contained another illustration as follows:

> "*(b)* A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C, in consequence, refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal."

A slander, in India, is clearly an act in itself constituting a legal injury, being an infringement of the legal right of reputation. (See Art. 25 and commentary thereunder.) In view of the discussion above, S. 24 will not apply to such cases and the illustration was therefore wrong; hence, apparently, it has been omitted from the present section.

('74) 1 N W P H C R 292 (293) (DB), *Furookh Hosein* **v.** *Fuzul Hosein.* **(Malicious act — Time will run from the time when the act was committed, or at least from the time when damage resulting from the injury was actually suffered.)]**

[2] ('91) 18 Cal 91 (96) (DB), *Dwarka Nath Gupto* **v.** *Corporation of Calcutta.*

[3] ('24) 11 AIR 1924 Bom 290 (292) : 84 Ind Cas 796 (DB), *Abdulla Muhammad Jabli* **v.** *Abdulla Mahomed Zulaikhi.*

[4] ('20) 7 AIR 1920 Pat 324 (329) : 58 Ind Cas 749 : 5 Pat L Jour 359 (DB), *Allan Mathewson* **v.** *District Board Manbhum.* **(In cases of personal injury, fresh cause of action does not arise by reason of the mere aggravation of the original injury.)**

See also S. 23 Note 3.

Before the amendment of S. 235 of the Companies Act by Act XXII of 1936, it was held in the undermentioned case[5] that this section would apply to an application under section 235 of the Companies Act, 1913, (which was to be regarded as a *suit*) for compensation for misfeasance of the directors (being wilful neglect and breach of trust). It is submitted that this view was not correct. The misfeasance in the case was clearly itself a wrongful act and S. 24 could not apply to such cases. The undermentioned cases[6] were also cases of similar applications, the limitation applicable to which had to be decided. In none of these cases, however, was the applicability of S. 24 considered or adverted to. Under the Companies Act, as amended above, limitation is provided for such applications in the Act itself and under S. 29, this section will not apply to them.

The section does not extend or restrict any period of limitation but *alters the date* or time from which limitation has to be computed according to the third column of the articles of the first schedule. Thus, if the suit is for compensation for any malfeasance or misfeasance, independent of contract, which is not actionable without specific injury, the period of two years prescribed by Art. 36 will run, not from the date of malfeasance or misfeasance, but from the time when the injury results.[7] The effect of this section on Article 36 is thus to *postpone* the starting point of limitation to the date when the injury results. Similarly, where an act, not actionable without proof of specific injury resulting therefrom, is done by a local authority in pursuance of their powers under a statute, the commencement of the period of limitation under Article 2 will, by virtue of this section, be postponed to the time when the injury results.[8]

2. Breach of contract. — It has been held by the High Court of Allahabad that the section applies not only to suits based on torts but also to suits based on contracts.[1] Thus, where A entrusted a

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5. ('30) 17 AIR 1930 Bom 572 (585, 591) : 54 Bom 226 : 127 Ind Cas 305 (DB), *Govind Narayana* v. *Rangnath Gopal.*

6. ('27) 14 AIR 1927 Lah 433 (434, 435) : 8 Lah 167 : 100 Ind Cas 907 (DB), *Bhim Singh* v. *Basheshar Nath.*

('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 899 (DB), *Bank of Multan* v. *Hukum Chand.*

('25) 12 AIR 1925 All 519 (528) : 88 Ind Cas 785 : 47 All 669, *In re Union Bank of Allahabad.*

7. ('29) 16 AIR 1929 Pat 245 (246) : 8 Pat 776 : 120 Ind Cas 626 (DB), *Jagannath Marwari* v. *Kali Das Raha.*

See also Article 36 Note 4.

8. ('09) 2 Ind Cas 819 (824) : 1909 Pun Re No. 72 (DB), *Richard Watson* v. *Municipal Corporation Simla.*

('91) 18 Cal 91 (96, 97) (DB), *Dwarka Nath Gupto* v. *Corporation of Calcutta.* (Construction of reservoir by Corporation of Calcutta — Subsidence of plaintiff's house caused—Subsidence gives a cause of action.)

See also Article 2 Note 8.

Note 2

1. ('26) 13 AIR 1926 All 605 (609) : 95 Ind Cas 913 (DB), *Kedar Nath* v. *Har Govind.*

certain sum of money with B to be paid by the latter to A's mortgagee and B failed to pay the amount within a reasonable time, it was held by Ashworth, J., that the mere failure to pay did not give rise to a cause of action for compensation but that a cause of action arose when A suffered damages by being forced to pay an additional sum as interest to his mortgagee, and the suit was therefore governed by this section read with Article 116 of the Act.[2] A contrary view, namely, that the section applies only to suits based on torts and not to suits based on contracts, has been held by the High Court of Rangoon.[3]

3. "Specific injury." — The word "injury" in this section includes *legal injury*.[1] The word "specific" means "that can be specified."[2]

4. "Act." — Under S. 3 cl. (2) of the General Clauses Act, 1897, "act" includes "illegal omissions."[1]

5. Starting point of limitation. — The computation of time in cases coming under this section is to be made from the date on which the *injury results* and not from the date on which the plaintiff becomes *aware* of the injury or loss.[1]

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[2] ('26) 13 AIR 1926 All 605 (607, 608) : 95 Ind Cas 913 (DB), *Kedar Nath* v. *Har Govind*. (Kanhaiya Lal J., dealt with the case as falling under Article 83 and did not advert to S. 24.)

[3] ('38) 25 AIR 1938 Rang 258 (259, 260) : 1938 Rang L R 457 : 176 Ind Cas 608 (FB), *Anamalai Chettyar* v. *N. M. Cowasjee*. (Limitation applicable to a suit brought against an advocate for neglect or misconduct in his professional duties is that prescribed by Art. 90 and not by S. 24, as such suit arises on negligence arising out of contract between principal and agent and not out of tort — A I R 1936 Rang 510, relied on.)

('36) 23 AIR 1936 Rang 510 (514) : 166 Ind Cas 48, *V. M. Gany* v. *Leong Chye*. (A I R 1926 All 605 Dissented from.)

Note 3

[1] ('30) 17 AIR 1930 Bom 572 (585) : 54 Bom 226 : 127 Ind Cas 305(DB), *Govind Narayan* v. *Rangnath Gopal*.

[2] ('26) 13 AIR 1926 All 605 (608) : 95 Ind Cas 913 (DB), *Kedar Nath* v. *Har Govind*.

Note 4

[1] (26) 13 AIR 1926 All 605 (609) : 95 Ind Cas 913 (DB), *Kedar Nath* v. *Har Govind*.
[*See* ('91) 18 Cal 91 (96, 97) (DB), *Dwarka Nath* v. *Corporation of Calcutta*.]

Note 5

[1] ('36) 23 AIR 1936 Rang 310 (313) : 164 Ind Cas 410, *Tavoy Municipality* v. *U Khoo Zun Nee*.

Computation of time mentioned in instruments.

25.* All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(a) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after date computed according to the Gregorian calendar.

(b) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar.

Synopsis

1. Scope of the section.
2. "Shall, for the purposes of this Act, be deemed."
3. Instrument fixing thirtieth of a Native month for payment—Month containing only twenty-nine days.

1. Scope of the section. — The ordinary meaning of the word "month" in the English language is a *lunar* month and not the artificial month in the Gregorian calendar.[1] Until the year 1850 the word "month" in an Act of Parliament meant only "lunar month," but since that date it is used in Acts of Parliament as meaning calendar month.[2] The rule as to "month" meaning a lunar month in contracts still remains the law in England.[3] It has been held that the same interpretation must be given in this country also to the word "month" used in a contract in English.[4] Thus, where an insurance contract provided that the lapse of six months after loss, without any suit or action being taken, should be regarded as conclusive evidence against the validity of any claim in respect of the loss, it was held that the word "month" must be taken to be "lunar month" of twenty eight days.[5]

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* **Act of 1877 : S. 25 ; Act of 1871 : S. 26.**
Same as above.

Act of 1859.
No corresponding provision.

Section 25 — Note 1

[1] ('09) 2 Ind Cas 573 (583) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha.*

[2] ('09) 2 Ind Cas 573 (583) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha.*
Wharton's "Law Lexicon."

[3] ('09) 2 Ind Cas 573 (583) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha.*

[4] ('09) 2 Ind Cas 573 (584) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha.*

[5] ('09) 2 Ind Cas 573 (584) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha.*

A year in English language means the period in which the revolution of the earth round the sun is completed.

The Legislature in this country has, for certain purposes, modified the ordinary meaning of the words 'year' and 'month'. Thus, in S. 3 cl. (33) of the General Clauses Act, 1897, a 'month' is defined as meaning a month reckoned according to the British calendar; and in cl. (59) of the same Act, a 'year' is defined as meaning a year reckoned according to the British calendar. These definitions, however, apply only where such expressions *have been used in any Act of the Legislature.*[6] The present section enacts that all *instruments* shall *for the purposes of this Act* be deemed to be made with reference to the Gregorian calendar.

As has been seen already, in cases not falling within the scope of these enactments a "month" and a "year" would still bear their ordinary meanings as explained above.

2. **"Shall, for the purposes of this Act, be deemed."**— There was no provision corresponding to this section in the Act of 1859 and it was held that when a Native date was borne by an instrument, and a debt made payable within a certain number of months, those months must be taken to be the *Native* months, and the period of limitation reckoned by the English year *from the English date which may correspond with the Native date on which the stipulated period of payment calculated according to the Native months, may expire,* the reason of the decision being that the parties having used Native dates must be presumed to have contracted with reference to Native and not to English calendar.[1]

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[6] ('09) 2 Ind Cas 573 (584): 36 Cal 516 (DB), *South British Insurance Company* v. *Brajonath Shaha.*

('84) 10 Cal 913 (914) (DB), *Saroda Prashad Ganguli* v. *Pahali Mahanti.* (The word "months" in S. 32 of Act X of 1859 should be computed, in calculating the period of limitation, according to the English calendar.)

('79) 4 Cal 497 (497) : 3 Cal L R 398 (DB), *Mahomed Elahee Bukhsh* v. *Brojokishore Sen.* (The judgment in this case simply follows the decisions in 4 Beng L R App 53 and 9 Beng L R App 41.)

('70) 13 Suth W R 183 (183) : 4 Beng L R App 53 (DB), *Maharaj Jay Mangal Singh Bahadur* v. *Lal Rang Pal Singh.* (Year and month in the Limitation Act must be computed according to the English calendar.)

('72) 18 Suth W R 403 (403) : 9 Beng L R App 41 (DB), *Khasro Mandar* v. *Premlal.*

[But see (24) 11 AIR 1924 Nag 216 (216) : 76 Ind Cas 44, *Motiram* v. *Lakmichand.* (A year calculated according to the *Sambat* calendar amongst Hindi speaking parties should not be considered to mean a year according to the British calendar.)]

Note 2

[1] ('68-69) 5 Bom H C R A C 150 (151), *Ganpatrav Ramji* v. *Mannu Mohanji.*

('69) 6 Bom H C R A C 136 (136, 137), *Lalji Vaijinath* v. *Ravji Abaji.*

('70) 7 Bom H C R A C 77 (78), *Babaji Lakshman* v. *Maroti Raghoji.* (Where parties are Hindus, the presumption is that they intended to calculate the time

After the introduction of the present provision in 1871, there has been a conflict of opinions as to whether the words "month" and "year" used in any instrument must, for purposes of the Act, be reckoned according to the Gregorian calendar even in cases where the intention of the parties to use a different calendar is clearly apparent. In *Nilkanth* v. *Dattatraya*,[2] the High Court of Bombay held that the section means that the parties shall be deemed to have used the terms 'month' and 'year' in the sense they bear in the Gregorian calendar. In *Rungo Bujaji* v. *Babaji*,[3] the instrument contained a stipulation as follows: "In the month of *Kartik Shake 1799*,— that is to say in four months — we shall pay in full the principal and interest." Westropp, C. J., observed as follows :

> "The Court thinks that the true construction of the note is that the maker was to pay within four (lunar) months from the date, which would expire in the month of *Kartik*. Four months according to the Gregorian calendar, would extend beyond that month, and expire in *Margasheersh*. But the legislation in S. 25 of Act XV of 1877 is *absolute*. There is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties. This Court, must, therefore, be guided by S. 25, and hold the period of four months to be, for the purpose of ascertaining whether or not the suit is barred by lapse of time, four months according to the Gregorian calendar."

The view taken in *Rungo Bujaji's case*[3] has been followed in the undermentioned cases.[4] In *Latifunnissa* v. *Dhan Kunwar*,[5] the question was regarded as one of *intention* of the parties, although *Rungo Bujaji's case*[3] was cited with approval by Beverley, J. It was

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of payment according to Hindu era notwithstanding the fact that the document (promissory note) bore also English date.)

[2] ('79-80) 4 Bom 103 (104) : 4 Ind Jur 580 (DB). (Bond in this case bore Native date only and was made payable after a certain time.)

[3] ('83) 6 Bom 83 (85) (DB).

[4] ('24) 11 AIR 1924 Nag 208 (208) : 78 Ind Cas 338, *Harbhagat* v. *Narayan Rao*. (Even when lunar months are mentioned in a vernacular contract the time is to be decided by reference to calendar months — 2 Ind Cas 573 distingiushed on the ground that it referred to contract in the English language.)

('27) 14 AIR 1927 Mad 917 (918, 919) : 105 Ind Cas 241 (DB), *Venkatasubramania* v. *Bhiravaswami*. (The intention of the parties is immaterial where Section 25 applies.)

('98) 11 C P L R 91 (93), *Bhaiyalal Wani* v. *Jamnadas Potdar*. (Money to be paid in twelve months, i. e., up to Baisakh 1302 Fasli — Months must be calculated according to Gregorian calendar.)

('36) 23 AIR 1936 Oudh 270 (274) : 12 Luck 109 : 161 Ind Cas 605 (DB), *Raja Ram* v. *Rameshwar Bakhsh Singh*. (Their Lordships however rely upon Section 3, cl. (59) of the General Clauses Act which cannot apply to the case.)

('31) 18 AIR 1931 Oudh 357 (358): 134 Ind Cas 601, *Pulai Ram Dubey* v. *Sanchit Misir*.

[5] ('97) 24 Cal 382 (384, 385) (DB).
See also Article 132 Note 23.

Section 25
Notes 2–3

also observed that a liberal construction should be given in cases of doubt. In that case the reckoning, according to the Gregorian calendar, gave a larger period to the debtor within which to repay the money and was accordingly adopted. The High Court of Allahabad has also held that the question is one of intention of the parties and if the intention of the parties is clear that the months should be reckoned in a particular manner, S. 25 will have no application.[6] The Judicial Commissioner's Court of Nagpur also seems inclined to this view.[7]

Where a promissory note bore two dates, one according to the Native calendar and the other according to the British calendar and the two dates did not tally with each other, it was held that this section does not raise any presumption as to the date of the document but merely provides that the period of limitation should be worked out according to the Gregorian calendar and that the correct date should be ascertained on taking evidence.[8]

3. Instrument fixing thirtieth of a Native month for payment — Month containing only twenty-nine days. — Where money advanced under an instrument is stipulated to be repaid on the thirtieth of a particular Hindu month and it happens that that month in that year contains only twenty-nine days, the cause of action has been held to arise only on the first of the next month. Thus, where money was repayable on the 30th *Pous* 1283 B. S., and *Pous* in that year consisted only of twenty-nine days, the 29th *Pous* answering to the 12th January 1877, it was held that a suit brought on the 13th January 1880 was in time.[1] This decision has been followed by the High Court of Madras in the undermentioned case[2] arising under similar circumstances. These decisions, however, rest on general principles of law and have nothing to do with S. 25 of the Limitation Act.

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[6] ('15) 2 AIR 1915 All 272 (273) : 29 Ind Cas 980 (DB), *Dwarka Prasad* v. *Raja Ram.*

('25) 12 AIR 1925 All 138 (139) : 82 Ind Cas 330 : 47 All 66 (DB), *Roshan Lal* v. *Bashir Ahmed.* (Parties intending to give six months according to Hindu calendar for payment — Gregorian calendar not to be applied.)

See also Article 132 Note 23.

[7] ('27) 14 AIR 1927 Nag 259 (261) : 102 Ind Cas 588, *Madhorao Narayan Rao* v. *Deepchand.*

[8] ('41) 28 AIR 1941 Mad 587 (588), *Achuthan Nayar* v. *Achuthan Nayar.* (Promissory note bearing both English date and Malayalam date — Inconsistency between the two — Computation of time for limitation — Evidence as to date of note is admissible under Evidence Act, S. 96.)

Note 3

[1] ('81) 6 Cal 239 (240) : 6 Cal L R 553 (DB), *Almas Banee* v. *Mahomed Buya.*

[2] ('94) 17 Mad 61 (62) (DB), *Gnanasammanda Pandaram* v. *Palaniyandi Pillai.*

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easements.

26.* *(1)* Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

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* Act of 1877 : S. 26.
Same as Section 27 of the Act of 1871 below.

Act of 1871 : S. 27.

Acquisition of right to easement.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or water-course or the use of any water, or any other easement, whether affirmative or negative, has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation. — Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustrations.

(a) A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(b) In a like suit also brought in 1871, the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by *actual user* has been proved to have taken place within two years next before the institution of the suit.

(c) In a like suit, the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Act of 1859.
See Note 1 to this Section.

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section *(1)* belongs to [1][the Crown], that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustrations.

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

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[1] Substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Synopsis

1. History of the law of acquisition of easements in India.
2. Extent of applicability of the Easements Act and the Limitation Act.
3. Acquisition of easements by prescription.
4. Other modes of acquisition not barred.

4a. Acquisitions of rights other than easements.

5. Who can acquire easements.
6. Easements of light and air.

7. Right of way.
8. Right to watercourse or to the use of any water.
9. "Any other easement."
9a. "Enjoyed."
10. "Peaceably."
11. Enjoyment should be open.
12. As an easement.
13. "As of right."
14. "Without interruption."
15. "For twenty years."
16. Sixty years' user necessary against Government.
17. Plea of easement.
18. Onus of proof.
19. Suit in respect of easements — Parties.
20. "Shall be absolute and indefeasible."
21. Custom, if can override the Limitation Act.
22. Unity of title or possession of dominant and servient estates in the same person — Effect.

Other Topics (miscellaneous)

Abandonment and discontinuance. See Note 14.
Artificial watercourse. See Note 8.
"Belongs" in sub-section (2) refers to ownership and not to possession. See Note 16.
Enjoyment for twenty years by same person not necessary. See Note 15.
Mere non-user for sometime — Not interruption. See Note 14.
Permissive user — Not user as of right. See Note 13.
User 'as of right' — Presumption. See Notes 13 and 18.

1. History of the law of acquisition of easements in India. — The origin of servitudes seems to have been as ancient as that of property. They seem to have been well known both to the Hindu and Mahomedan law as well as to the English law. After the advent of the British rule in India, the development of the law of easements in this country prior to the passing of the special Acts relating to easements was marked by the application of the principles of English law. In districts outside the Presidency Towns where the law was to be administered according to the principles of justice, equity and good conscience, the principles of English law were applied as being the measure of justice, equity and good conscience but subject to such modifications as were suited to the usages and habits of the people. In the Presidency Towns, the English law was administered by virtue of the provisions contained in the charters constituting the High Courts. By Regulation V of 1827 the acquisition of easements by prescription was provided for so far as the mofussil in Bombay Presidency was concerned, the period necessary for such acquisition being *thirty* years.[1] In other Presidencies, sometimes, a user for a period of twenty years, and sometimes for a period of twelve years was held necessary to acquire an easement[2] and in some cases the question was regarded as

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Section 26 — Note 1

[1] (1865) 2 Bom H C R 333 (333), *Rambhau Bapushet* v. *Bhai Babushet.*
('73) 10 Bom H C R 399 (400), *Savalgiapa Virbasapa* v. *Basvanapa Basapa.*
(1865) 2 Bom H C R 334 (337), *Anaji Dattushet* v. *Morushet Bapushet.*

[2] ('69) 12 Suth W R 76 (77) : 3 Beng L R 211 (DB), *Kristo Chunder Chuckerbutty* v. *Kristo Chunder Burnick.* (A user for the period of twelve years gave a person a legally prescriptive right.)

Section 26
Note 1

one to be decided on the facts of each case whether the enjoyment was of sufficient length as to enable the Court to hold in favour of acquisition.[3]

In the year 1859 an attempt was made to insert in the Limitation Bill of that year, the following provisions relating to the acquisition, by prescription, of easements :

"(iv) Subject to the exceptions and to the qualifications hereinafter mentioned, whoever has enjoyed, mediately or immediately, any benefit, liberty or privilege derived out of immovable property or any right of ownership over the same for the space of twelve years without interruption, shall acquire by prescription both at law and in equity, a right to the enjoyment of such benefit, liberty or privilege as against the owner of such immovable property, unless such benefit or privilege shall have been enjoyed by some consent or agreement expressly given or made for that purpose by some deed or writing.

"(v) If the perpetual right to any such benefit, liberty or privilege as in the last preceding section mentioned, whether acquired by prescription or otherwise, shall have been disused for twelve years when it was capable of being used, the same shall be extinguished."

These sections were, however, omitted when the bill was passed into law and the old system of administering the law of easements in the Presidency Towns and in the mofussil continued.

The Limitation Act of 1871 introduced for the first time provisions relating to easements in sections 27 and 28 thereof corresponding to the present Ss. 26 and 27. The provisions were confined to the acquisition of easements by *prescription*. The acquisition of easements in *other*

('69) 11 Suth W R 522 (523, 524, 525) : 3 Beng L R A C 166 (DB), *Kartick Chunder Sircar* v. *Kartick Chunder Dey*. (Twelve years sufficient.)

('69) 5 Mad H C R 6 (21), *Ponnusami Tevar* v. *Collector of Madura*. (Period of user should be for at least the period of adverse possession which is prescribed by S. 1, cl. 12 of the Limitation Act of 1859.)

3. ('69) 5 Mad H C R 6 (25, 26, 28) (DB), *Ponnusami Tevar* v. *Collector of Madura*. (Per Innes, J.)

('69) 12 Suth W R 274 (274, 275): 3 Beng L R A C 325 (DB), *Roop Chunder Ghose* v. *Roop Moonjuree Dossee*. (Long user is enough but no specific number of years necessary.)

('70) 14 Suth W R 199 (200) (DB), *Imambundee* v. *Sheo Dayal*. (Proof of well established and fixed user in sufficient.)

('70) 13 Suth W R 440 (441) : 5 Beng L R 174 (DB), *Mullick Kurim Baksh* v. *Harrihur Mandar*. (Long user is enough.)

('67) 7 Suth W R 271 (272) (DB), *Bhugwan Chunder Chowdhry* v. *Shaikh Khosal*. (Do.)

[*See also* ('68) 10 Suth W R 452 (453) (DB), *Mohim Chunder Chuckerbutty* v. *Chundee Churn Gooho*.]

ways than by prescription, the extent, incidents and extinction of easements were all matters to which the principles of English law continued to be applied. The Act repealed the Bombay Regulation V of 1827.

The Limitation Act of 1877 simply reproduced the sections relating to easements in the Act of 1871.

In 1882 the Indian Easements Act[4] was passed codifying the law of easements and licenses in India. It however extended only to the Provinces of Madras, Central Provinces and Coorg, and so far as such Provinces were concerned the provisions of the Limitation Act as to easements were repealed.

By Act VIII of 1891 the Easements Act 1882 was extended to what now is the United Provinces, and the Province of Bombay. It applies to Sind also.[5]

The present Act has reproduced the provisions as to easements in the Act of 1877 with the following changes:

(1) Sub-section (2) of S. 26 is new and enlarges the period of prescription to sixty years where the servient tenement belongs to the Government.

(2) The words "the Crown" were substituted for the word "Government" in sub-s. (2) by the Government of India (Adaptation of Indian Laws) Order, 1937.

(3) Illustration (b) to the section was omitted apparently on the ground that it was not correct, no *actual* user being necessary to be shown within two years of the suit. See Note 15.

2. Extent of applicability of the Easements Act and the Limitation Act. — As has been seen in Note 1 the Easements Act now applies to the Provinces of Madras and Bombay, the United Provinces, the Central Provinces, Sind and Coorg. Sub-section (4) of S. 29 of this Act provides that nothing in Ss. 26 and 27 and the definition of easement in S. 2, cl. (5) shall apply to cases arising in territories to which the Easements Act may, for the time being, extend. Thus, it is clear that in the said Provinces, the law of easements in all the aspects is solely governed by the Easements Act.[1]

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[4] See pages 19 to 85.

[5] ('39) 26 AIR 1939 Sind 89 (42) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi.* (NOTE.—By Act VIII of 1891 the Easements Act was extended to the territories administered by the Governor of Bombay — Sind was one of such territories — Sind was made a separate Province under the Government of India Act, 1935 but the laws in force there previously continued to be in force after the separation.)

Note 2

[1] ('39) 26 AIR 1939 Sind 89 (42) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi.*

Section 26
Notes 2–3

In all the other Provinces in India, the law, so far as the *acquisition* of easements by *prescription* is concerned, is that prescribed by the Limitation Act. The *extent*, *incidents*, *extinction* and *disturbance* of easements as well as *other modes* of acquisition of easements, are not affected by this Act and are governed by the principles of English law as it stood before the Prescription Act in England where the application of such principles is suited to the usages and habits of the people.[2]

The Easements Act has generally adopted the principles of English law in such matters except in certain particulars, and consequently decisions in cases arising under the Easements Act may usefully be referred to in dealing with similar cases arising in the Provinces to which the Easements Act does not apply.[3]

3. Acquisition of easements by prescription. — Under the early English law, prescription was not regarded as a mode of *acquiring* an easement. Where long user of a particular right was proved, it was regarded as evidence that the servient owner *acquiesced* in or *consented* to such user being made, from which acquiescence or consent, a grant or covenant on the part of the servient owner could be *presumed*,[1] provided the nature of the user was what it would have been if the person claiming the right had been a *grantee* or a person in whose favour a covenant had been entered into by the servient owner. A grantee or a covenantee would exercise the right obtained by him openly and peaceably and without fear of interruption. It was therefore a user of this nature for a long time that gave rise to the presumption of grant or covenant in his favour.[2] In the course of the development of the law, *immemorial* user, which at first was regarded as necessary to raise the presumption of grant, was changed to user for the period of *legal* memory which reached back to 1189 A. D. and no farther. This was the result of the Statute of Westminster, 3 Edw.

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[2] ('12) 12 Ind Cas 60 (61) : 39 Cal 59 (DB), *Paul* v. *William Robson.*

('95) 19 Bom 797 (801), *Municipality of Poona* v. *Waman Rajaram.* (Easement of necessity—Acquisition.)

('94) 18 Bom 616 (623, 628, 629) (DB), *Chuni Lal Mancharam* v. *Manishankar Atmaram.*

('87) 14 Cal 839 (855), *Delhi and London Bank Ltd.* v. *Hem Lall Dutt.*

('27) 14 AIR 1927 Lah 492 (493) : 102 Ind Cas 447, *Karam Ilahi* v. *Ghulam Mustafa.* (Alteration of easement not increasing burden furnishes no cause of action.)

[3] *See* ('39) 26 AIR 1939 Rang 421 (422) : 1940 Rang L R 93 : 185 Ind Cas 605, *Tan Sit Shan* v. *U Po Nyun.* (Although Easements Act does not apply to Burma, Court must have regard to that Act in considering the question of the acquisition of a right of way under S. 26, Limitation Act—A I R 1936 Rang 58, followed.)

Note 3

[1] See Peacock on "Easements," 3rd Edition, pages 414, 421, 422, 425.
[*See also* ('16) 3 AIR 1916 Sind 29 (31) : 33 Ind Cas 615 : 9 Sind L R 101, *Premji Ladha* v. *Visram Amul.*]

[2] Peacock on "Easements" 3rd Edition, page 425.

I, c. 39. Later still, user for the period of *living* memory came to be regarded as sufficient to raise the presumption of grant. Lastly, user for a period of twenty years was regarded as sufficient to raise the said presumption. This was based on the analogy of the provisions in the Statute of James I, c. 16, which limited the period for possessory actions to a period of twenty years. But whatever the length of the user was, it did not by itself *create* a right of easement, but was merely regarded as raising a *presumption* of a grant having been made or a covenant having been entered into. It was under the English Prescription Act, 2 & 3 Will. IV, Ch. 71,[2a] that a user for a particular period, *created* by its own force, a right which was non-existent.[3] But notwithstanding that prescription was thus made a mode of *acquisition* of easements, the principle that prescription *lies in grant* which in its turn is based upon the acquiescence or consent of the servient owner has never been lost sight of[4] and is found in the requirement that the user must be *nec vi, nec clam, nec precario,* i. e., peaceable, open and without interruption.[4a]

This section has followed the general principles of English law as to the acquisition of easements by prescription in that it prescribes that there must be user for twenty years and that such user must be open, peaceful, as of right and without interruption.[5] Although, thus, this section contains the elements which have come down from the times when long user was treated as raising a presumption of a grant or covenant, the acquisition of an easement under this section is independent of the capacity or incapacity of the servient owner to make a grant of the easement. Thus, where a person claimed a prescriptive right to the flow of rain water from his compound to a municipal drain it was held that whether the municipality could grant such an easement was immaterial for deciding the question of acquisition of the easement under this section.[6]

[2a] See pages 17 to 19.

[3] ('76-78) 1 Mad 335 (337, 338) : 1 Ind Jur 802 (DB), *Subramania Ayyar* v. *Ramchandra Rao.* (English law surveyed.)

('69) 5 Mad H C R 6 (20, 21), *Ponnasami Tevar* v. *Collector of Madura.* (Do.)

[4] *See* (1864) 1 Suth W R 230 (230), *Moonshee Zumer Ali* v. *Mt. Durgabun.* (Grant is implied in prescription.)

(1865) 4 Suth W R 49 (50), *Goluck Chunder Chowdhury* v. *Tarinee Churn Chukerbutty.* (An easement by prescription presupposes a grant.)

('26) 13 AIR 1926 Cal 647 (647) : 91 Ind Cas 348 (DB), *Mamin Khan* v. *Moisuddin Khan.*

[4a] ('17) 4 AIR 1917 Lah 382 (383) :37 Ind Cas 788 : 1917 Pun Re No. 4, *Sundar* v. *Nag.* (Enjoyment should be *nec vi, nec clam, nec precario.*)

('31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup* v. *Abdul Haq.*

[5] *See* ('25) 12 AIR 1925 Cal 788 (789): 87 Ind Cas 19 (DB), *Behari Lal Mukerjee* v. *Asutosh Banerjee.*

[6] ('38) 25 AIR 1938 Pat 423 (424) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality.*

Section 26
Note 4

4. Other modes of acquisition not barred. — The leading case on the point is *Rajrup Koer* v. *Abdul Hossein*,[1] where the plaintiff had enjoyed a right to an artificial watercourse for more than twenty years prior to the obstruction complained of, which was, however, more than two years before suit. It was held by the High Court of Calcutta that the claim to establish his right was barred under section 27 of the Act of 1871 (now S. 26). It was held by their Lordships of the Privy Council that the Act did not exclude other modes of acquisition, that, independent of the Act, a grant could be presumed from long user and that on the facts of that case a presumption should be made. Their Lordships observed as follows :

> "But the statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements."

It has consequently been held in numerous cases[2] that a grant or other legal origin could be presumed from long user and relief granted

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Note 4

[1] ('81) 6 Cal 394 (403, 404) : 7 Ind App 240 : 4 Sar 199 : 7 Cal L R 529 : 4 Ind Jur 530 : 3 Suther 816 : 4 Shome L R 7 (PC). (Long enjoyment — Legal origin, grant or agreement to create the right of easement must be presumed.)

[2] ('41) 45 Cal W N 486 (488), *Abdul Hamid* v. *Ahmed Ali.* (In such case enjoyment within two years of suit need not be proved.)

('24) 11 AIR 1924 Cal 369 (370) : 69 Ind Cas 183, *Amritnath Biswas* v. *Jogendra Chandra Bhattacharjee.* (Immemorial user—Grant may be presumed.)

('23) 10 AIR 1923 Cal 291 (291) : 67 Ind Cas 244, *Guru Prasanna Roy* v. *Fulchand Mondal.* (The provisions of S. 26 are not applicable where plaintiff sues for a declaration of a right of easement on the basis of lost grant.)

('23) 10 AIR 1923 Cal 200 (201) : 70 Ind Cas 263 (DB), *Ali Mohamed* v. *Sheikh Katu.* (The right claimed in this case was customary right of way— *Held* it was not necessary to rely on S. 26, if the existence of such a right could be otherwise established.)

('75) 15 Beng L R 361 (366, 367), *Modhoosooden Dey* v. *Bissonath Dey.* (Partition of common property of joint Hindu family many years back—Grant of easement may be presumed.)

('83) 8 Cal 956 (958) : 10 Cal L R 577 : 7 Ind Jur 86 (DB), *Charu Surnokar* v. *Dakouri Chunder Thakur.* (Relief was given on the basis of implied grant though the case did not fall under S. 26.)

('18) 5 AIR 1918 Cal 212 (213) : 46 Ind Cas 970 (DB), *Nagendra Nath Mazumdar* v. *Banwari Lal Das.* (Section 26 of the Limitation Act has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial.)

('08) 35 Cal 851 (857) (DB), *Eshan Chandra Samanta* v. *Nil Moni Singh.* (Customary right and right by vicinity can be acquired apart from S. 26.)

('20) 7 AIR 1920 Cal 940 (941) : 62 Ind Cas 633 (DB), *Surendra Nath* v. *Girdhari Singh.* (Acquisition of right by immemorial user.)

('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat* v. *Hem Chandra Roy.* (Ferry right is a right in the nature of an easement and can therefore be acquired independently of S. 26, Limitation Act.)

on that basis though the plaintiff is unable to establish his right to an easement under S. 26 of the Limitation Act.

('09) 2 Ind Cas 410 (411) (DB) (Cal), *Nerode Kanta Chakravarthy* v. *Bharat Chandra Chakrabarthy.* (Path set apart on partition of joint lands for use by both branches of the family — Section 26, Limitation Act, held inapplicable as there was no question of easement there being no dominant or servient tenement.)

('25) 12 AIR 1925 Pat 748 (749, 750) : 90 Ind Cas 356 (DB), *Abdul Ghani* v. *Harnam Singh.* (Long user may be attributed to implied grant.)

('26) 13 AIR 1926 Cal 507 (507) : 53 Cal 1016 : 91 Ind Cas 712 (DB), *Bhabadee Chatterjee* v. *Bhussan Chandra Mukerjee.* (Customary right can be acquired by long user.)

('81) 7 Cal 132 (136) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose* v. *Sonatun Chung Barooie.* (Right of passage for boats over another's land when it becomes covered with water during the rainy season can be acquired by immemorial user.)

('19) 6 AIR 1919 P C 52 (54) : 43 Mad 529 : 46 Ind App 302 : 54 Ind Cas 154 (P C), *Secretary of State* v. *Maharajah of Bobbili.* (Easement enjoyed over a long course of years—Grant may be presumed.)

('82) 1882 All W N 76 (76), *Sheikh Bhusai* v. *Mata Prasad.*

('81) 1881 Bom P J 322 (DB), *Ramchandra* v. *Narayan.* (No obstruction by owner of unoccupied ground to falling of plaintiff's eaves — No grant can be presumed.)

('89) 1889 All W N 133 (134), *Shankar Lal* v. *Motar Mul.* (A well and chabutra standing neither on the land of plaintiff or of defendant used by inhabitants of mohulla for bathing purposes for upwards of fortyone years—Interference with plaintiff's right though two years prior to the institution of the suit for disturbance of the right—Plaintiff's suit was decreed.)

('21) 8 AIR 1921 Bom 430 (432) : 45 Bom 1027 : 62 Ind Cas 65 (DB), *Rambhai* v. *Vallabha Jhaverbhai.* (Limit of time from which immemorial user may be inferred depends upon the circumstances of each case—But in any case such user must be in excess of twenty years.)

('81) 6 Bom 20 (23) (DB), *Punja Kuvarji* v. *Bai Kuvar.* (Immemorial user must be referred to legal origin.)

('89) 4 C P L R 16 (19, 20), *Amritnath* v. *Moti Lall.* (Thirty years user before the Easements Act came into force—Plaintiff's claim for easement was decreed.)

('16) 3 AIR 1916 Mad 1001 (1005) : 31 Ind Cas 528 (DB), *Muthu Goundan* v. *Anantha Goundan.* (Where open enjoyment has taken place for a long series of years, title by prescription can be acquired independently of the statute and a suit to establish that right can be brought within twelve years after the obstruction.)

('36) 23 AIR 1936 Mad 682 (687) : 164 Ind Cas 764 : 59 Mad 979, *Nagarethna Mudaliar* v. *Sami Pillai.* (Prescription at Common law as such is not applicable to India—Three methods of acquiring easements by prescription under the Indian law pointed out.)

('29) 16 AIR 1929 Mad 819 (820, 821) : 122 Ind Cas 497 (DB), *Ramakrishna Iyer* v. *Ramanatha Pattar.*

('22) 9 AIR 1922 Mad 5 (6) : 66 Ind Cas 11 : 45 Mad 633 (DB), *Kunjammal* v. *Rathanam Pillai.* (In the case of long enjoyment of a right, legal origin should be presumed.)

('82) 5 Mad 226 (228, 229) (DB), *Srinivasa Rau* v. *Secretary of State.*

('82) 5 Mad 253 (255): 6 Ind Jur 465 (DB), *Zamindar of Kurupam* v. *Zamindar of Merangi.*

[*See* ('81) 6 Cal 812 (814) (DB), *Achul Mahta* v. *Rajun Mahta.* (The case was remanded for finding on the issue whether there was evidence of enjoyment of

An easement such as a right of way may be acquired, as regards a portion of the way, by grant and as regards another portion by prescription.[3]

4a. Acquisition of rights other than easements. — This section only deals with the acquisition of *easements*. For the meaning of "easement," see Notes under section 2, clause (5).

A right to a way claimed by the public or a right to a village pathway claimed by the residents of a village is not an *easement*. (See Note 7.) Similarly, the right claimed by the Mahomedans of a certain locality to bury their dead in a particular piece of land is not an easement. (See Notes 4 and 5 under section 2 (5).) Such rights can be based on custom raising a presumption of grant.[1] Immemorial user is not necessary, as in English law, to prove such custom.[2] See the case cited below for the essentials of a valid customary right to a village pathway.[3] A right to pasturage cannot be claimed by an indefinite body of persons on the basis of a *lost grant*.[4] But such a right can be based on custom.[5]

5. Who can acquire easements. — An easement may be acquired in respect of a tenement either by the owner of such tenement or on his behalf by any person in possession thereof.[1] Thus, a tenant of the owner can acquire an easement for the benefit of the dominant tenement in his possession and the owner may thus gain a prescriptive right.[2] One of two or more co-owners of immovable property may,

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the right of such character and duration as to justify the presumption of grant independent of S. 26, Limitation Act.)]

[*See also* ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao* v. *Badar Farid*. (Right of Mahomedans to bury their dead — Grant was presumed from long user—6 Cal 394 (PC) relied on.)]

[3] ('20) 7 AIR 1920 Cal 600 (601) : 57 Ind Cas 852 (DB), *Kala Chand Mukhapadhya* v. *Jotindra Nath Chakerbutty*.

Note 4a

[1] ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao* v. *Badar Farid*. (Right to bury dead in a particular piece of land.)

[2] ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao* v. *Badar Farid*.

('38) 25 AIR 1938 Cal 202 (204): 175 Ind Cas 252, *Harisadhan De* v. *Radhika*.

[3] ('38) 25 AIR 1938 Cal 202(204): 175 Ind Cas 252, *Harisadhan De* v. *Radhika*.

[4] ('38) 42 Cal W N 1102 (1104), *Abdul Hosain* v. *Sadai Gobinda*. (Essentials of custom to establish such right indicated.)

[5] ('38) 42 Cal W N 1102 (1104), *Abdul Hosain* v. *Sadai Gobinda*.

Note 5

[1] See Peacock on "Easements," 3rd Edition, p. 317.

Compare also Section 4 of the Easements Act.

See also the cases cited in foot-note 2.

[2] ('15) 2 AIR 1915 Cal 403 (404) : 31 Ind Cas 549, *Madan Mohan* v. *Sashi Bhusan*. (Note that even though this case is from Bengal where Easements Act does not apply yet the principle of S. 12 of Easements Act has been applied.)

as such, with or without consent of the other or others, acquire an easement for the beneficial enjoyment of such property.[3]

At the same time, as seen in S. 2 (5) Note 4, an easement implies that the servient tenement does not belong to the person claiming the easement.[4] (See also section 4 of the Easements Act.) Hence, a tenant cannot acquire either for himself or for his landlord an easement on land which belongs to himself.[5] So also, one co-owner cannot acquire an easement over the joint property.[6] See also Note 12.

As to whether a tenant may acquire an easement against his own landlord (or against another tenant under the landlord) in respect of the tenement demised, see Note 13.

See also Note 9a and section 12 of the Easements Act.

6. Easements of light and air. — Every owner of land has a *natural right* to so much light and air as pass vertically thereto. (See Easements Act, S. 7.) But he may have acquired an *additional* right the enjoyment of which is a restriction of the enjoyment by the neighbour of his natural rights. The additional right to light and air is an easement, and if acquired will be a legal right that the servient owner shall not by any act on the servient tenement diminish the quantity of light and air to which the dominant owner is so entitled. (See Note 2 to S. 2, sub-s. (5).) It is thus a *negative* easement.

Where a right to light and air is enjoyed through an *aperture* in a wall, it is not necessary that the aperture should belong to the

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('34) 21 AIR 1934 Mad 575 (578) : 152 Ind Cas 216, *Chinnasamy Goundar* v. *Balasundra.* (Possession as occupier can be tacked to enjoyment as owner.)

('18) 5 AIR 1918 Oudh 296 (299) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad* v. *Khuda Baksh.* (The enjoyment of the right may be by successive tenants of the dominant heritage.)

[3] See Section 12 of the Easements Act, 1882.

[4] ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath* v. *Muni Lal.* (Section 26 assumes that the dominant and servient tenements belong to different persons.)

[5] ('39) 26 AIR 1939 Rang 421 (422) : 1940 Rang L R 93 : 185 Ind Cas 605, *Tan Sit Shan* v. *U Po Nyun.* (Case relating to right of way—15 Beng L R 361 and A I R 1926 Mad 728 (FB), followed.)

[6] ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath* v. *Muni Lal.* (Wall erected by one co-owner on top of joint wall is joint property — He cannot acquire an easement in respect of ventilators in the top wall — NOTE.—The facts of this case are not clear but if the co-owners of the wall are owners of the properties on either side of the wall there does not seem to be any difficulty in holding that one of them can acquire an easement of light and air through the ventilators in the common wall, as in such a case the owners of the dominant and servient tenements will be different persons notwithstanding the common ownership of the party wall—For such a case, see A I R 1923 Lah 249 where one of the co-owners of a common wall was held entitled to an easement against the other co-owner in respect of the ventilators in the common wall.)

dominant owner. The aperture may belong even to the servient owner. The ownership of the aperture is not an essential matter.[1]

As to the *extent* of the right to the access of light and air that can, under law, be recognized as an easement, see Note 9a to S. 2, sub-s. (5).

7. Right of way. — In *Chuni Lall* v. *Ram Kishen Sahu*,[1] Wilson, J., observed as follows :

> "It may be useful to premise that by the Common Law of England there are three distinct classes of rights of way and other similar rights. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication.
>
> "It is unnecessary to enquire whether the mode of acquiring each of these classes of rights is necessarily the same in all cases in England and in India. But it is, I think, important to remember that these three classes of rights exist in the one country as well as in the other."

This has been followed in the undermentioned cases.[2]

A right for passage of boats through another man's channel is analogous to a right of way.[3]

Note 6

[1] ('32) 19 AIR 1932 Cal 249 (252) : 59 Cal 260 : 131 Ind Cas 193 (DB), *Jotindra Mohan* v. *Probodh Kumar*.

('23) 10 AIR 1923 Lah 249 (250), *Nandu Shah* v. *Sant Ram*. (Where the dominant owner had an easement right in respect of ventilators in a wall of his house, the fact that the adjoining servient owner acquires by agreement a joint ownership in the wall will not operate to extinguish the easement—It would have been otherwise if the former had acquired the joint ownership of the whole house of the servient owner.)

[But see ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath* v. *Muni Lal*. (One co-owner of a wall cannot acquire as against another co-owner an easement in respect of ventilators in the wall.)]

Note 7

[1] ('88) 15 Cal 460 (464, 465) : 12 Ind Jur 425 (FB).

[2] ('38) 25 AIR 1938 Cal 202(203): 175 Ind Cas 252, *Harisadhan De* v. *Radhika*.

('30) 17 AIR 1930 Cal 286 (287): 57 Cal 526: 125 Ind Cas 600, *Pran Nath Kundu* v. *Emperor*. (A public right of way in the full sense of the term is unconnected with any dominant tenement.)

[3] ('81) 7 Cal 145 (147) : 8 Cal L R 375 (DB), *Doorga Churn Dhur* v. *Kally Kumar Sen*. (A right of way is ordinarily a right of passing in a particular line, or direction and not a right to vary it at pleasure.)

As to the *extent* of a right of way that can be acquired, see Note 9a to section 2 sub-section (5).

An easement as to a right of way necessarily implies that the right is vested in a determinate individual or individuals. (See Note 8 under S. 2 (5).) Hence, a right of way belonging to the public in general or a particular section of the public cannot be claimed as an *easement*. Thus, a customary right to a village pathway is not an easement.[4]

8. Right to watercourse or to the use of any water.— As has been seen already in the Notes to S. 2 sub-s. (5), where water flows in a *natural* defined channel, each successive riparian owner is *prima facie* entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of it. It has also been pointed out that a right, which is an interference with the natural rights of riparian owners to use the river water for ordinary purposes, can be acquired by prescription.[1]

But the said principles do not apply to *artificial* watercourses. In the case of artificial watercourses any right to the flow or the use of water must rest on some grant or arrangement proved or presumed.[1a] Where the artificial watercourse is found to have been for a *temporary* purpose and liable to variations (e. g., where it is created for running a mill), no grant of right to an easement in the water (which must be of permanent character), can be presumed from long enjoyment. In such a case, therefore, there can be no prescriptive right also to the use of the water.[2] Where, on the other hand, the watercourse though artificial is intended to be a *permanent* one, e. g., channels constructed as part of a permanent system of irrigation, a long enjoyment of the water can certainly give rise to a presumption of a grant. A prescriptive right to the use of the water in such a channel can be acquired by prescription.[3]

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[4] ('38) 25 AIR 1938 Cal 202 (203, 204) : 175 Ind Cas 252, *Harisadhan De* v. *Radhika Prosad.*

Note 8

[1] ('08) 35 Cal 851 (857) (DB), *Eshan Chandra Samanta* v. *Nil Moni Singh.*

[1a] ('79) 4 Cal 633 (637) : 6 Ind App 33 : 3 Sar 856 : 3 Ind Jur 179 : 2 Shome L R 194 (PC), *Ramessur Persad* v. *Koonj Behary.*

('23) 10 AIR 1923 Lah 257 (258) : 73 Ind Cas 489, *Bela Singh* v. *Bali Ram.*

[2] (1839) 8 L J Ex 201 (215) : 52 R R 671, *Arkwright* v. *Gell.*

(1848-49) 18 L J Ex 305 (313) : L R 3 Ex 748 : 13 Jur 472 : 77 R R 809, *Wood* v. *Waud.*

[3] ('79) 4 Cal 633 (638, 639) : 6 Ind App 33 : 3 Sar 856 : 3 Ind Jur 179 : 2 Shome L R 194 (PC), *Ramessur Persad* v. *Koonj Behary.*

('84) 7 Mad 530 (534), *Rayappan* v. *Virabhadra.* (The right to artificial watercourses as against the party creating them depends upon the character of the watercourse and upon the circumstances under which it was created.)

('01) 14 C P L R 145 (146, 149) (DB), *Chakradhar Singh* v. *Tikaram Saw.* (Following (1839) 8 L J Ch 201.)

('03) 30 Cal 281 (284), *Madhub Dass Bairagi* v. *Jogesh Chunder Sarkar.*

An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation by means of an embankment erected on the dominant tenement.[4]

9. "Any other easement." — The expression "any other easement" includes a variety of rights which can be acquired as easements but not falling within the classes of easements specified in the section. For instances of such easements, see Note 9 to S. 2, cl. (5).

9a. "Enjoyed." — For the acquisition of an easement under this section it must have been enjoyed by the *claimant* or some person on his behalf. Where a scavenger, who is a *municipal* servant, passes over A's land for conserving B's latrines it has been held by the Rangoon High Court that it cannot be said that B enjoys the right of way as contemplated by this section.[1] A different view has, however, been held by the Bombay High Court.[1a] See also the case cited below.[2]

A right may be "enjoyed" during a certain period although there may be no *actual user* of the subject-matter of the right at that time. See Notes 14 and 15.

10. "Peaceably." — It is only where the user is *nec vi, nec clam* and *nec precario* that a prescriptive right to an easement can be acquired. The qualification "peaceably" lies in the word *nec vi*, that is, without violence.[1] The word "peaceably" therefore means that the dominant owner has neither been obliged to resort to *physical force* himself at any time during the period of enjoyment, nor had he been prevented by the use of *physical force* by the defendant in his enjoyment of such right.[2] In the undermentioned case[3] it was held that the words "peaceable enjoyment" within the meaning of S. 15 of the Easements Act, corresponding to this section, mean enjoyment without "interruption" by the servient owner sufficient to defeat the enjoyment. A mere protest, it is conceived, would not render the enjoyment otherwise than peaceable. See Note 14.

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[4] ('03) 30 Cal 1077 (1082) (DB), *Budhu Mandal* v. *Maliat Mandal*.
[*See also* ('27) 14 AIR 1927 Lah 216 (217) : 100 Ind Cas 498, *Tunnan* v. *Tota*. (Right to take water through another person's property is an easement within the meaning of S. 26, Limitation Act.)]

Note 9a

[1] ('39) 26 AIR 1939 Rang 34 (41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*. (13 Cal 136 (PC) and AIR 1926 Bom 282 distinguished. Per Braund, J.—"Enjoy" in S. 26 means "exercise"—In this case the claimant of the easement never had any right to say when or how or over what land or by what method the municipal scavenger should carry out his work.)

[1a] ('22) 9 AIR 1922 Bom 79 (79) : 76 Ind Cas 754, *Yosef David Varulker* v. *Moses Solomon Talker*. (Right of passage for scavenger can be acquired by twenty years' user.)
('26) 13 AIR 1926 Bom 282 (283) : 95 Ind Cas 170, *Ram Chandra Wasudeo* v. *Anant Laxman*. (Passage for sweeper can be acquired by prescription though sweeper is a municipal servant.)

[2] ('38) 42 Cal W N 1102 (1104), *Abdul Hosain* v. *Sadai Gobinda*. (Right to pasturage claimed by villagers —As *all* the villagers could not have enjoyed the right during the statutory period, the right could not be acquired under this section—The decision does not refer to the point that an indefinite body of persons cannot acquire an easement—See Section 2 (5) Note 8.)

Note 10

[1] ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan* v. *Set Lan*.

11. Enjoyment should be open.—The qualification "openly" lies in the words "*nec clam*"[1] which is found in the expression *nec vi, nec clam, nec precario.* The words "*nec clam*" mean "without stealth" and the reason of the requirement that the user must be open lies in the fact that *acquiescence* lies at the root of all prescription, and where the enjoyment is not open it cannot be said that the owner of the servient tenement, actually or constructively acquiesced in or consented to the easement. In *Angus* v. *Dalton*,[2] Thesiger, L. J., observed that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and as a consequence, no presumption of right on the part of the dominant. In *Sturges* v. *Bridgman*,[3] the same learned Lord Justice observed as follows :

> "A man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests or endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent can raise no presumption of consent or acquiescence. Upon this principle it was decided in *Webb* v. *Bird*,[4] that currents of air blowing from a particular quarter of the compass and in *Chasemore* v. *Richards*,[5] that subterranean water percolating the strata in no known channels could not be acquired as an easement by user; and in *Angus* v. *Dalton*,[6] a

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[2] ('16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan* v. *Anantha Goundan.* (Thus oral opposition or oral expressions of dissent cannot prevent the enjoyment being peaceful.)

('31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup* v. *Abdul Haq.* (Mere denial by the defendant of plaintiff's right and an unsuccessful attempt to have it negatived in Courts of law does not prevent the plaintiff acquiring the right.)

[3] ('19) 6 AIR 1919 Bom 94 (95) : 49 Ind Cas 963 (DB), *Kurvarbai* v. *Jamsedji.* (Protests in this case were made by giving written notices.)

Note 11

[1] ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan* v. *Set Lan.*

[2] (1878) 27 W R (Eng) 623 (628) : 4 Q B D 162 : 48 L J Q B 225 : 40 L T 605.

[3] (1880) 28 W R (Eng) 200 (200, 203) : 48 L J Ch 785 : 11 Ch D 852 : 41 L T 219.

[4] (1861) 4 L T 445 (447) : 10 C B (NS) 268 : 30 L J C P 384 : 9 W R (Eng.) 899.

[5] (1859) 7 H L C 349 : 29 L J Ex 81 : 5 Jur (NS) 873 : 7 W R (Eng.) 685.

[6] (1878) 4 Q B D 162 (181, 187) : 48 L J Q B 225 : 27 W R (Eng.) 623 : 40 L T 605.

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> case of lateral support of buildings by adjacent soil, which came on appeal to this Court, the principle was in no way impugned. . . . . . . It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply consent to your neighbour enjoying something which passes from your tenement to his, or subjecting your tenement to something which comes from his when in both cases you have no power of prevention.
>
> "But the affirmative easement differs from the negative easement in this — that the latter can in no circumstances be interrupted except by acts done upon the servient tenement; the former constituting as it does a direct interference with the enjoyment by the servient owner of his tenement, may be subject of legal proceedings as well as of physical interruption. To put concrete cases the passage of light and air to your neighbour's windows may be physically interrupted by you but gives you no legal ground of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages or for an injunction, or both."

Actual knowledge is, however, not necessary on the part of the servient owner of the right enjoyed by the dominant owner.[7] The requirement that the user should be open shows, however, that it must be of a nature from which a presumption that the owner of lands had knowledge and had acquiesced in the right, might be drawn.[8]

12. As an easement. — The right claimed must have been enjoyed *as an easement*. If the acts done by the person claiming the easement are only referable to a purported character of owner, they cannot sustain a subsequent claim for an easement in respect of the property.[1] The mere fact, however, that in litigation the claimant puts forward a claim of ownership, which is found to be not true, is not conclusive on the question whether the right was enjoyed as an easement or not and will not necessarily entail the dismissal of the suit.[2]

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[7] ('39) 26 AIR 1939 Rang 34 (39) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*. (Per Mackney, J., in the judgment appealed from —10 Cal 214 referred.)
('84) 10 Cal 214 (218) (DB), *Arzan* v. *Rakhal Chunder Roy Chodhury*.
('89) 1889 Bom P J 196, *Ganpat Rao* v. *Baji Shamraj*. (The section only requires that the right should be exercised openly—10 Cal 214 followed.)
('16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan* v. *Anantha Goundan*. (Lunacy or imprisonment of the servient owner cannot prevent acquisition of easement under the Easements Act.)

[8] ('39) 26 AIR 1939 Rang 34 (39) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*. (Per Mackney, J., in the judgment appealed from —10 Cal 214, referred.)
('29) 16 AIR 1929 Bom 144 (146) : 116 Ind Cas 231 (DB), *Ramchandra Trimbak* v. *Hari Martand*. (Case under Easements Act.)

Note 12

[1] ('26) 13 AIR 1926 Mad 728 (732) : 49 Mad 820 : 96 Ind Cas 968 (FB), *Subba Rao* v. *Lakshmana Rao*. (The question to what purported character are the acts of user to be ascribed is one which the Court *must* answer — AIR 1916 Mad 718, overruled; 34 Cal 51 and (1911) 1 Mad W N 95 dissented from; AIR 1915 P C 131 and (1914) L R 3 K B 911, followed.)

It has been seen in Note 4 to S. 2, sub-s. (5) that the essence of an easement is that there should be two tenements belonging to *different* persons, the maxim being "None can have land and also an easement over it." Where therefore there is unity of possession or ownership in the same person of both the tenements, there cannot be any enjoyment *as an easement* during the period of unity.[3]

('39) 26 AIR 1939 Rang 34 (35, 36) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm.* (Per Mackney, J., in the judgment in S. A. No. 275 of 1937—The words "as an easement" qualify the words "claiming title thereto" and not the word "enjoyed".)

('39) 26 AIR 1939 Sind 110 (110, 111) : I L R (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal* v. *Naraindas Pahlajrai.*

('32) 19 AIR 1932 Bom 513 (514, 515) : 56 Bom 427 : 139 Ind Cas 571, *Marghabhai Vallavbhai* v. *Motibhai Mithabhai.* (A person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and that he is exercising right over property which does not belong to him : NOTE — This view is criticised in A I R 1939 Bom 149.)

('92) 16 Bom 592 (595) (DB), *Chunilal Fulchand* v. *Mangaldas Govardhandas.*

('27) 14 AIR 1927 Nag 386 (386) : 104 Ind Cas 503, *Tulsiram* v. *Ganpat.* (User as owner cannot be made basis of easement.)

('30) 17 AIR 1930 Pat 7 (9, 10) : 124 Ind Cas 385 (DB), *Kartic Manjhi* v. *Banmali Mukerji.* (AIR 1926 Mad 728 (FB) followed.)

[*See* ('10) 8 Ind Cas 502 (503) (DB) (Mad), *Venkata Varahia Dikshitar* v. *Subbaroya Pillai.* (A false plea of ownership would not necessarily preclude the acquisition of right of easement.)]

[*See also* ('39) 26 AIR 1939 Bom 149 (150) : ILR (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama* v. *Tukaram.* (In this case it is held that while acts done under a definite claim of ownership cannot establish an easement a *conscious* assertion of an easement is not necessary.)]

[But see ('33) 20 AIR 1933 Bom 122 (123) : 144 Ind Cas 998 (DB), *Tamanbhat Shankarbhat* v. *Krishtacharya Tamanacharya.* (Obiter.)

('22) 9 AIR 1922 Bom 199 (200) : 46 Bom 200 : 64 Ind Cas 517 (DB), *Dharamdas Kaushalyadas* v. *Ranchhodji Dayabhai.* (Per Macleod, C. J.)]

[2] See the cases cited in foot-note 1 above.

('20) 7 AIR 1920 Cal 940 (940) : 62 Ind Cas 633 (DB), *Surendra Nath Singh* v. *Girdhari Singh.* (16 Bom 592 not followed ; A I R 1916 Mad 718 and 34 Cal 51 (FB), followed.)

('39) 26 AIR 1939 Sind 110 (112) : ILR (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal* v. *Naraindas Pahlaj Rai.* (But if plaintiff in witness box leads evidence to show that he has been the owner of the land over the statutory period he clearly destroys his case as to easement.)

[*See also* ('39) 26 AIR 1939 Bom 149 (150) : I L R (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama* v. *Tukaram.* (Ownership and easement can be claimed in the alternative—34 Cal 51 (FB) followed.)]

[3] ('75) 15 Beng L R 361 (365, 366), *Modhoosoodhun* v. *Bissonath Dey.*

('93) 15 All 270 (282) : 1893 All W N 151 (DB), *Wutzler* v. *Sharpe.*

('83) 1883 All W N 66 (67), *Jalaluddin* v. *Asad Ali.*

[*See* ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago* v. *Mt. Lahani.* (A right of easement and a right of ownership are mutually exclusive.)]

Where the ownership of a property vests *jointly* in several persons, they are all owners having a right to use the property in whole or in part *(per my et per tout)* and the mere fact that each is exclusively enjoying some portion which is undivided from the rest cannot enable the one to acquire a right of easement over another plot held exclusively by other cosharers.[4] See also Note 5.

An easement can be claimed only by a determinate person or persons. A right claimed by the public in general or a section of the public, such as a public right of way is not an *easement*. (see Note 7.) See also S. 2 (5) Note 8.

An act done in the exercise of a statutory duty or right cannot be relied on to create an easement.[5]

13. **"As of right."**— The qualification "as of right" lies in the words "*nec precario*" which are found in the expression "*nec vi, nec clam, nec precario*" and mean "without permission or favour."[1] A user as of right does not therefore mean a *rightful* user or a user without trespass[2] but simply means a user in the assertion of right,[3] as if the

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[*See also* ('1863) 2 Bom H C R 176 (178), *Lalji Ratanji* v. *Ganga Ram Tulja Ram*. (In a suit brought to establish a right of ownership over certain land it is not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same.)]

[4] ('25) 12 AIR 1925 Pat 492 (493) : 87 Ind Cas 736 (DB), *Kameshwar Narain Singh* v. *Janardhan Prasad Narain Singh*. (A person cannot claim right of easement over any portion of the village of which he is a co-owner.)

('30) 17 AIR 1930 Sind 34 (35) : 120 Ind Cas 497 : 24 Sind L R 208 (DB), *Girdharidas Radhakishandas* v. *Thirthadas Gokaldas*. (32 Cal 837 followed.)

[*See also* ('26) 13 AIR 1926 Bom 545 (545) : 97 Ind Cas 691 (DB), *Rajubhai Mohanbhai* v. *Lalbhai Mulchand*. (Joint property—Right of easement does not arise.)]

[5] ('39) 26 AIR 1939 Rang 34 (40, 41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*. (The passage of scavenger across another's land to plaintiff's latrine was an act done in the exercise of the statutory right under the Burma Municipal Act and could not give rise to an easement.)

Note 13

[1] ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan* v. *Set Lan*.

('18) 5 AIR 1918 Oudh 296 (299) : 21 Oudh Cas 78 : 45 Ind Cas 585, *Ganesh Prasad* v. *Khuda Baksh*. (Non-permissive user is as of right.)

[2] ('39) 26 AIR 1939 Rang 34 (41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*.

('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality*. (23 Suth W R 52 and A I R 1931 Lah 395, relied on.)

('75) 23 Suth W R 52 (53), *Alimooddeen* v. *Wuzeer Ali*.

[3] ('39) 26 AIR 1939 Rang 34 (41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm*.

('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality*. (There should be the assertion of a right to act against the will of the servient owner—23 Suth W R 52 and A I R 1931 Lah 395, relied on.)

('75) 23 Suth W R 52 (53), *Alimoodeen* v. *Wuzeer Ali*.

claimant was the true owner of the right.[4] In other words, it means an *adverse* exercise of a growing right against the servient tenement.[5] In the undermentioned case[6] it was held that an enjoyment in such a manner as not to involve the admission of any obstructive right in the owner of the servient tenement was an enjoyment as of right. As will be observed in Arts. 142 and 144 Note 18 it is a fundamental principle that where a possession can be referred to a lawful title it will not be considered to be adverse, under similar principles an act which is traceable to a statutory right will not be deemed to be adverse so as to create a prescriptive right under this section.[6a] A *permissive* user is not a user as of right and cannot be the basis of any prescriptive right.[7] Whether a user was as of right or not must be decided on a

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('31) 18 AIR 1931 Lah 395 (397) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup* v. *Abdul Haq.* ('As of right' is not synonymous with 'rightfully'—15 Beng L R 361 followed.)

[4] **('17) 4 AIR 1917 Lah 382 (383):** 1917 Pun Re No. 4 : 37 Ind Cas 788, *Sundar* v. *Nag.*

[5] **('70) 13 Suth W R 344 (344)** : 5 Beng L R App 12 (DB), *Askar* v. *Ram Manik Roy.*

('75) 15 Beng L R 361 (365, 366), *Modhoosoodhun Dey* v. *Bissonath Dey.* [*See also* **('09) 3 Ind Cas 271 (273)** (DB) (Lah), *Sahib Ditta* v. *Daya Singh.*]

[6] **('83) 7 Bom 522 (524) (DB),** *Mathuradas* v. *Bai Amthi.* (Enjoyment of light and air through apertures in wall.)

[6a] **('39) 26 AIR 1939 Rang 34 (40): 180 Ind Cas 477 (DB),** *Murugappa Chettyar* v. *K. S. A. K. Chettyar Firm.* (Right of municipal scavengers to enter on any land for the purpose of conserving latrines is a statutory right under the Burma Municipal Act and no question of easement can arise in regard to such right.)

[7] **('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315,** *Dwarka Prasad* v. *Patna City Municipality.* (Right to use of municipal drain—Municipality being entitled under the Municipal Statute to enlarge, lessen, close up or remove drain—Plaintiff's use of drain held only permissive.)

('70) 13 Suth W R 449 (449) (DB), *Aukhoy Coomar* v. *Mollah Nobee Nowaz.* (Servient owner resuming the exclusive user of his land occasionally — Dominant owner's user is permissive.)

('17) 4 AIR 1917 Lah 382 (383) : 1917 Pun Re No. 4 : 37 Ind Cas 788, *Sunder* v. *Nag.* (Annual payment for user—User was not as of right.)

('93) 16 Mad 304 (304, 305) (DB), *Nagappa* v. *Subba.* (Kumki right of landholders in South Canara is a right exercised over Government waste by the permission of the Government and is not an easement right.)

('70) 13 Suth W R 344 (344) : 5 Beng L R App 12 (DB), *Askar* v. *Ram Manik Roy.* (Possession in case of easements must be exercised adversely to the owner of land over which the easement is claimed.)

('24) 11 AIR 1924 All 50 (50) : 74 Ind Cas 481 (DB), *Panna Lal* v. *Bohra Panna Lal.*

('89) 1889 Bom P J 196 (DB), *Ganpatrav* v. *Baji Shamraj.*

('72) 17 Suth W R 11 (11) (DB), *Futteh Ali* v. *Asgur Ali.* (To constitute a right of way, the right must not be exercised at the will and favour of the other party.)

('37) 24 AIR 1937 Lah 320 (321) : 171 Ind Cas 40, *Asmat Ullah* v. *Rahmat Ullah.* [*See also* **('34) 21 AIR 1934 Pesh 96 (98) : 152 Ind Cas 141 (DB),** *Galun Shah* v. *Nawab Ali.* (Where the grant is in the nature of a license and not of an easement, right of user cannot be acquired by prescription.)

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Note 13

consideration of the character of the ground (in the case of a right of way), the space for which the right is claimed, the relations between the parties and the circumstances in which the user took place.[8] It can, generally, only be established indirectly as a matter of inference from circumstances.[9] Where long open user is proved, the *presumption*[9a] however is, in the absence of other circumstances, that it has been as of right.[10] This is the general trend of opinion though it has

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(1900) 24 Bom 156 (165) : 26 Ind App 184 : 2 Bom L R 518 : 7 Sar 609 (PC), *Sultan Nawaz Jung* v. *Rustumji Nanabhoy Byramji Jijibhoy.* (Case under the Easements Act—Right enjoyed in pursuance of an agreement.)

('33) 20 AIR 1933 Cal 539 (541) : 146 Ind Cas 427 (DB), *Brajendra Kishore* v. *Iswar Kaibarta.* (Every act of fishing by license — There is no enjoyment as of right so as to give rise to the customary right of fishing.)]

[8] ('29) 16 AIR 1929 Bom 144 (147) : 116 Ind Cas 231 (DB), *Ramachandra Trimbak* v. *Hari Martand.*

('39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi.* (The mere fact that plaintiff must have erected buildings on the property with the permission of the defendants does not make the enjoyment of light and air through the windows of that building permissive.)

('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality.* (Municipality enpowered to enlarge, lessen or close up a drain under S. 223 (1) of the Bihar and Orissa Municipal Act—Rain water from plaintiff's compound flowing into the drain for more than twenty years—*Held* plaintiff was not acting in assertion of a private right against statutory rights of the Municipality, hence the enjoyment was not "as of right" and the drain could be closed by the Municipality—16 Ind Cas 893 referred.)

('22) 65 Ind Cas 509 (510) (DB) (Cal), *Mahomed Nural Huq* v. *Baksu Mandal.* (Fact that land is waste land does not necessarily show that no easement can be acquired over it—8 Cal W N 359 followed.)

('11) 9 Ind Cas 965 (965) (DB) (Cal), *Meser Mullick* v. *Hefizuddin Mullick.* (Because the exercise of the right of way is not proved to be permissive, it cannot be presumed to be exercised 'as of right.')

[9] ('06) 1906 Pun L R No. 26, p. 95, *Mir Mansab Ali* v. *Muhammad Akbar.*

[9a] ('26) 13 AIR 1926 Oudh 237 (238, 239) : 91 Ind Cas 987, *Majid Hussain* v. *Faiyaz Hussain.* (Rebuttable presumption is used.)

[10] ('26) 13 AIR 1926 Lah 522 (522) : 95 Ind Cas 269 (DB), *Piare Lal* v. *Ishaq Lal.* (An open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is *prima facie* evidence of enjoyment as of right—The presumption is that the user is of right.)

('75) 24 Suth W R 228 (229), *Poorno Chunder Chatterjee* v. *Shurut Chunder Bhuttacharjee.* (User for upwards of twenty years proved.)

('17) 4 AIR 1917 Mad 386 (388, 389) : 35 Ind Cas 749 (DB), *Swaminatha Mudaly* v. *Velu Mudaly.* (Case of right to water — 8 Cal W N 359 distinguished on the ground that that case referred to right of way.)

('26) 13 AIR 1926 Pat 460 (460, 461) : 96 Ind Cas 1010 (DB), *Nazir Hussain* v. *Aulad Haider.* (The rule that presumption from user should be that it is as of right must depend not only upon the circumstances of each case but also of each particular country—8 Cal W N 359 followed.)

('21) 8 AIR 1921 Nag 127 (128) : 61 Ind Cas 569, *Hari* v. *Mahadeo.* (14 Suth W R 124 followed.)

('20) 7 AIR 1920 Lah 354 (355) : 1 Lah 206 : 56 Ind Cas 728, *Diwan* v. *Jagta.*

('23) 10 AIR 1923 Lah 594 (594) : 83 Ind Cas 538, *Bali Ram* v. *Bela Singh.* (Thirty years user without permission or not in pursuance of any arrangement — Enjoyment of easement is of right.)

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been held in some cases[11] that such a presumption, though applicable under the English law, is not applicable in this country where the conditions are different.

The words "as of right" clearly indicate that there must be two tenements belonging to different persons. Hence a co-owner cannot acquire an easement in respect of the joint property.[11a] See Note 5.

('25) 12 AIR 1925 Lah 344 (345) : 86 Ind Cas 595, *Ishaq Lall* v. *Piyari Lal.* (A I R 1922 Mad 5 followed.)

('22) 9 AIR 1922 Mad 5 (6) : 66 Ind Cas 11 : 45 Mad 633 (DB), *Kunjammal* v. *Rathnam Pillai.* (User proved — Presumption is as of right — The distinction made between case of right of way and right to water in A I R 1917 Mad 386 not approved.)

('34) 21 AIR 1934 Pat 11 (13) : 148 Ind Cas 215 (DB), *Radha Kishun* v. *Sunder Mal.* (Long enjoyment in a particular way proved — It is the duty of Court to clothe such enjoyment with right.)

('22) 9 AIR 1922 Upp Bur 23 (23) : 4 Upp Bur Rul 90 : 70 Ind Cas 915, *Maung Po Hla* v. *Maung Po Sein.*

('25) 12 AIR 1925 Nag 270 (271) : 85 Ind Cas 81, *Narain* v. *Ikram.* (A I R 1920 Nag 26 followed.)

('28) 111 Ind Cas 196 (197) (Lah), *Laba Singh* v. *Sunder Singh.* (When a right of way has been used peaceably and openly without interruption for 20 years its user as of right may be legally inferred.)

('35) 22 AIR 1935 Lah 937 (938, 939) : 157 Ind Cas 871, *Bishan Das* v. *Behari Lal.*

('32) 19 AIR 1932 Cal 249 (251) : 59 Cal 260 : 138 Ind Cas 193 (DB), *Jotindra Mohan Mitter* v. *Probodh Kumar Dutt.*

('37) 24 AIR 1937 Pat 589 (591) : 172 Ind Cas 516, *Balakrishna Das* v. *Shyam Sunder.*

[See however ('38) 25 AIR 1938 Cal 202 (204) : 175 Ind Cas 252, *Harisadhan De* v. *Radhika Prosad.* (Customary right to village pathway—Evidence of user of pathway as of right is necessary—Mere evidence of user openly and without obstruction is not enough—Such user is consistent with its being permissive.)]

[11] ('29) 16 AIR 1929 Pat 124 (125) : 115 Ind Cas 884 (DB), *Nasiruddin* v. *Deokali.* (Mere period of long user does not give rise to a presumption that the user was 'as of right'—Hence one who claims a right by reason of long user must plead and prove that the user was under a claim of right.)

('23) 10 AIR 1923 Nag 192 (192) : 71 Ind Cas 831, *Sonba* v. *Dattatraya.* (Long user may not always raise a presumption of grant.)

('13) 18 Ind Cas 211 (211) (DB) (Cal), *Baroda Kant Karmakar* v. *Sreenath Sil.* (8 Cal W N 359 followed.)

('29) 16 AIR 1929 Cal 542 (543) : 56 Cal 927 : 119 Ind Cas 293 (DB), *Siti Kanta Pal* v. *Radha Gobinda Sen.*

('23) 10 AIR 1923 Lah 257 (258) : 73 Ind Cas 489, *Bela Singh* v. *Bali Ram.* (Long user—No proof of user as of right—*Held* easement not established.)

[*See also* ('89) 2 C P L R 34 (35), *Hira* v. *Khushalgir.* (The fact that the plaintiff's cattle passed over defendant's *banjar*, does not show that the way was used as of right.)

('13) 19 Ind Cas 66 (67) (DB) (Cal), *Rameshur Mitra* v. *Nut Behari Guin.* (Presumption to be drawn from user must always be a question of fact depending on circumstances of each case.)]

[11a] ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath* v. *Muni Lal.* (No easement can be acquired in respect of ventilators in wall which was jointly owned. NOTE—But see AIR 1923 Lah 249.)

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Note 13

This section differs from the corresponding provisions of the English Prescription Act and of the Indian Easements Act in that, it requires the user as of right in the case of *all* easements. Under the English Act, the words "as of right" are omitted in respect of easements of light and under the Easements Act the words are omitted in respect of easements of light and air and of support.[12] The result is that under the said Acts a *tenant* can under certain circumstances, acquire for his own benefit as against the landlord, certain easements.[13]

Under this Act a *tenant* cannot acquire by prescription *any* easement against his landlord, because he cannot be said to use it *as of right*.[14] Similarly, where two tenements are owned by the same person and are in the occupation of different persons as lessees, one of them cannot prescribe against the other. This is based on the principle that the possession of the tenant is in law the possession of the landlord and to allow a right to be acquired by prescription under such circumstances would be to allow the landlord to acquire an easement right in his own soil.[15] But where A is a tenant of a certain land under B and *owns* a building on such land A can acquire an easement of light and air in regard to such building as against C who is a tenant of another piece of land under the same landlord. The reason is that A is not a tenant in regard to the building.[16] As to whether a permanent tenure-holder can acquire an easement against the owner or another permanent tenure-holder, see the undermentioned cases.[17]

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[12] ('19) 6 AIR 1919 Bom 94 (95) : 49 Ind Cas 963 (DB), *Bai Kuvarbai* v. *Jamsedji Rustomji.*

[13] See Peacock on "Easements," 3rd Edition, page 457.

[14] ('92) 14 All 185 (188): 1892 All W N 38 (FB), *Udit Singh* v. *Kashi Ram.*

('02) 29 Cal 363 (366, 367) (DB), *Mani Chandra* v. *Baikanta Nath.* (Tenant derives his right from the lessor, and as the latter cannot have an easement as of right against himself so also the tenant cannot have it.)

('30) 17 AIR 1930 Lah 119 (119, 120) : 119 Ind Cas 418, *Puran* v. *Ghungar.* (The presumption always is that possession or user is permissive.)

('17) 4 AIR 1917 Cal 681 (685) : 34 Ind Cas 450 (DB), *Sital Chandra* v. *Allen. Delanny.* (But he can acquire it by grant.)

('23) 10 AIR 1923 Cal 8 (9) : 70 Ind Cas 663 : 50 Cal 356 (DB), *Tinkori Pathak* v. *Ram Gopal.* (But he can acquire such an easement by other modes such as by immemorial user—20 Ind Cas 359 followed.)

('17) 4 AIR 1917 Pat 530 (531) : 41 Ind Cas 577 (DB), *Krishna Chandra Mandal* v. *Ram Sahai Katari.*

('34) 21 AIR 1934 Pat 11 (12) : 148 Ind Cas 215 (DB), *Radha Kishen* v. *Sunder Mal.* (There cannot be prescription as between tenants of same landlord.)

('07) 6 Cal L Jour 218 (222) (DB), *Sitab Rai* v. *Dubal Nagesia.*

('30) 17 AIR 1930 Pat 7 (10) : 124 Ind Cas 385 (DB), *Kartic Manjhi* v. *Banamali Mukherji.* (But he can claim a right of easement based on immemorial user.)

('96) 1 Cal W N 151 (152) (DB), *Jeenab Ali* v. *Allabuddin.* (But he can acquire a way of necessity by implied grant.)

('13) 22 Ind Cas 379 (380) (All), *Bahadur* v. *Khushi Ram.*

('36) 23 AIR 1936 Sind 61 (62, 63) : 30 Sind L R 32 : 163 Ind Cas 137 (DB), *Mowloo Nanji* v. *Rochiram.* (Tenant holding temporary lease cannot acquire right of way by user over land in possession of other tenant under same landlord —Enjoyment of easement is not as of right.)

[15] ('39) 43 Cal W N 636 (638) (DB), *Nagendra Nandini* v. *Priya Nath.*

Where an enjoyment has begun as of right, a mere interruption for less than a year cannot affect it though constant interruptions, even if not acquiesced in for a year, may show that the enjoyment was not as of right.[18]

14. "Without interruption." — The enjoyment necessary to qualify for a right of easement is something very different from *actual user*. A discontinuous easement such as a right of way, or a right to use a piece of land at particular intervals or a right to go by boats in times of flood or in the rainy season, cannot be actually used every moment of the period of prescription but only at intervals. There may be days and weeks and months during which the right may not be exercised at all and yet during all these days and weeks and months the person claiming the right may have been in full enjoyment of it when necessary.[1] But no easement can be acquired where there has

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16. ('39) 43 Cal W N 636 (639) (DB), *Nagendra Nandini* v. *Priya Nath.*
[*See also* ('39) 26 AIR 1939 Sind 39 (44) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi.* (Easement of light and air for building owned by tenant but standing on leased land can be acquired against the landlord—A I R 1938 All 293 (FB) followed—Case under Easements Act.)]

17. ('24) 11 AIR 1924 Cal 363 (364) : 70 Ind Cas 173 (DB), *Kali Pada Bose* v. *Fani Bhusan Roy.* (In this case the user of thirty years was traced to a lost grant.)

('29) 16 AIR 1929 Pat 124 (126) : 115 Ind Cas 884 (DB), *Nasiruddin* v. *Deokali.* (*Obiter*—He may acquire.)

('20) 7 AIR 1920 Mad 125 (125) : 54 Ind Cas 943 (DB), *Narayan* v. *Lingappa.* (A permanent tenant cannot acquire an easement against his landlord — 29 Cal 363 followed.)

('15) 2 AIR 1915 Cal 403 (404, 405) : 31 Ind Cas 549, *Madan Mohan* v. *Sashi Bhusan.* (The point was left undecided in the case but it was doubted whether easement could be acquired by prescription in such a case.)

18. (1851) 20 L J Q B 482 (485) : 17 Q B D 267 : 85 R R 455 : 15 Jour 675, *Eaton* v. *Swansea Waterworks Co.*

Note 14

1. ('24) 11 AIR 1924 All 97 (98) : 74 Ind Cas 922, *Sri Ram* v. *Mani Ram.* (Right to irrigate from certain wells—There may have been no irrigation because of excessive rainfall or because land was allowed to lie fallow—Hence in the absence of proof of interruption by defendants, plaintiff's right was decreed.)

('15) 2 AIR 1915 Cal 594 (595) : 26 Ind Cas 485 (DB), *Ram Gopal Sen* v. *Abhoya Charan Ghose.* (Where a plaintiff sues for obstructing the right of way for boats in the rainy season, the non-user of the way within two years previous to the institution of the suit is no bar under Section 26 of the Limitation Act.)

('81) 7 Cal 132 (135) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose* v. *Sonatun Chung Barooie.* (Do.)

('36) 40 Cal W N 222 (224), *Mangulal Agarwalla* v. *Chandi Charan Mukherji.*

('19) 23 Cal W N lxxxii. ((1919) 1 Ch 24, *Level* v. *Gas Light and Coke Company* criticised.)

Section 26
Note 14

been no user *at all*.[1a]

The section requires that the enjoyment should be 'without interruption' and the explanation thereto enacts that nothing is to be considered as an interruption unless —

1. *firstly:* there is an actual discontinuance of the possession or enjoyment;
2. *secondly:* such discontinuance is by reason of the act of some person other than the claimant himself, and
3. *thirdly:* such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

It follows that the exercise of the right need not be continuous[2] and that a mere *non-user* of an easement for a time is not an interruption of the enjoyment.[3] Thus, where the owner of a house

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('19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandar Sen* v. *Bankim Behary Ray.* (Cessation of user is not always inconsistant with continuance of enjoyment of a right.)

('29) 16 AIR 1929 All 497 (497) : 118 Ind Cas 521, *Partap Singh* v. *Hemraj.* (The mere failure to exercise the right for a period of two years does not extinguish the right of easement.)

[1a] ('90) 1890 Bom P J 184, *Patel Valabhbhai* v. *Valabhai.* (Mere proof of existence of gutter for the statutory period is not sufficient to establish easement to discharge the water of a sink through it on to another's land—Actual passage of water must be proved.)

[2] ('03) 30 Cal 1077 (1083) (DB), *Budhu Mandal* v. *Maliat Mandal.* (An easement, to cause the water of a river to flow, by means of bunds erected on the claimant's land, across the servient tenement, on to the dominant tenement may be established by twenty years' user during the periods of draught, when it could be taken advantage of, although the exercise of the right may not be continuous.)

('11) 9 Ind Cas 69 (70) (DB) (Cal), *Ghasiram* v. *Asirbad.* (Proof of substantial enjoyment of the right for the requisite period is enough.)

('35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy* v. *Sm. Sachchhandra.* (A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment.)

[*See also* ('29) 16 AIR 1929 Cal 286 (287) : 56 Cal 161 : 110 Ind Cas 422, *Bepin Behary* v. *Ramnath Ghatak.* (Where a person is taking water during monsoon through an artificial channel for nearly 32 or 35 years into his own field for irrigation purposes by cutting an *ail* of another's field at a particular place during the monsoon, such user cannot be said to be of a temporary nature and the right to take such water can be acquired by prescription.)]

[3] ('41) 45 Cal W N 486 (487), *Abdul Hamid* v. *Ahmed Ali.* (But user of a pathway only once in the period of twenty years is not enough to establish the easement under this section.)

('29) 16 AIR 1929 All 497 (497) : 118 Ind Cas 521, *Partab Singh* v. *Hemraj.* (Mere failure to exercise right within two years before suit does not extinguish easement.)

('35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy* v. *Sm. Sachchhandra.*

('74) 22 Suth W R 340 (341), *Sheikh Muhammad Ansure* v. *Sheikh Sefatoollah.* (Temporary non-user during rainy season.)

('18) 5 AIR 1918 Oudh 296 (298) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad* v. *Khuda Baksh.* (To establish right of way it is not necessary to show that the right was exercised at every moment of time during the statutory period.)

ceases to use the way to it because the house is for a time unoccupied, or where a farmer desists for a time from exercising a right of pasture because he happens to have no pasturable cattle or because by reason of draught or some other cause the herbage is scanty or unwholesome, it cannot be said that the enjoyment has been "interrupted" within the meaning of the section.[4]

A non-user of the right may be an interruption if it is caused by reason of an *obstruction* of a person other than the claimant himself.[5] In other words, the non-user must be the effect of a prevention of the user by some person acting *adversely* to the claimant.[6] In the case of affirmative easements, such adverse act must consist in doing some act on the servient tenement or in taking legal proceedings for the direct interference with the servient owner's rights of ownership. In the case of negative easements, it must consist in doing some act on the servient tenement. Proof of circumstances which merely *negative assent* on the part of the servient owner to the enjoyment of the easement claimed, or evidence of dissent such as a *protest* unaccompanied by actual obstruction, is not sufficient to support a plea of interruption.[7] Where in the process of acquisition of an easement of light and air through certain windows the dominant tenement was burnt down and was rebuilt with windows corresponding to the old windows, it was held that the temporary discontinuance of the enjoyment was not an "interruption" as it was not by reason of any obstruction by the servient owner or other person.[8] In the undermentioned case[8a] it was held that the mere filling up of a channel would not necessarily constitute obstruction if no water for purposes of irrigation was required at that time and there was no refusal by the defendants to re-open the channel when wanted.

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[4] ('75) 1 Cal 422 (430): 25 Suth W R 228 (DB), *Sham Churn Auddy* v. *Tariney Churn Banerjee.* (The term 'interruption' in the section is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself.)

('19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandra* v. *Bankim Bihari.*

[5] ('75) 1 Cal 422 (429): 25 Suth W R 228 (DB), *Sham Churn Auddy* v. *Tariney Churn Banerjee.*

[6] ('75) 1 Cal 422 (429): 25 Suth W R 228 (DB), *Sham Churn Auddy* v. *Tariney Churn Banerjee.*

('35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy* v. *Sm. Sachchhandra.* (The term 'interruption' refers to an adverse obstruction and not to a mere discontinuance of user.)

[7] ('19) 6 AIR 1919 Bom 94 (95, 96) : 49 Ind Cas 963 (DB), *Kuvarbai* v. *Jamsedji Rustamji.* (Legal notices by servient owner.)

('31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup* v. *Abdul Haq.*

('16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan* v. *Ananta Goundan.*

[8] ('22) 9 AIR 1922 Bom 3 (4) : 46 Bom 448 : 67 Ind Cas 250 (DB), *Ratan Lal Bhola Ram* v. *Gulam Husen Abdul Ali.*

[8a] ('14) 1 AIR 1914 Cal 907 (907) : 25 Ind Cas 386, *Kanai Lal Mandal* v. *Jadablal Gangopadhya.*

A discontinuance of enjoyment, even though it may be by reason of an obstruction by a person other than the claimant, is nevertheless not an interruption unless such obstruction is *submitted to or acquiesced in for one year* after the claimant has notice thereof and of the person making or authorising the same to be made.[9] In order to negative acquiescence in, or submission to, obstruction, it is not necessary for the party obstructed to have brought a suit or taken any active steps to remove the obstruction; it is enough if he has communicated to the party obstructing that he does not submit to or acquiesce in it.[10]

The word "interruption," (not acquiesced in), is not confined to the case of *intermediate* obstructions in the course of the period of enjoyment of twenty years mentioned in the statute, but is capable of being applied to the case of an obstruction or hindrance at the latter part of the period of twenty years so as to prevent the actual enjoyment for the full period of twenty years without interruption from taking place. Thus, if the enjoyment has lasted nineteen years seven months and then there is an obstruction, and eight months thereafter a suit is filed, the enjoyment must be deemed to have continued up to date of suit.[11] In *Flight* v. *Thomas*,[12] Tindal, C. J., referring to the word 'interruption' used in the English Prescription Act, observed as follows:

> "There is nothing in the word itself which necessarily confines its meaning to an obstruction in the middle or course of the enjoyment; and no authority has been cited to show that an interruption for the last three months of the period of twenty years is to be considered as different in itself, or in its legal consequences, from an interruption of the same duration in the middle of the twenty years."

A contrary view, namely that the explanation does not apply to an interruption at the end of the period of twenty years, has been held in the undermentioned cases.[13] It is submitted that this view is not correct.

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[9] ('67) 7 Suth W R 367 (367) (DB), *Roy Luchmee Pershad* v. *Mt. Fuzeelutoonissa Bibee.* (A wrongful interruption of right of user of a channel to permit the egress of water collecting on plaintiff's land would not necessarily destroy the right of user, unless such interruption has been *acquiesced* in by the plaintiff.)

('29) 16 AIR 1929 All 382 (384) ; 116 Ind Cas 806, *Municipal Board, Pilibhit* v. *Khalil-ul-Rahiman.* (Acquiescence not proved — Explanation 2 to S. 15, Easements Act, which corresponds with explanation to this section, does not apply.)

[10] ('77) 1 Mad 335 (339) : 1 Ind Jur 802 (DB), *Subramania Iyer* v. *Ramachandra.*

('20) 7 AIR 1920 Nag 26 (28) : 54 Ind Cas 936 : 16 Nag L R 76, *Ramachandra Rao* v. *Venkat Rao.* (The question whether there has been submission to or acquiescence in an obstruction is one of fact.)

(1864) 31 L T 684 (687) : 23 W R (Eng) 163 (164) : 44 L J C P 66 : L R 10 C P 108, *Glover* v. *Coleman.*

[11] ('18) 5 AIR 1918 Lah 23 (25) : 1918 Pun Re No. 48 : 46 Ind Cas 17, *Sawan Singh* v. *Chattar Singh.* (Where the period of obstruction is less than one year the obstruction may, for the purposes of calculating the period of twenty years, be ignored.)

[12] (1839) 52 R R 468 (478) : 11 A & E 688 : 3 P & D 442.

The explanation does not, however, apply, where there has been no interruption *before* suit. Thus, where the servient owner files a suit nineteen years and some months after the dominant owner has begun to enjoy the easement, the latter cannot say that under the explanation he can add the period subsequent to suit as interruption not acquiesced in for more than a year.[14]

Although a mere non-user of an easement is not, as has already been seen, an interruption of the enjoyment, it may, under particular circumstances, show that the right has been *abandoned*, and the easement thus destroyed.[15] No hard and fast rule could, however, be laid down as to what would or would not constitute a discontinuance of the enjoyment or abandonment where there has been no user of it for a particular period. Obviously the question must depend upon the circumstances of the particular case and the nature of the right claimed.[16] A mere non-user for a time, if the circumstances are not such as to indicate an intentional abandonment of the right would not, even if such non-user extends to two or three years, be sufficient to destroy the right.[17] In the undermentioned case[18] the non-user of

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13. ('27) 14 AIR 1927 Mad 238 (239) : 98 Ind Cas 886, *Rama Krishnayya* v. *Rattaya.*

('05) 1905 Pun L R No. 203, p. 680 : 1905 Pun Re No. 73, *Amir Haidar Shah* v. *Fajja.* (The word 'interruption' applies only to cessation of enjoyment followed by a further period of enjoyment.)

14. ('24) 11 AIR 1924 Lah 628 (628) : 75 Ind Cas 608, *Chiragh Din* v. *Ghulam Muhammad.*

15. ('25) 12 AIR 1925 Rang 137 (139) : 2 Rang 534 : 84 Ind Cas 1003 (DB), *S. A. Christopher* v. *J. A. Cohen.*

('86) 1886 Pun Re No. 38, *Ghulam Muhammad* v. *Gulsher Mohamed Khan.*

16. ('99) 26 Cal 593 (597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani* v. *Bindu Bhashini Choudhurani.*

('10) 7 Ind Cas 813 (813, 814) (Cal), *Poran Ghosh* v. *Netai Sundar Roy.*

('19) 6 AIR 1919 Pat 185 (187, 188) : 49 Ind Cas 752, *Mewa Sao* v. *Nasiruddin.* (Non-user during the time the old building was pulled down and a new one constructed in its place—*Held* there was no abandonment.)

('73) 20 Suth W R 188 (188) (S B), *Raj Behari Roy* v. *Tara Pershad Roy.*

('69) 12 Suth W R 519 (520) (DB), *Jugutbundhoo Chuckerbutty* v. *Jagut Chunder Chowdhury.*

('04) 6 Bom L R 287 (288) (DB), *Vinayak* v. *Marland.*

17. ('80) 1880 Pun Re No. 68, *Churrut Singh* v. *Simboo.*

('86) 1886 Pun Re No. 38, *Ghulam Muhammad* v. *Gulsher Muhammad Khan.* (Non-user may amount to abandonment when considered with other circumstances.)

('10) 7 Ind Cas 813 (814) (Cal), *Poran Gosh* v. *Netai Sundar Roy.*

('19) 6 AIR 1919 Pat 185 (187, 188) : 49 Ind Cas 752, *Mewa Sao* v. *Nasiruddin.* (Mere non-user does not amount to abandonment.)

[But see ('05) 1905 Pun L R No. 203, p. 680 : 1905 Pun Re No. 73, *Amir Haidar Shah* v. *Fajja.* (Submitted not correct.)

18. ('70) 14 Suth W R 79 (80) : 5 Beng L R App 66 (DB), *Haridas Nandi* v. *Jadunath Dutt.*

a right of way for six years was held to show that the right was abandoned. Where the dominant owner himself created an obstruction of a permanent character thus incapacitating himself from using the right, and this happened at a time when the dominant owner had not yet acquired by prescription the easement, it was held that his act did not amount to an abandonment of an easement inasmuch as abandonment implied that the easement had already been acquired. At the same time, it was held that the act amounted to a discontinuance of the enjoyment of the right so that during the period that the obstruction existed it could not be said that the person was in the enjoyment of the right within the meaning of this section.[19] Where there is a right of way between fixed termini and the servient owner points out a different pathway, there is no interruption of the easement, the right being one to pass from one point to the other, not necessarily by the shortest route or by a particular route.[20] See also Note 9a to section 2 sub-section (5).

In April 1892, B, the servient owner, dispossessed A, the dominant owner from the dominant tenement. A thereupon sued B for possession of the dominant tenement under section 9 of the Specific Relief Act and obtained possession in June 1895. Between 1892 and June 1895, A could not, and was not, enjoying the easement (which was a right of way over B's land) though there was no obstruction by B by any act done on the servient tenement. After A obtained possession, B obstructed A in the exercise of the right of way and A thereupon filed a suit for a declaration of the right in November 1895. It was held that the cessation of the user from 1892 to 1895 was not consistent with the idea of continuance of the enjoyment and that consequently he did not acquire any right of way.[21]

15. "For twenty years." — A right to an easement is not indefeasibly established by an enjoyment for less than twenty years.[1]

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19. ('76) 1 Cal 422 (429, 430) : 25 Suth W R 228 (DB), *Sham Churn Auddy* v. *Tariney Churn Banerjee.* (As the discontinuance of the enjoyment was voluntary, it was not an *interruption* within the meaning of the section.)

20. ('29) 16 AIR 1929 Pat 124 (125) : 115 Ind Cas 884 (DB), *Nasiruddin* v. *Deokali.* (A case of discontinuous, non-apparent positive easement.)

21. ('99) 26 Cal 593 (597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani* v. *Bindu Bashini Choudhurani.* (At whatever time the suit is brought the enjoyment must be found to have continued till within two years of that time.)

Note 15

1. ('75) 7 N W P H C R 293 (295) (DB), *Jogal Kishore* v. *Mulchand.*

('99) 1899 Pun Re No. 68 : 1900 Pun L R No. 5, *Sharaf Husain* v. *Ram Kishen Das.*

('18) 5 AIR 1918 Lah 23 (25) : 1918 Pun Re No. 48 : 46 Ind Cas 17, *Sawan Singh* v. *Chattar Singh.*

('78) 2 Bom 660 (662) : 3 Ind Jur 278 (DB), *Sarubai Jitmal* v. *Bapu Narhar Sohoni.* (Where there has been no appropriation of light and air through an aperture for the statutory period of 20 years, no right of easement is created thereby.)

At any time within that period the owner of the servient tenement may sue for redress and the claimant to the easement cannot rely on a plea of prescription in answer.[2] But though an enjoyment by the dominant owner for less than twenty years does not give him any right against the servient owner, he has sufficient interest as against *trespassers* to maintain a suit against them for relief.[3]

The period of twenty years or more of enjoyment must end within two years before the institution of the suit.[4] Otherwise, the claimant to the easement cannot succeed.[5] If the period of twenty

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('71) 16 Suth W R 198 (199) (DB), *Rajah Bijoy Keshub Roy* v. *Obhoy Churn Ghose.* (The finding that the right claimed has been enjoyed 'for a good many years' is quite insufficient.)

('73) 20 Suth W R 283 (283), *Juggessur Singh* v. *Nund Lall Singh.* (This is so as regards both rights of way and rights of water.)

('75) 25 Suth W R 15 (16), *Sheikh Hubeebul Hossein* v. *Seikh Shahamut Ali.*

[*See also* ('21) 8 AIR 1921 Mad 627 (629) : 70 Ind Cas 367 (DB), *Sivananjiah* v. *Sithay Goundar.* (A mere user which has not ripened by prescription (in this case by 60 years' enjoyment against Government) would not give any right upon which an action could be founded.)]

[2] ('75) 7 N W P H C R 293 (295) (DB), *Jogal Kishore* v. *Mulchand.*

('24) 11 AIR 1924 Lah 628 (628) : 75 Ind Cas 608, *Chiragh Din* v. *Ghulam Muhammad.*

('22) 9 AIR 1922 Bom 83 (84) : 67 Ind Cas 356 : 46 Bom 827 (DB), *Kashi Bai Kalidas* v. *Vallabai.* (Redress by way of injunction.)

('28) 15 AIR 1928 Bom 312 (315) : 113 Ind Cas 525 (DB), *Lallubhai* v. *Bhimbhai.* (Case under Easements Act.)

('72) 19 Suth W R 194 (195) : I A Sup Vol 175 : 12 Beng L R 406 : 3 Sar 236 (PC), *Elliott* v. *Bhoobun Mohun Bonnerjee.* (Building commenced before expiry of 20 years.)

[*See* ('28) 15 AIR 1928 Nag 91 (91) : 109 Ind Cas 281, *Abdul Raheman* v. *Mulchand.* (Removal of support of wall before accrual of right of easement by prescription by neighbour is not actionable.)]

[3] ('16) 3 AIR 1916 Mad 442 (443) : 30 Ind Cas 989 (DB), *Anantha Desikachariar* v. *Viswanatha Mudaly.* (Injunction can be claimed against the trespasser.)

('95) 5 Mad L Jour 24 (25) (DB), *Acchanna* v. *Venkamma.* (He can, in the process of acquisition, claim as against a person not the servient owner that he shall not be obstructed in his enjoyment.)

('10) 6 Ind Cas 266 (266) : 34 Mad 173 (DB), *Kondappa Rajan* v. *Dwara Konda Suryanarayana.*

('14) 1 AIR 1914 Sind 24 (25) : 8 Sind L R 218 : 27 Ind Cas 999 (DB), *Gobind Ram* v. *Saberhatullah.* (6 Ind Cas 266 and 20 Cal 834 followed.)

[4] ('14) 1 AIR 1914 All 68 (69) : 24 Ind Cas 126 (DB), *Muhammad Maroof* v. *Sultan Ahmad.* (Case under Easements Act.)

('75) 24 Suth W R 295 (296) (DB), *Baboo Luchmee Pershad Narain Singh* v. *Tiluckdharee Singh.*

('74) 23 Suth W R 401 (401), *Gopee Chand Setia* v. *Bhoobun Mohun Sen.*

('15) 2 AIR 1915 Bom 284 (285) : 40 Bom 401 : 33 Ind Cas 192, *Bai Bhicaji* v. *Perojshaw Jiwanji.* (Case under Easements Act.)

('78) 1878 Pun Re No. 25, *Fatteh* v. *Himmat.*

('19) 6 AIR 1919 Cal 357 (357) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen* v. *Bankim Behary Ray.* (Mere proof of enjoyment for 20 years is not enough.)

[5] ('19) 6 AIR 1919 Cal 357 (357) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen* v. *Bankim Behary Ray.*

years has ended within two years of the suit, it does not matter if there has been a subsequent interruption for more than a year.[5a] A title to an easement under the section is not complete by the mere effluxion of the period of twenty years. However long the period of enjoyment may have been, no absolute or indefeasible right can be acquired until the right is brought in question in some suit.[6] In other words, it is the *filing of the suit* that enables the easement to be acquired.[7]

Since the enjoyment referred to in the section is not by *actual* user,[8] it is not necessary that there should have been *actual* user within two years next before the institution of the suit.[9] In this view illustration (b) to the corresponding sections of the Acts of 1871 and 1877 which indicated that *actual user* within two years next before the suit was necessary[9a] was against the terms of the section[10] and was consequently omitted in the present Act.

The *same* easement must have been enjoyed for the period of twenty years referred to in the section. Where during the course of enjoyment the easement is altered so as to impose *additional or new burden* on the servient tenement, a fresh period of twenty years' enjoyment is necessary to acquire the right.[11] The principle is that the owner of a dominant tenement cannot, by increasing the burden,

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[5a] ('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality.*

[6] ('29) 16 AIR 1929 Cal 542 (543) : 56 Cal 927 : 119 Ind Cas 293, *Siti Kanta Pal* v. *Radha Govinda Sen.*

('20) 7 AIR 1920 Mad 541 (541, 542) : 60 Ind Cas 171 (DB), *Nachiparayan* v. *Narayna Goundan.*

[7] ('16) 3 AIR 1916 Mad 1001 (1003) : 31 Ind Cas 528 (DB), *Muthu Goundan* v. *Anantha Goundan.* (Case under Easements Act.)

('16) 3 AIR 1916 Sind 29 (31) : 33 Ind Cas 615 : 9 Sind L R 101 (DB), *Premji Ladha* v. *Visram Amul.* (The period of 20 years is not a period 'in gross' but the 20 years immediately preceding the institution of the suit or ending not more than two years before suit.)

('23) 10 AIR 1923 Oudh 29 (30) : 72 Ind Cas 909, *Basdeo Singh* v. *Bhagwat Prasad.*

[8] See Note 14.

[9] ('19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen* v. *Bankim Behary Ray.*

('10) 9 Ind Cas 69 (70) (DB) (Cal), *Ghashiram* v. *Asirbad.*

[9a] ('73) 20 Suth W R 283 (283), *Juggessur Singh* v. *Nundlal Singh.*

[10] ('81) 7 Cal 132 (135, 136) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose* v. *Sonatun Chung Barooie.*

[*See also* ('99) 26 Cal 593 (596, 597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani* v. *Bindu Bashini Choudhurani.* (Though proof of actual user is not necessary, yet the cessation of user must be consistent with continuance of enjoyment.)]

[11] ('02) 26 Bom 374 (377, 378) : 4 Bom L R 34 (DB), *Bai Hariganga* v. *Tricamlal Kedareshwar.*

('26) 13 AIR 1926 Nag 474 (475) : 96 Ind Cas 546, *Badri* v. *Jafarbhai.*

Section 26
Note 15

by alteration, increase his right.[12] Thus, where new windows were built which did not receive the same cones of light or a substantial part thereof as were received by the old windows, it was held that the easement claimed in respect of the new windows was different from that claimed in respect of the old windows, and can only be acquired by twenty years' enjoyment of the light through the new windows.[13] On the same principle, no easement can be claimed to spread the branches or the roots of a tree on the neighbour's land without liability to have them cut.[14] The reason is that a growing tree is always in a state of change in extent and space by the growth of twigs, etc., and cannot be enjoyed as the *same* easement for any length of time.[15]

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[12] ('20) 7 AIR 1920 Cal 268 (268) : 58 Ind Cas 854 (DB), *Suresh Chandra Biswas* v. *Jogendra Nath Sen.* (Alteration of dominant tenement.)

('22) 65 Ind Cas 579 (579) (DB) (Cal), *Ram Kumar Majumdar* v. *Mohim Chandra Dutta.* (When a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, e. g., the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads.)

('13) 19 Ind Cas 984 (986) (All), *Jamna Prashad* v. *Gopinath.* (Passage used for the sweepers, maids and ladies of a household could not be used as a passage for males also as it amounted to an aggravation of the easement.)

('24) 11 AIR 1924 Lah 387 (388) : 69 Ind Cas 406, *Hans Raj* v. *Malawa Mal.* (Where defendant had acquired the right to use the roof over plaintiff's room as an open space, he will not be justified in building over that portion and increase the burden on the servient tenement.)

('26) 97 Ind Cas 169 (169) (DB) (All), *Gajadhar* v. *Kishori Lal.*

[*See also* ('15) 2 AIR 1915 Sind 12 (12, 13) : 28 Ind Cas 169, *Ayoob Ismail* v. *Nur Muhammad Sileman.* (If he increases burden, proper remedy is injunction.)

('32) 19 AIR 1932 Cal 249 (254) : 59 Cal 260 : 138 Ind Cas 193 (DB), *Jotindra Mohan Mitter* v. *Probodh Kumar Dutt.* (Adjoining premises — Construction of drain with consent — Right limited by particular purpose — Additional burden cannot be imposed.)]

[13] ('02) 26 Bom 374 (377, 378) : 4 Bom L R 34 (DB), *Bai Hariganga* v. *Tricamlal Kedareshwar.*

[14] ('25) 12 AIR 1925 Bom 446 (447) : 89 Ind Cas 191 (DB), *Keshav Krishna* v. *Shankar Mahadeo.* (19 Bom 420 followed.)

('95) 19 Bom 420 (427) (DB), *Hari Krishna* v. *Shankar Vithal.*

('04) 31 Cal 944 (948) : 8 Cal W N 710 (DB), *Lakshmi Narain Banerjee* v. *Tara Prosonna Banerjee.*

('09) 2 Ind Cas 230 (232) : 5 Nag L R 52, *Udesingh* v. *Ganeram.*

('02) 24 All 499 (500) : 1902 All W N 169, *Behari Lal* v. *Ghisa Lal.*

[*See* ('18) 5 AIR 1918 Bom 68 (70) : 43 Bom 164 : 47 Ind Cas 629 (DB), *Vishnu Jagannath* v. *Vasudeo Raghunath.*]

[*See also* ('29) 114 Ind Cas 512 (512) (Oudh), *Abdul Haq* v. *Shahamat Ali.* (*Quære* — Whether easement can be claimed to collect fruits falling upon neighbour's land from a growing tree.)]

[But see ('93) 17 Bom 745 (747) (DB), *Naik Parsotam Ghela* v. *Gandrap Fatelal Gokuldas.* (Assumed to be an easement right.)]

[15] ('09) 2 Ind Cas 230 (232) : 5 Nag L R 52, *Udesing* v. *Ganeram.* (1 Rolle 393; (1895) A C 1 and 19 Bom 420 followed.)

The question whether the *same* easement has been enjoyed during a particular period is a question of fact. Where the light received through certain new apertures is the same or a substantial part of the cone of light received through the old windows, the easement cannot be considered to have been altered so as not to constitute the *same* easement.[16] Where A had enjoyed an easement over B's lane for allowing A's sweepers to walk and cleanse A's privy for a certain number of times a year, and during the course of enjoyment the Municipality made a rule that municipal servants should clean the privies *daily* and such servants began thereafter to cleanse A's privy daily, it was held by the Privy Council that the easement did not become materially different so as to prevent the periods prior and subsequent to the change being tacked on.[17] Similarly, where the same channel was used to take water from a tank, but the water was taken through different openings, it was held that the easement was not different.[18] So also, an easement of way cannot be deemed not to be the *same* easement where the termini are fixed, though the servient owner can point out the route from time to time.[19]

It is not necessary that the same *person or individual* should have enjoyed the easement for the whole of the twenty years. Where A, B and C have been successively in possession of the dominant tenement and have enjoyed an easement right over the servient tenement, C can tack on the period of his own enjoyment to the periods of enjoyment of the easement by A and B in order to make up the statutory period of twenty years.[20] The principle that one trespasser cannot tack on his *possession* to that of another for claiming a prescriptive title to the *ownership* of the property does not apply to easements which are appurtenant to the land and are not personal rights.[20a]

Where a right of pasturage was claimed by all the villagers over certain land which they alleged they had enjoyed as a pasture for over twenty years it was held that *some* of the villagers might have enjoyed it for the prescriptive period but it could not be the case with all of them. Hence such right could not be established under this section.[20b]

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[16] ('04) 7 Bom L R 73 (75), *Framji Shapurji* v. *Framji Edulji.*

[17] ('86) 13 Cal 136 (142) : 13 Ind App 77 (PC), *Jadulal* v. *Gopala Chandra.*

[18] ('11) 9 Ind Cas 69 (70) (DB) (Cal), *Ghashiram* v. *Asirbad.*

[19] See Note on "Extent of easements" in Note 9a to S. 2 sub-section (5).

[20] ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago* v. *Mt. Lahani.* (A I R 1917 Nag 7 distinguished.)

('22) 9 AIR 1922 Upp Bur 23 (24) : 4 Upp Bur Rul 90 : 70 Ind Cas 915, *Maung Po Hla* v. *Maung Po Sein.*

('18) 5 AIR 1918 Oudh 296 (299) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad* v. *Khuda Baksh.* (Periods of enjoyment by successive tenants of dominant heritage can be tacked.)

[20a] ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago* v. *Mt. Lahani.*

[20b] ('38) 42 Cal W N 1102 (1104), *Abdul Hosain* v. *Sadai Gobinda.* (There is no reference in the judgment to the question whether an *easement* can be acquired

The requirement of twenty years' user is not applicable to easements that may be acquired in other ways than by prescription, e. g., by contract[21] or custom.[22]

When the enjoyment is once "interrupted" within the meaning of the explanation, a fresh user for the full period of twenty years must be shown in order to establish a right of easement: the user prior to the interruption cannot be added on to the period subsequent to the interruption.[23]

16. Sixty years' user necessary against Government. — Under the Acts of 1871 and 1877 there was no provision corresponding to sub-s. (2) and there was a conflict of opinions whether the twenty years' rule applied to rights of easement claimed by prescription against Government. According to one view the Crown was not affected by S. 26 at all[1] and this was based on the general principle that "the law is *prima facie* made for subjects only: at all events the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest."[2] According to another view the section would apply even against the Crown.[3] Sub-section (2) of the present section

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by an indefinite body of persons like the inhabitants of a village—As seen in Section 2 (5) Note 8, an easement can be vested only in a determinate person or persons.)

[21] ('75) 23 Suth W R 290 (290), *Kallaram Dhur* v. *Jogul Kishore Surmah.*
[*See also* ('97) 1 Cal W N 96 (98), *Sreemati Soojan Bibi* v. *Shamed Ali.* (Easement acquired by virtue of decree—Obstruction—Suit need not be within two years of obstruction.)]

[22] (1900) 2 Bom L R 454 (459) (DB), *Nathubhai* v. *Choksi Chaganlal.*
('97) 20 Mad 389 (390) (DB), *Palaniandi Tevan* v. *Puthirangouda Nadan.* (No fixed period.)
('13) 20 Ind Cas 467 (467) (Oudh), *Jai Jai Ram* v. *Sanwal Singh.* (A right to graze cattle can be subject of a customary right.)

[23] ('38) 25 AIR 1938 Pat 423 (424, 425) : 177 Ind Cas 315, *Dwarka Prasad* v. *Patna City Municipality.* (But 'interruption' for a year or more will not nullify a right already acquired by twenty years' enjoyment where the period of twenty years has ended within two years of the suit.)
('14) 1 AIR 1914 All 323 (324) : 25 Ind Cas 405 (DB), *Kedar Nath* v. *Sohan Lal.* (Case under Easements Act.)

Note 16

[1] ('90) 14 Bom 213 (220) (DB), *Secretary of State* v. *Mathurabhai.* (NOTE—The head-note to this report is misleading as observed in 5 Ind Cas 621 (626).)
('27) 14 AIR 1927 Sind 270 (271, 272) : 86 Ind Cas 757 : 21 Sind L R 195 (DB), *Ganga Ram* v. *Secretary of State.*
[*See also* ('11) 11 Ind Cas 180 (181) : 39 Cal 53 (DB), *Abhoy Charan Jelia* v. *Dwarka Nath Malo.*]

[2] Maxwell, 6th Edition, page 244 cited in A I R 1927 Sind 270 (271).
[*See also* ('74) 1 Bom 7 (9) (DB), *Ganpat Putaya* v. *Collector of Kanara.*
('10) 5 Ind Cas 621 (626) : 34 Bom 618 (DB), *The Government of Bombay* v. *Usufali Salabhai.*]

[3] ('84) 10 Cal 214 (218) (DB), *Arzan* v. *Bakhal Chunder Roy.* (Assumed.)
('85) 8 Mad 467 (471) (DB), *Viresa* v. *Tattayya.* (Do.)

now makes it clear that an easement can be acquired even against the Crown by an enjoyment for sixty years.

But in order that that sub-section may apply, it is necessary that the property over which a right is claimed "belongs" to Government. It has been held by the High Court of Allahabad in a case arising under the corresponding section of the Easements Act that the words "belongs to Government" mean belongs to Government *at the date the easement is claimed* in suit and not at some anterior period. Thus, if at the date of the suit the Government is not the owner but has transferred the property to X, the sub-section will not apply.[4] But the High Court of Madras has held that the words "belongs to the Government" refer to the period during which the easement is enjoyed and not to the time of the suit.[5] In that case there was an enjoyment for forty years of land belonging to Government, after which the Government transferred the same to a private person. A suit was brought against the latter to establish the easement. Their Lordships observed :

> "We think the words 'belongs to Government' in the last paragraph of S. 15 must refer, *not to the time of suit*, but to the time during which the easement is enjoyed. An easement can only be acquired by twenty years' enjoyment against a private person or by sixty years' enjoyment against Government. Here neither condition is satisfied."

The word "belongs" refers to *ownership* and not to *possession*. If therefore the property is in the *ownership* of the Government at the date the claim is made, sub-section (2) will apply, even though the property may be in the possession of a tenant or other person with a limited right.[6] The reason is that the easement attaches to one piece of land or building over another piece of land and not against A or B.[7]

17. Plea of easement. — A plea of prescriptive right cannot, like a plea of limitation, be taken at any stage of the suit. The reason is that the plea relates to a branch of *substantive* law which strengthens the title of the claimant. It is not part of the adjective law. Such a plea cannot therefore be taken for the first time in second appeal.[1]

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[4] ('29) 16 AIR 1929 All 382 (383, 384) : 116 Ind Cas 806, *Municipal Board, Pilibhit* v. *Khalil-ul-Rahman.*

[5] ('18) 5 AIR 1918 Mad 120 (121) : 41 Mad 622 : 45 Ind Cas 98 (DB), *Srinivasa Upadhya* v. *Ranganna Bhatta.*

[6] ('34) 21 AIR 1934 Mad 575 (578) : 152 Ind Cas 216, *Chinnasamy Goundan* v. *Balasundara Mudaliar.*
('24) 11 AIR 1924 All 724 (726) : 78 Ind Cas 844, *Narain Das* v. *Behari Kahar.*
('28) 15 AIR 1928 Oudh 17 (18) : 106 Ind Cas 305, *Jagan* v. *Jagadish.*

[7] ('24) 11 AIR 1924 All 724 (726) : 78 Ind Cas 844, *Narain Das* v. *Behari Kahar.*

Note 17

[1] ('28) 15 AIR 1928 Nag 203 (204, 205) : 109 Ind Cas 293, *Gulab Rao* v. *Manjoolabai.*

Section 26
Note 17

A party can set up *alternative* claims to ownership of the servient tenement, and to an easement thereon.[2] This does not affect in any way the principle that unless the party is actually found by the Court to have enjoyed the right *as an easement*, he cannot succeed in establishing an easement right.[3]

A plea that the party has been using water from a particular source from time immemorial does not amount to setting up a plea of an *easement*.[4]

A claim to an easement by prescription should not be converted by the Court into one by custom, as what may suffice to prove the one may not suffice to establish the other.[5] Similarly, where a suit is merely to establish a right of *ownership* of property, it is not competent for the Court to enter into and decide the question of a right to an easement over such property.[6]

Since an easement is only a privilege, the claimant can, when obstructed, only claim that his right should not be encroached upon and not that the party in possession of the servient tenement, whether owner or trespasser, should not enjoy the tenement at all.[7]

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[2] ('39) 26 AIR 1939 Bom 149 (150) : I L R (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama* v. *Tukaram*. (34 Cal 51 (FB) followed.)
('39) 26 AIR 1939 Sind 110 (111) : I L R (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal* v. *Naraindas Pahlaj Rai*.
('07) 34 Cal 51 (56) : 4 Cal L Jour 437 : 11 Cal W N 20 : 1 Mad L Tim 364 (FB), *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya*. (It is not inconsistent for the plaintiff to claim *mourashi* right in a property and in the alternative a right of easement over the same.)
('06) 4 Cal L Jour 367 (368, 370) (DB), *Durgamani Debya* v. *Ambika Charan*. (But the plaintiff cannot set up an *inconsistent* case—See 16 Suth W R 198.)
('08) 8 Cal L Jour 289 (291) (DB), *Purnendu Narain Roy* v. *Dwijendra Narain Roy*.
('24) 11 AIR 1924 Cal 369 (369): 69 Ind Cas 183, *Amritanath Biswas* v. *Jogendra Chandra*.
('25) 12 AIR 1925 Cal 788 (789) : 87 Ind Cas 19 (DB), *Behari Lall Mukherjee* v. *Asutosh Banerjee*.
('30) 17 AIR 1930 Pat 7 (9): 124 Ind Cas 385 (DB), *Kartic Manjhi* v. *Banamali Mukerji*. (If however he claims right by ownership he cannot *per se* claim as an easement.)

[3] See Note 12.

[4] ('23) 10 AIR 1923 Lah 605 (606) : 80 Ind Cas 197, *Mansa Ram* v. *Kalu Ram*.

[5] ('24) 11 AIR 1924 Lah 275 (276) : 69 Ind Cas 528 (DB), *Sitaram* v. *Ghanno*.
[*See also* ('38) 42 Cal W N 1102 (1104, 1105), *Abdul Hosain* v. *Sadai Gobinda*. (In this case, on the construction of the pleadings the Court held that the plea of customary right was not a new plea—A I R 1921 Cal 569 distinguished.)

[6] ('92) 15 Mad 489 (490) : 2 Mad L Jour 257 (DB), *Sambbayya* v. *Gopalakrishnamma*. (In this case neither pleadings nor the issues suggested a right of easement.)

[7] ('28) 15 AIR 1928 Lah 709 (710) : 108 Ind Cas 610, *Shimbu Dayal* v. *Gajju Mal*. (An easement like right of way over a tenement is a right running with the land and is not a personal right.)

Section 26
Notes 18–19

18. Onus of proof. — The onus is on the claimant to an easement to prove all the points necessary to establish an easement under this section.[1] But where a long open user of a right is proved, there will arise a *presumption*, in the absence of circumstances negativing it, that the user was as of right.[2]

Where an obstruction is proved to have taken place, the burden is on the person obstructed to show that he did not submit to or acquiesce in it.[3]

19. Suit in respect of easements — Parties. — A suit for a *declaration of a right to an easement* should be instituted against *all* the owners of the servient tenement where there are several of them[1] though for a suit to *remove an obstruction* created by *one* of such owners only, the others are not necessary parties.[2]

Note 18

1. ('39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon* v. *Municipal Corporation, Karachi.*
('25) 12 AIR 1925 Lah 297 (298) : 91 Ind Cas 485, *Bija Ram* v. *Brij Lal.*
('27) 14 AIR 1927 Lah 885 (886) : 105 Ind Cas 560, *Duni Chand* v. *Nizam-ud-din.*
('90) 1890 Bom P J 184, *Patil Valabhbhai* v. *Valabhai.*
('06) 1906 Pun L R No. 26, *Mir Mansab Ali* v. *Muhammad Akbar.*
('35) 22 AIR 1935 Pat 188 (190) : 155 Ind Cas 966, *Jangbahadur* v. *Thithar Singh.*
('04) 8 Cal W N 359 (361), *Shaikh Khoda Buksh* v. *Shaikh Tajuddin.* (Claimant to easement must prove that the user was "as of right.")
('71) 15 Suth W R 401 (402) (DB), *Heera Lall Kooer* v. *Purmessur Kooer.*
('70) 14 Suth W R 199 (199, 200) (DB), *Imambundee Begam* v. *Sheo Dyal Ram.*
('14) 1 AIR 1914 All 407 (408) : 25 Ind Cas 499, *Ganga Sahai* v. *Shib Charan.*
('74) 1 Cal 422 (423) : 25 Suth W R 228 (DB), *Sham Churn Auddy* v. *Tariney Churn Banerjee.*

2. See Note 13.

3. ('20) 7 AIR 1920 Nag 26 (28) : 16 Nag L R 76 : 54 Ind Cas 936, *Rama Chandra Rao* v. *Venkat Rao.* (This is so, because, whether a person submitted or not necessitates inquiry into the state of mind of that person and is a matter within his special knowledge : See sections 103 and 106, Evidence Act.)

Note 19

1. ('24) 11 AIR 1924 Cal 369 (369) : 69 Ind Cas 183, *Amritanath Biswas* v. *Jogendra Chandra.*
('21) 8 AIR 1921 Cal 622 (622) : 62 Ind Cas 425, *Haran Sheikh* v. *Ramesh Chandra.* (Suit for declaration of right of way as village road — One of the persons interested in servient tenement not made party to suit — Court will not proceed to make a decree.)

2. ('15) 2 AIR 1915 Cal 403 (403) : 31 Ind Cas 549, *Madan Mohan* v. *Sashi Bhushan.* (5 Ind Cas 23 explained — All the "servient owners" means all the servient owners who had raised objections to the plaintiff's right of way and against whom there was a cause of action.)
('23) 10 AIR 1923 Pat 65 (70) : 2 Pat 110 : 69 Ind Cas 947 (DB), *Mt. Sarban* v. *Phudo Sahu.* (Easement claimed over lands of several proprietors one of whom obstructs—Other proprietors not necessary parties.)

A *benamidar* for the dominant owner can sue for removal of an obstruction to access to light and air to the dominant tenement.[3]

Where A carries water by a drain on B's land which then goes on to C's land, A cannot sue C to allow the water to flow to C's land. The most that A can do is to sue B for a right to discharge water on B's land. If B wants in turn to discharge it upon C's land, he must sue C.[4]

20. "Shall be absolute and indefeasible." — It has been seen in Note 15 that a right to an easement is established only in a suit. Where the right is so established, it becomes absolute and indefeasible.[1] The mere fact that the dominant owner is not inconvenienced by the obstruction does not affect the right so acquired. Thus, the fact that A who has established a right of way over B's land to go to plot C, has another way by which he can go to plot C, cannot affect the right of A to enjoy the easement established.[2] Similarly, the fact that light from other sources exists than that which is acquired by prescription, is no answer to a suit for infringement of a prescriptive right to light and air which has been established.[3] Where A has established a right of easement but makes an excessive user of it to which user he has not acquired a prescriptive right, the servient owner can obstruct and prevent the excessive user but he has no right to obstruct and prevent the rightful user.[4]

21. Custom, if can override the Limitation Act.—It was held in the undermentioned case[1] that a custom cannot be allowed to override the positive provisions of the Limitation Act. Thus, where a prescriptive right is allowed by the Limitation Act, no custom to the effect that no such right shall be acquired is admissible.

22. Unity of title or possession of dominant and servient estates in the same person — Effect. — "The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate, for no person can have an easement in land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and all other circumstances of right. If one estate is held in fee and the other for a term of years there is no unity of possession that will extinguish an easement of one estate as against the other; but the unity of possession in such case, will only suspend the easement during the time of such unity of possession. Consequently, an easement may be revived, after it has been extinguished by the union of the dominant and servient tenements in one owner, by their subsequent severance, provided the easement is apparent, continuous and essential to the enjoyment of the dominant tenement."[1]

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[3] ('21) 8 AIR 1921 Cal 560 (561) : 64 Ind Cas 581 (DB), *Panchu Gopal* v. *Matangini Debi.* (Benamidar though he has no beneficial interest in the property yet in fact represents the owner.)

[4] ('30) 1930 Mad W N 611 (612), *Srinivasa Chettiar* v. *Aravamutha Iyengar.*

Note 20

[1] ('78) 3 Bom 174 (176) : 1878 Bom P J 257 (DB), *Mohan Lal Jechand* v. *Amratlal Bechardas.*

[2] ('66) 6 Suth W R 222 (223), *Sham Bagdee* v. *Fukeer Chand Bagdee.*
('74) 22 Suth W R 302 (303), *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory.*

[3] ('11) 12 Ind Cas 60 (63) : 39 Cal 59 (DB), *Paul* v. *William Robson.*
('28) 15 AIR 1928 Pat 106 (107, 108) : 105 Ind Cas 39, *Mt. Jadooie Kaharin* v. *Mt. Kishun Basi.*

[4] ('29) 16 AIR 1929 Cal 350 (352) (DB), *Raman Chandra* v. *Bhola Nath.*

Note 21

[1] ('78) 3 Bom 174 (177) : 1878 Bom P J 257 (DB), *Mohanlal Jechand* v. *Amratlal Bechardas.*

See also Notes 5 and 13.

Section 27

Exclusion in favour of reversioner of servient tenement.

27.* Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting

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* **Act of 1877 : S. 27.**

Same as S. 28 of the Act of 1871 below, except that the words in parenthesis "(other than the access and use of light and air)" after the word "easement" were omitted.

Act of 1871 : S. 28.

Exclusion in favour of reversioner of servient tenement.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B*'s land. *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that, during ten of these years, *C*, a deceased Hindu widow, had a life-interest in the land; that, on *C*'s death, *B* became entitled to the land; and that within two years after *C*'s death, he contested *A*'s claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Act of 1859.

No corresponding provision.

Note 22

[1] ('23) 10 AIR 1923 Cal 8 (10, 11) : 50 Cal 356 : 70 Ind Cas 663 (DB), *Tinkori Pathak* v. *Ram Gopal.*

thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B's* land. *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that during ten of these years *C*, a Hindu widow, had a life interest in the land, that on *C's* death *B* became entitled to the land, and that within two years after *C's* death he contested *A's* claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

1. Scope.—This section must be read with S. 26. It provides for exclusion of certain periods in reckoning the twenty years or sixty years referred to in S. 26. In order that this section may apply —

(1) the servient tenement must, during the period of user by the dominant owner, have been held under or by virtue of life interest or for any term exceeding three years, and

(2) the person entitled to the servient tenement on the determination of such interest or term, must have resisted the enjoyment within three years of such determination.

Where a Hindu widow is in possession, and makes a transfer of the land in favour of X by virtue of her powers as representing the estate, it cannot be said that the transferee is a "person entitled on the *determination* of the interest" of the widow, within the meaning of this section.[1]

The deduction referred to in the section can be claimed only when the claim is contested within three years next after the termination of the term or interest. The fact that the owner did not determine the tenancy at the expiry of the term and allowed the tenant to *hold over* does not affect the question. Thus, where A enjoyed the easement for twenty-two years from 1877 to 1899, but during the period from 1887 to 1899 the land was in the possession of a *kanomdar* under a *kanom* executed by the servient owner B, but B allowed the *kanomdar* to hold over till 1905, and obstructed the easement only after 1905, it was held that the fact that B obstructed after 1905 will not prevent the right becoming indefeasible in favour of A inasmuch as the obstruction was

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Section 27 — Note 1

[1] ('18) 5 AIR 1918 Cal 1028 (1034) : 41 Ind Cas 47 (DB), *Eralijool Tea Co., Ltd. v. Nagendra Nath Chowdhury.* (Obiter.)

Section 27
Note 1

not made within three years of 1899 which was the expiry of the term of the *kanom*.[2]

Section 28

28.* At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Extinguishment of right to property.

Synopsis

1. Principle of the section.
2. "At the determination of the period."
2a. Applicability of section to cases where there is a continuing wrong. See Section 23 Note 16.
3. "Suit for possession."
4. "Any person."
5. "Any property."
6. "Shall be extinguished."
7. Inalienable property—Acquisition of title by adverse possession. See Notes to Articles 142 & 144.
8. Plea of title.
9. Onus of proof. See Notes to Articles 142 & 144.

Other Topics (miscellaneous)

Attachment under Section 146, Criminal Procedure Code. See Note 2.
Doctrine of remitter. See Note 6.
Equity of redemption. See Note 2.
Local or special laws. See Note 3.
Personal actions. See Note 1.
Principal right extinguished—Accessory rights also extinguished. See Note 6.
Retrospective extinguishment of right. See Note 6.
Section not applicable to defences. See Note 2.
Suit for declaration—Not suit for possession. See Note 3.
Suit for restitution of conjugal rights. See Note 3.

1. Principle of the section. — The general principle is that limitation bars only the remedy and does not *extinguish the right* itself.[1] This section is an exception to this general principle so far as

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*** Act of 1877 : S. 28.**

Same as above.

Act of 1871 : S. 29.

Extinguishment of right to land or hereditary office.

At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

Act of 1859.

No corresponding provision.

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[2] ('19) 6 AIR 1919 Mad 339 (341, 342) : 42 Mad 567 : 50 Ind Cas 291 (DB), *Kuniparambil Parkum* v. *Kutti Ammoo.* (Case under Easements Act.)

Section 28 — Note 1

[1] See Note 14 to Section 3 and Note 16 to the Preamble.

See also the following cases :

('38) 42 Cal W N 758 (759), *Bhupendra Nath* v. *Trinayani Debi.*

('29) 16 AIR 1929 Nag 145 (146) : 25 Nag L R 74 : 116 Ind Cas 421 (DB) *Naraindas* v. *Nenu.* (2 Nag L R 42 disapproved.)

('86) 9 All 23 (25, 26) : 1886 All W N 279 (DB), *Chunni Lal* v. *Banaspat Singh.* (Lease — Mortgage for securing payment of rent — Decree by Revenue Court for arrears of rent time-barred—Suit for sale of the mortgaged property not time-barred.)

('24) 11 AIR 1924 All 551 (554, 556) : 46 All 775 : 80 Ind Cas 684 (FB), *Gajadhar* v. *Jagannath.* (A I R 1922 All 402 followed.)

('30) 17 AIR 1930 All 416 (417) : 52 All 539 : 122 Ind Cas 411 (DB), *Jokhu Bhunja* v. *Sitla Baksh Singh.* (A I R 1915 All 480, dissented from.)

('30) 17 AIR 1930 All 858 (860) : 52 All 979 : 132 Ind Cas 21 (DB), *Muhammad Raza Ahmad* v. *Zahoorahmad.* (It was a suit for partition.)

('67) 8 Suth W R 51 (54) (DB), *Mt. Janee Khanum* v. *Mt. Amatool Fatima Khanum.* (A lien is a right of defence not a right of action and consequently can be claimed in respect of a statute-barred debt.)

('80) 5 Cal 897 (899) : 6 Cal L R 489 : 3 Shome L R 154 (DB), *Nursing Doyal* v. *Hurryhur Saha.*

('81) 6 Cal 340 (349) : 7 Cal L R 121 (DB), *Mohesh Lal* v. *Busunt Kumaree.* (1 Mad 228 followed.)

('82) 7 Cal 91 (95) : 9 Cal L R 53 (DB), *Muhammad Hossein* v. *Kokil Singh.* (Decree remains whether execution can be taken out upon it or not.)

('18) 5 AIR 1918 Cal 933 (937, 938) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priyasakhi Debi* v. *Bireshwar Shamanta.* (Dispossession of mortgagor in simple mortgage does not extinguish title of mortgagee by lapse of time.)

('21) 8 AIR 1921 Cal 67 (68) : 66 Ind Cas 209 : 48 Cal 817, *Narendra Lal Khan* v. *Tarubala Dassi.* (If the creditor has any form of lien upon property, he can exercise it notwithstanding that he could not bring a suit, it being time-barred.)

('13) 21 Ind Cas 716 (718) (DB) (Cal), *Ramdhari Singh* v. *Parmanund Singh.* (32 Cal 576 relied on.)

('21) 8 AIR 1921 Lah 170 (171) : 65 Ind Cas 642 (DB), *Nathwa* v. *Kanhiya.* (A I R 1915 All 480 disapproved and distinguished.)

('21) 8 AIR 1921 Lah 351 (352) : 57 Ind Cas 348 (DB), *Akbar Hussain* v. *Ragnandan Das.* (1890 Pun Re No. 147 (FB) followed.)

('22) 9 AIR 1922 Lah 254 (256, 257) : 3 Lah 200 : 66 Ind Cas 771 (FB), *Motan Mal* v. *Muhammad Baksh.* (Post diem interest can be claimed as damages for entire period if mortgagee is defendant and for six years if he is plaintiff.)

('26) 13 AIR 1926 Lah 633 (633, 634) : 96 Ind Cas 844 (DB), *Sultan Muhammad* v. *Ladha Singh.* (A I R 1915 All 480 dissented from.)

('31) 18 AIR 1931 Lah 668 (670) : 132 Ind Cas 661 (DB), *Dalip Singh* v. *Sikh Gurdwara Parbandhak Committee, Amritsar.* (A petition under S. 5, Sikh Gurdwaras Act.)

('70) 6 Mad H C R 32 (33) (DB), *Mooneappah* v. *Venkatacharyudoo.* (An unappropriated payment is to be applied to the earliest debt, although the debt is barred by the act of limitation.)

('77) 1 Mad 267 (275, 276) : 1 Ind Jur 367 : 1 Mad L R 343 (DB), *Administrator General of Madras* v. *Hawkins.* (The Administrator of Madras is authorised to pay a barred debt.)

('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi* v. *Ponnusami.* (Foreign judgment is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made.)

('83) 6 Mad 293 (294) : 7 Ind Jur 357 (DB), *Narayanasami* v. *Samidas.* (Hindu law—The son is liable to pay barred debt acknowledged by his father.)

('83) 6 Mad 351 (353, 354) (DB), *Samuel Pillai* v. *Ananthanatha Pillai.* (The administratrix of an estate agreed to pay *S* his share of the estate—*S* gave a promissory note for a barred debt claimed by *A* from her—*Held* that there was consideration for the promissory note.)

('90) 13 Mad 189 (190) (DB), *Kondappa* v. *Subba.* (It is competent to the widow of a deceased Hindu to bind the reversion by a mortgage executed to secure such debts though they were barred.)

Section 28
Note 1

suits for *possession of property* are concerned[2] and provides that the bar of the remedy shall operate to extinguish the right.[2a] But the section enacts no new principle not recognized before. Before the Act of 1871, there was no provision corresponding to this in the Bengal Limitation Regulations III of 1793 and II of 1805 or the Bombay Regulation V of 1827 or the Limitation Act of 1859. The Regulations and Act, in reference to suits for the possession of land, in terms limited

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('90) 13 Mad 490 (492) (DB), *Kanharankutty* v. *Uthotti*. (Malabar law—Right of pre-emption under otti—Not barred under S. 28.)

('10) 7 Ind Cas 898 (898, 899) : 33 Mad 308 (DB), *Subramania Aiyar* v. *Gopala Aiyar*. (14 Cal 50 relied on.)

('12) 14 Ind Cas 69 (70) (DB) (Mad), *Muthusawmi Chettyar* v. *Subramaniya Ayer*. (29 Mad 200 distinguished.)

('16) 3 AIR 1916 Mad 720 (725, 726) : 28 Ind Cas 221 : 39 Mad 365 (DB), *Chidambara Mudaliar* v. *Krishnaswamy Pillai*. (Limitation cannot be pleaded to defeat an adjustment which the right to account gives.)

('18) 5 AIR 1918 Mad 657 (658, 659) : 40 Ind Cas 358 (DB), *Nathamuni Pillai* v. v. *Vengammal*. (A I R 1915 All 480 distinguished.)

('33) 20 AIR 1933 Nag 190 (191) : 144 Ind Cas 716, *Narhar Ramchandra Gude* v. *Gullu*. (A I R 1931 P C 79 explained and distinguished.)

('33) 20 AIR 1933 Nag 241 (242, 243) : 144 Ind Cas 736 : 30 Nag L R 142, *Ramshanker* v. *Ghulab Shanker*. (Mortgage decree barred by limitation — Security is not extinguished.)

('25) 12 AIR 1925 Oudh 92 (93) : 79 Ind Cas 942 : 27 Oudh Cas 268, *Behari Lal* v. *Beni Madho*. (Suit to recover money secured where the debt was evidenced by a prior pro-note the claim under which was barred.)

('25) 12 AIR 1925 Oudh 267 (268) : 78 Ind Cas 106, *Zohra Bibi* v. *Ganesh Pershad*. (A time-barred debt can be valid consideration for transfer of property.)

('28) 15 AIR 1928 Oudh 273 (276) : 3 Luck 459 : 112 Ind Cas 481 (DB), *Ram Ratan Lal* v. *Aditya*. ((1885) 14 Q B D 394 followed.)

('32) 19 AIR 1932 Pat 346 (348, 349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad* v. *Sadanand Misra*. (A I R 1928 Pat 24 dissented from.)

('12) 14 Ind Cas 508 (509, 510) : 6 Low Bur Rul 34 (DB), *Momein Bee Bee* v. *Ariff Ebrahim*. ((1904) 52 W R (Eng.) 586 followed.)

('37) 24 AIR 1937 Sind 273 (275, 278) : 172 Ind Cas 520 : 31 Sind L R 180 (DB), *Premomal Daomal* v. *Khudabux*. (A I R 1923 Sind 14 relied on.)

[*See* ('39) 26 AIR 1939 Cal 163 (166) : ILR (1938) 2 Cal 328 : 182 Ind Cas 389 (DB), *Nakul Chandra* v. *Kalipada Ghosal*. (Limitation does not bar defence— A I R 1916 P C 172 followed.)]

[2] ('30) 17 AIR 1930 All 858 (860) : 52 All 979 : 132 Ind Cas 21 (DB), *Mahomed Raza Ahmad* v. *Zahoor Ahmad*. (It was a suit for partition and not for possession.)

('24) 11 AIR 1924 All 551 (556) : 46 All 775 : 80 Ind Cas 684 (FB), *Gajadhar* v. *Jagannath*. (Per Daniels, J.)

('18) 5 AIR 1918 Mad 657 (658) : 40 Ind Cas 358 (DB), *Nathamuni Pillai* v. *Vengammal*. (A I R 1918 Mad 1332 distinguished.)

('31) 18 AIR 1931 Lah 668 (670) : 132 Ind Cas 661, *Dalip Singh* v. *Sikh Gurdwara Parbandhak Committee, Amritsar*. (1907 Pun Re No. 140 referred.)

('30) 17 AIR 1930 All 416 (417) : 122 Ind Cas 411 : 52 All 539 (DB), *Jokhu Bhunja* v. *Sitla Baksh Singh*. (A I R 1928 All 99 relied on.)

('37) 24 AIR 1937 Sind 273 (277, 278) : 172 Ind Cas 520 : 31 Sind L R 180 (DB), *Premomal Daomal* v. *Khudabux*. (A I R 1924 P C 198 explained.)

[2a] ('40) 27 AIR 1940 Nag 49 (53) : ILR (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba* v. *Ramu Chintoo*.

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Note 1

the remedy only and did not expressly extinguish the right or title. But it was nevertheless settled as a general principle that upon the expiry of the prescribed period of limitation for such suits the title was *extinguished* in favour of the person in possession.[3] In *Gunga Gobind Mandul* v. *The Collector of the 24-Purgunnahs*,[4] their Lordships of the Privy Council observed as follows:

> "The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession; . . . . As between private owners contesting *inter se* the title to the lands, the law has established a limitation

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[3] ('41) 28 AIR 1941 Cal 223 (227) : I L R (1940) 2 Cal 393 (DB), *Rajnandini Debi* v. *Manmatha Pal.* (Per Nasim Ali, J.—Even before 1877, the law of limitation was regarded not simply as barring the remedy but also as conferring title on the adverse possessor.)

('67) 11 Moo Ind App 345 (359, 361, 363) : 7 Suth W R P C 21 : 1 Suther 676 : 2 Sar 284 (P C), *Gunga Gobind Mundul* v. *Collector of 24-Pergunnas.* (1 Moo Ind App 305 (P C) recognized and supported.)

('69) 12 Suth W R 192 (193, 194) : 3 Beng L R A C 343 (DB), *Baradakant Roy Bahadur* v. *Prankrishna Paroi.*

('73) 20 Suth W R 114 (115, 116) : 11 Beng L R 237 (DB), *Brindabun Chunder Roy* v. *Tarachand.*

('69) 11 Suth W R 382 (386, 388) (DB), *Booa Russoolee* v. *Nawab Nazim of Bengal.*

('69) 11 Suth W R 139 (140) (DB), *Radha Gobind Roy* v. *Ram Kishore Dutt.*

('70) 13 Suth W R 465 (466) (DB), *Mt. Bee Bee Chummun* v. *Mt. Om Koolsoom.* (The rule of limitation applies to the case of a proprietor claiming malikana.)

('66) 1 Agra Rev 38 (40) (DB), *Bhagoutee Charun* v. *Shiva Pershad.* (In this case a rent free holder had encroached on the adjoining land and enjoyed it rent free and adversely to zamindari right for more than twelve years.)

('76) 1 Bom 286 (290, 291, 293) (DB), *Sita Ram* v. *Khanderav.* (Case under Bombay Regulation V of 1827.)

('85) 9 Bom 198 (226, 227) (F B), *Radhabai* v. *Anantrav Bhagwant Deshpande.* (Service vatan lands.)

('76) 1 Bom 352 (366, 367) (DB), *Collector of Thana* v. *Dadabhai Bommanji.* (Case under Bombay Regulation V of 1827.)

('67) 8 Suth W R 386 (387, 388) (DB), *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Sarma.* (5 Suth W R 261 and 5 Suth W R P C 69 followed.)

('72) 17 Suth W R 119 (120) : 8 Beng L R 540 (DB), *Ameeroonissa Begum* v. *Amir Khan.* (Case under Act XIV of 1859.)

(73) 20 Suth W R 104 (105) (DB), *Ramlochun Chuckerbutty* v. *Ram Soondar.*

('71) 15 Suth W R 80 (82) (DB), *Ram Sahoy Singh* v. *Kooldeep Singh.*

[*See also* ('18) 5 AIR 1918 Mad 183 (187, 188) : 44 Ind Cas 630 (DB), *Raman Somayajipad* v. *Kunhikutty Kovilamma.* (1 Mad H C R 258 dissented from.)

('29) 16 AIR 1929 Cal 149 (154) : 118 Ind Cas 566 (DB), *Khantamoyee Debi* v. *Hridayanand Bhattacharjee.* (1 M I A 446 (P C) and 3 Cal 224 followed.)]

[But see (1862) 1 Mad H C R 85 (89) (DB) *Doed Kullammal* v. *Kuppu Pillai.* (The Indian Law of Limitation (Act XIV of 1859) as to realty was held to bar the remedy, but not to extinguish the right.)

('77) 1 Bom 592 (598, 599) (DB), *Rambhat Agnihotri* v. *Collector of Poona.* (Case under Bombay Regulation V of 1827.)]

[4] ('67) 11 Moo Ind App 345 (361, 363) : 7 Suth W R 21 : 1 Suther 676 : 2 Sar 284 (P C).

of twelve years: after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor."

The law of limitation as regards possession and dispossession of property, has thus always been a law of *prescription*.[5]

2. **"At the determination of the period."** — The words "at the determination of the period hereby limited to any person for instituting a suit for possession" imply that limitation has begun to run against the person for instituting the suit referred to and has expired.[1] It follows that where a person could not or need not have sued for possession, there is no question of any determination of the period limited to him for instituting a suit for possession and consequently no question of the applicability of this section.[2]

Illustrations.

1. A person in possession of property has obviously no need to sue for possession thereof. The section, therefore, cannot apply where, as a defendant, he seeks to rely upon his possession as a defence to a suit.[3]

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5. ('29) 16 AIR 1929 Cal 149 (154) : 118 Ind Cas 566 (DB), *Khantamoyee Debi* v. *Hridayanand*.

See also the cases cited in Foot Notes (2) and (3) above.

Note 2

1. ('35) 22 AIR 1935 Bom 326 (330) : 59 Bom 502 : 159 Ind Cas 213, *Gopal Bhaurao* v. *Jagannath Wasudeo*.

('20) 7 AIR 1920 Lah 504 (507), *Basanta* v. *Indar Singh*. (Puisne mortgage of property in possession of prior usufructuary mortgagee — Puisne mortgagee given right under his mortgage, to redeem prior mortgage and take possession of mortgaged property — Puisne mortgagee not bound to claim redemption within twelve years of his mortgage and his failure to do so does not extinguish his right under this section; Article 135 does not apply to such a case: AIR 1919 Lah 402 followed.)

2. ('35) 22 AIR 1935 Mad 914 (917) : 59 Mad 51 : 161 Ind Cas 447, *Ramalingam* v. *Veerabhadradu*. (Suit for possession during adverse possession not capable of being brought in civil Court but only in revenue Court.)

('29) 16 AIR 1929 Mad 38 (41, 42) : 111 Ind Cas 152 (DB), *Alagarswami Thevan* v. *Ramabhadra*. (Need not have sued for possession.)

('90) 13 Mad 490 (492) (DB), *Kanharankutti* v. *Uthotti*. (Do.)

3. ('39) 26 AIR 1939 Cal 163 (165, 166): ILR (1938) 2 Cal 328 : 182 Ind Cas 389 (DB), *Nakul Chandra* v. *Kalipada Ghosal*. (There is no bar of limitation to defence under S. 53A of the Transfer of Property Act — Right of defence is not lost even if there is no present right to enforce contract — S. 28 does not apply to right of defence under S. 53A.)

('90) 14 Bom 222 (226, 227) (DB), *Hargovindas Lakshmidas* v. *Baji Bhai Jijibhai*.

('35) 22 AIR 1935 Bom 326 (330) : 59 Bom 502 : 159 Ind Cas 213, *Gopal Bhaurao* v. *Jagannath Wasudeo*.

('16) 3 AIR 1916 Lah 229 (229) : 1916 Pun Re No. 1 : 32 Ind Cas 485 (DB), *Gokulchand* v. *Naidarmal*.

('07) 1907 Pun L R No. 26, p. 75 : 1907 Pun W R No. 3, *Baldeo* v. *Gajwa*.

('04) 27 Mad 28 (29, 30) (DB), *Subramaniya Ayyar* v. *Poovan*. (The vendor's lien is not extinguished by Section 28, Limitation Act, even though the right to sue to enforce the lien is barred by Article 111.)

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Note 2

2. Where property is in the possession of a usufructuary mortgagee and a third person trespasses on such property the mortgagor cannot sue the trespasser till on redemption he becomes again entitled to the possession of the property.[4] Hence the mortgagor's right cannot be extinguished under this section by adverse possession against the mortgagee. Similarly, if property is subject to a simple mortgage and the possession continues with the mortgagor, adverse possession against the mortgagor cannot affect the rights of the mortgagee. (See Note 6.)

3. A reversioner of a Hindu widow cannot sue for possession from an alienee from the Hindu widow until her death, and his right will not be extinguished by the alienee continuing in possession for any period shorter than twelve years after the death of the widow.[5]

4. Where a person such as a tenant is entitled to be in possession for a particular period, the person entitled to the property after the expiry of the period cannot sue for possession before such expiry merely because the tenant claims to be in possession by virtue of a higher right. The right of the person entitled to the property after the expiry of the period cannot be extinguished in such a case by a failure to sue for possession before the expiry of the term.[6] In *Mumtaz*

('94) 17 Mad 255 (256, 257) (DB), *Orr* v. *Sundra Pandia.*

('16) 3 AIR 1916 Mad 350 (357) : 19 Ind Cas 596 : 38 Mad 321 (DB), *Rajah of Ramnand* v. *Arunachallam Chetliar.* (30 Mad 169 followed.)

('31) 18 AIR 1931 Lah 668 (670) : 132 Ind Cas 661 (DB), *Dalip Singh* v. *Sikh Gurdwara Parbandhak Committee.*

('23) 10 AIR 1923 Lah 247 (247) : 70 Ind Cas 966, *Chauhar* v. *Mansha Singh.*

('26) 13 AIR 1926 Nag 99 (106) : 89 Ind Cas 752, *Banau* v. *Ranjit Singh.* (Section 28 does not apply to C. P. Tenancy Act even in principle.)

('21) 8 AIR 1921 Bom 257 (258, 259) : 45 Bom 45:59 Ind Cas 118 (DB), *Mahadev Narayan* v. *Sadashiv Keshav.* (30 Mad 444 followed.)

[4] ('35) 22 AIR 1935 All 542 (543) : 159 Ind Cas 151, *Salig Ram* v. *Gauri Shanker.*

[5] ('90) 13 Mad 512 (515) (DB), *Sambasiva* v. *Raghava.* (5 Mad H C R 428 followed.)

[*See also* ('99) 23 Bom 725 (736) : 1 Bom L R 607 : 3 Cal W N 621 : 26 Ind App 71 : 7 Sar 543 (PC), *Ranchordas Vandrawandas* v. *Parvatibai.* (Adverse possession against widow — Suit by heir after widow's death — S. 28 is not applicable.)]

[6] ('23) 10 AIR 1923 P C 118 (121) : 50 Ind Cas 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC), *Muhammad Mumtaz Ali Khan* v. *Mohan Singh.*

('30) 58 Mad L Jour 226 (228) (PC), *Raja Muhammad Mumtaz Ali Khan* v. *Dhanna Singh.* (A I R 1923 P C 118 followed.)

('27) 14 AIR 1927 Cal 913 (914) : 104 Ind Cas 812 (DB), *Rajani Kanta Banerjee* v. *Raj Kumari Dasi.* (A I R 1924 P C 65 followed.)

('23) 10 AIR 1923 Mad 661 (662) : 72 Ind Cas 690 (DB), *Sundararajachariar* v. *Ethebar Khan Sahib.*

[*See* ('28) 15 AIR 1928 Pat 63 (64) : 104 Ind Cas 124 (DB), *Sheonandan Singh* v. *Keshao Prasad Singh.* (16 Cal W N 235 distinguished.)]

[But see ('05) 9 Cal W N 292 (299, 300) (DB), *Bagdu Majhi* v. *Raja Sri Sri Durga Prosad Singha.* (He can acquire such right if his claim of higher right

Ali v. *Mohan Singh*,[7] their Lordships of the Privy Council observed as follows :

> "This section appears to have no application to the present case, for the appellant through his counsel did not maintain that he could institute a suit for possession of the village in question, or treat the plaintiffs as if they had merely been squatters, and the Board were not referred to and are not aware of any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession."

5. C as agent of A let certain lands to B and was for sometime collecting the rents from B on behalf of A. He then began to collect the rents and to appropriate them for his own use asserting that the land was his own. It was held that A's right to the land could not, by reason of such assertion and appropriation, be extinguished by the operation of this section. So long as B was in possession, he was so as tenant of A and could not have been sued by A for possession.[8]

6. A and B usufructuarily mortgaged certain property to C but A alone received and appropriated the whole of the rent payable by the mortgagee under the mortgage. It was held that the receipt by A could not be considered to be the possession of the property by A, that it was at the best equivalent to non-payment of the rent by the mortgagee himself and that his right to redeem was not affected by this section.[9]

7. Where the possession of the defendant is, in law, the possession of the plaintiff, the latter is not bound to sue for possession and there is no "determination of the period limited for instituting a suit for possession." The plaintiff's right to the property cannot be extinguished under this section.[10]

8. Where the plaintiff is legally in possession, as where his property is under attachment under S. 146 of the Criminal Procedure Code, his title cannot be extinguished, however long the attachment may continue.[11]

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is a repudiation of the tenancy or worked a forfeiture and the landlord failed to sue for possession for twelve years.)]

[7] ('23) 10 AIR 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC).

[8] ('14) 1 AIR 1914 Bom 296 (297, 298) : 21 Ind Cas 763 (764) : 38 Bom 53 (DB), *Krishnadixit Baldixit* v. *Baldixit Wamandixit.*

[9] ('84) 7 Mad 26 (28, 29) (DB), *Chathu* v. *Aku.*

[10] ('15) 2 AIR 1915 Cal 653 (654) : 28 Ind Cas 22 (DB), *Faizuddin Khan* v. *Reju Akab.* (Co-tenant's possession cannot become adverse until there is an ouster or the equivalent of an ouster of the other co-tenant.)

[11] ('02) 26 Mad 410 (415) (DB), *Raja of Venkatagiri* v. *Isakpalli Subbayya.*
('29) 16 AIR 1929 Mad 38 (41, 42) : 111 Ind Cas 152 (DB), *Alagarswami Thevan* v. *Ramabhadra Naidu.* (1 Mad 309 relied on.)

The *full* period prescribed for a suit for possession must have expired; otherwise, the title of the true owner is not extinguished in favour of the wrongdoer.[12] Thus, an owner of property does not lose his right to it merely because he happens not to be in possession of it for twelve years. His right is extinguished only when somebody else is in possession against whom a suit for possession could have been filed but had not been filed within the time prescribed.[13]

The words "hereby limited" show that the section does not apply to cases where the period of limitation is prescribed by some other Act. (See Note 8.)

2a. Applicability of section to cases where there is a continuing wrong. — See Section 23 Note 16.

3. "Suit for possession." — The section, in terms, applies only where *suits* for possession of property become barred by limitation.[1] It does not apply to *applications* for possession. Thus, the fact that an application for execution of a decree for possession is barred by limitation will not extinguish *ipso facto* the right of the applicant to the property.[2]

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[12] ('79) 7 Ind App 73 (80, 81) : 6 Cal L R 249 : 4 Sar 127 : 3 Suther 370 (PC), *Wise* v. *Amiroonissa Khatoon*. (Possession for three years under order made under Act IV of 1840 does not create title against Government.)

('68) 9 Suth W R 283 (283) (DB), *Durga Churn Paul* v. *Pearee Mohun*.

('35) 22 AIR 1935 Pat 164 (165, 166) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar* v. *Sri Bhup Narain Singh*. (A I R 1922 P C 184 relied on.)

('34) 21 AIR 1934 Pat 485 (489): 154 Ind Cas 1032 (DB), *Mt. Dharischhna Kuari* v. *Ramyad Kuar*. (A I R 1929 P C 166 relied on.)

[13] ('21) 8 AIR 1921 Bom 368 (369) : 45 Bom 1020 : 62 Ind Cas 101 (DB), *Swamirao* v. *Bhimabai*.

('29) 16 AIR 1929 Oudh 402 (405) : 119 Ind Cas 866, *Mubinul Nisa* v. *Ali Hussain*.

('26) 13 AIR 1926 Oudh 313 (315) : 29 Oudh Cas 131 : 92 Ind Cas 825, *Sukh Deo* v. *Mt. Ram Dulari*. (A I R 1916 P C 21 followed.)

('25) 12 AIR 1925 Cal 981 (983) : 85 Ind Cas 594 (DB), *Abhoy Sankar* v. *Satyendra Prasanna*. ((1847) 10 Ir L R 504 followed.)

Note 3

[1] ('18) 5 AIR 1918 Pat 492 (493) : 46 Ind Cas 569 : 3 Pat L Jour 478 (DB), *Bhaiga Parida* v. *Gannath Khandai*. (Section 28 provides only the extinction of the rights upon the termination of the period of limitation for a suit and not that at the termination of the period of limitation for an *application*, any right shall be extinguished.)

('30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375 (DB), *Abdul Alim* v. *Abdul Hamid*.

('29) 16 AIR 1929 Nag 145 (145) : 25 Nag L R 74 : 116 Ind Cas 421 (DB), *Naraindas* v. *Nenu*.

('09) 2 Ind Cas 981 (981) : 1909 Pun Re No. 69, *Aruramal* v. *Kesar Singh*.

[2] ('02) 25 Mad 300 (327) : 12 Mad L Jour 128 (FB), *Vedapuratti* v. *Vallabha Valiya Raja*.

('10) 8 I. C. 639 (643): 35 Bom 79 (DB), *Vasudeo Atmaram* v. *Eknath Balkrishna*.

('09) 4 Ind Cas 246 (248, 249) (DB) (Bom), *Bala Kushaba* v. *Amrita Vaghmode*.

Section 28
Note 3

The "suit for possession" referred to in the section is a suit in respect of which the period of limitation is prescribed by schedule I, Limitation Act; the section therefore does not apply to suits for possession to be brought in the revenue Courts for which no limitation is provided in this Act.[3] But the principle of the section, which, as has been seen in Note 1, is of general applicability, has been applied to such cases.[4] The section has been expressly made applicable to cases arising under the Central Provinces Tenancy Act by virtue of the provisions of S. 104 thereof.[5]

('95) 1 Cal W N 569 (571) (DB), *Jagabandhu Bhattacharjee* v. *Harimohan Roy.*

('66) 1 N W P H C R 154 (156), *Jugur Nath* v. *Balgobind.* (When a right to property has been established by a declaratory decree the barring of the right of execution by limitation does not extinguish the right.)

('87) 1887 Pun Re No. 3, *Ganda Mal* v. *Nanak Chand.* (5 Cal 897 referred to; 9 Cal 651 dissented.)

[3] ('35) 22 AIR 1935 Mad 914 (917) : 59 Mad 51 : 161 Ind Cas 447, *Ramalingam* v. *Veerabhadradu.* (A holder of a service inam, who is out of possession of the lands attached to his office must, under the Madras Hereditary Village Offices Act, sue for possession in the revenue Court within three years—Section 28 does not apply to such suits.)

('98) 21 Mad 134 (135) : 7 Mad L Jour 196 (DB), *Pichuvayyan* v. *Vilakhudayam Asari.* (Rights to property which cannot be enforced in civil Courts by reason of the Regulation VI of 1831 are not extinguished under S. 28 of the Limitation Act XV of 1877, as the latter Act does not prescribe any period of limitation for suits under the Regulation aforesaid.)

[4] ('11) 11 Ind Cas 465 (467, 468) (DB) (Cal), *Nand Kumar Dobey* v. *Ajodhya Sahu.* (Cases governed by Article 3 of Schedule III of the Bengal Tenancy Act.)

('33) 20 AIR 1933 Pat 6 (15) : 11 Pat 701 : 141 Ind Cas 157 (DB), *Chaturbhuj Singh* v. *Sarada Charan.* (Do.)

('99) 21 All 204 (205, 206, 208) : 1899 All W N 36 (DB), *Dalip Rai* v. *Deoki Rai.* (Cases under Act XII of 1881 (N W P Rent Act), S. 95 (*n*).)

('35) 22 AIR 1935 Lah 787 (789) : ILR (1937) Lah 517 : 160 Ind Cas 1000 (DB), *Kartar Singh* v. *Kharkha.* (Section 28 does not in terms apply to cases under special or local laws, but the principle underlying it is of general application and has been applied to cases governed by local laws.)

('30) 17 AIR 1930 Cal 225 (227) : 127 Ind Cas 51 (DB), *Nalini Bhusan* v. *Hiralal Roy.* (Where a landlord keeps a ryot out of possession of his holding for the periods specified in Art. 3 of Sch. III of the Bengal Tenancy Act, the ryot's title in the holding is existinguished by adverse possession.)

('04) 27 All 372 (373, 374) : 2 All L Jour 69 : 1904 All W N 281, *Ram Lal* v. *Chuni Lal.* (Case under Agra Tenancy Act II of 1901.)

[But see (30) 17 AIR 1930 Pat 476 (478, 479) : 126 Ind Cas 858 (DB), *Bankey Behary Lal* v. *Gudo Choudhury.* (11 Ind Cas 465 distinguished.)]

[5] ('40) 27 AIR 1940 Nag 49 (55, 56) : ILR (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba* v. *Ramuchintoo.* (The extinguishment spoken of by S. 28 occurs at the end of the period specified in the second schedule to the Tenancy Act and not at the end of the period prescribed by the Limitation Act.)

('28) 15 AIR 1928 Nag 281 (281) : 109 Ind Cas 403, *Dadoo* v. *Sukha.*

('34) 21 AIR 1934 Nag 61 (62) : 30 Nag L R 208 : 148 Ind Cas 733, *Sujatkhan* v. *Nazafali.*

The following have been held not to be suits for possession of property for the purposes of this section:

(1) Suit for sale on a mortgage.[6]

(2) Suit to enforce maintenance.[7]

(3) Suit for the restitution of conjugal rights.[8]

(4) Suit for a declaration.[9]

(5) Suit for setting aside an order rejecting a claim to attached property.[10]

A suit for pre-emption is a suit for possession within the meaning of this section.[10a]

Where a person is *bound* to set aside a document before he can sue for possession, as in the case of a minor whose property has been alienated by his guardian on his behalf, a failure to sue to set aside the alienation within the time prescribed will extinguish his rights to the property under this section.[11] The reason is that the suit for

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('27) 14 AIR 1927 Nag 352 (352): 107 Ind Cas 522, *Dharmu* v. *Dal Singh.* (A I R 1926 Nag 99 dissented from.)

[6] ('30) 17 AIR 1930 All 416 (417) : 122 Ind Cas 411 : 52 All 539 (DB), *Jokhu Bhunja* v. *Sitla Bakhsh Singh.* (A I R 1928 All 99 relied on.)

('35) 22 AIR 1935 Oudh 139 (141) : 10 Luck 531 : 153 Ind Cas 808 (DB), *Ram Adhar* v. *Shankar Baksh Singh.*

('18) 5 AIR 1918 Cal 933 (938, 940) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya Sakhi Debi* v. *Bireshwar Samanta.*

[*See also* ('35) 22 AIR 1935 Oudh 213 (216): 10 Luck 481 : 153 Ind Cas 307 (DB), *Sarada Nand* v. *Daya Shanker Singh.*]

[7] ('24) 11 AIR 1924 Cal 364 (366) : 73 Ind Cas 235 (DB), *Gopal Chandra* v. *Kadambini Dasi.* (3 Bom 415 (P C) and 29 Cal 557 followed.)

[8] ('01) 25 Bom 644 (657) : 3 Bom L R 371 (FB), *Dhanjibhoy Bomanji* v. *Hirabai.*

('12) 16 Ind Cas 124 (124) : 34 All 412 (DB), *Ayesha* v. *Faiaz Husain.*

[9] ('10) 6 Ind Cas 881 (883) : 3 Sind L R 228 (FB), *Goverdhandas* v. *Naraindas.* (Suit for declaration of right to the flow of water and for injunction restraining defendant from obstructing it.)

('09) 2 Ind Cas 981 (981) : 1909 Pun Re No. 69, *Aruramul* v. *Kesar Singh.*

('28) 15 AIR 1928 Bom 383 (384) : 113 Ind Cas 378 (DB), *Chintaman Balwant* v. *Bhagwan Ganapati.* (Mortgage by Hindu father — Mortgagee not put in possession — Sale to mortgagee — Suit by son to set aside sale and recover his share.)

[10] ('36) 165 Ind Cas 84 (85) (DB) (Cal), *Bama Pada* v. *Rama Nath.* (Claimant's right to property is not extinguished by his failure to get order set aside within period of limitation by regular suit.)

[10a] ('34) 21 AIR 1934 Oudh 303 (305) : 9 Luck 475 : 149 Ind Cas 258, *Salamat Ali* v. *Nur Muhammed Khan.*

[11] ('33) 20 AIR 1933 Bom 42 (44) : 141 Ind Cas 806 (DB), *Jhaverbhai Hathibhai* v. *Kabhai Becher Patel.*

('19) 6 AIR 1919 Cal 404 (404): 52 Ind Cas 269, *Kanok Dasi* v. *Srihari Goswami.* (Suit to set aside invalid alienation by certificated guardian.)

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possession in such cases will be governed by the same article which governs the suits to set aside such alienations.

A suit for recovery of possession on redemption of a mortgage on the property is virtually a suit for *possession* and on the expiry of the period of limitation for such suit, the mortgagor's title to the property will be extinguished.[12] (See also Art. 148 Notes 2 and 25.)

As to whether the section applies to a suit for possession under S. 9 of the Specific Relief Act, see Note 2 under Article 3.

4. "Any person." — A title by adverse possession can be obtained against a *math*. The fact that during the period of prescription the *math* had no lawful manager will not affect the operation of this section.[1]

5. "Any property." — Section 29 of the Act of 1871 corresponding to this section referred only to "land or hereditary office."[1] The present section is wider than S. 29 of the Act of 1871 and refers to "any property."[2] It would seem to include all property in respect of which a suit for possession can be filed. It is, however, necessary that the property must be one recognized by law.[3] The following have been regarded as property for which a title can be acquired by the operation of this section:

(1) An exclusive right of fishery.[4]

('18) 5 AIR 1918 Mad 724 (726) : 41 Mad 102 : 40 Ind Cas 664 (DB), *Kandasamy Naicken* v. *Irusappa Naicken*.

('12) 12 Ind Cas 695 (697, 700) (DB) (Mad), *Doraiswamy Serumadam* v. *Nandisamy Seluvan*. (A suit by a minor to set aside a sale by his guardian and to recover property is governed by Arts. 44 and 144 and also by S. 28.)

('14) 1 AIR 1914 Oudh 338 (339) : 17 Oudh Cas 52 : 23 Ind Cas 406, *Mt. Sheonatha* v. *Sheoraj Singh*. (23 Mad 271 (P C) relied on.)

[But see ('40) 27 AIR 1940 Cal 589 (590) : 193 Ind Cas 168, *Lalit Kumar Das* v. *Nogendra Lal*. (Article 44 is not concerned with suits for possession — Ward's failure to sue within period prescribed by Art. 44 bars only his right to set aside transfer—It does not extinguish right to property under S. 28.)]

See also Note 2 to Article 44.

[12] ('25) 12 AIR 1925 Bom 339 (340) : 87 Ind Cas 699 (DB), *Indurai Bhaurai* v. *Shivlal Nabhubhai*.

Note 4

[1] ('94) 18 Bom 507 (511, 512) (DB), *Vithalbowa* v. *Narayan Daji Thite*.

Note 5

[1] ('81) 3 All 435 (436) : 1881 All W N 9 : 5 Ind Jur 652 (DB), *Jagram Bibi* v. *Ganeshi*. (Trees growing upon land are "land" within the meaning of S. 29, Limitation Act, 1871.)

[2] ('79) 4 Cal 283 (297) : 3 Cal L R 336 : 2 Shome L R 2 (DB), *Ramchunder Ghosaul* v. *Juggut Monmohiney Dabee*.

[3] ('04) 28 Bom 399 (407) : 6 Bom L R 428 (DB), *Jethabhai* v. *Nathabhai*.

[4] ('32) 19 AIR 1932 Cal 300 (302, 303) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nandi* v. *Lokenath Mookerjee*.

('23) 10 AIR 1923 Pat 58 (60, 62): 1 Pat 674 : 67 Ind Cas 954 (DB), *Henry Hill & Co.* v. *Sheoraj Rai*. (AIR 1917 Pat 528 followed.)

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Note 5

(2) A right to maintain a projection over the neighbour's land. The right is a right to the occupation of space belonging to the neighbour and therefore of property.[5]

(3) A right to levy assessment on rent-free lands.[6]

(4) A right to a Buddhist monastery.[7]

(5) A right to *birt jajmani*.[8]

(6) A *nankar* allowance when that allowance forms part of a larger estate which has been divided and enjoyed in severalty for a long time.[9]

(7) A right to an office of profit.[10] It must be noted that where land is attached to the office as appurtenant to it and the right to the office is barred, not only the right to the office but the right to the land also will be extinguished.[11]

('30) 17 AIR 1930 Mad 679 (680, 683) : 125 Ind Cas 545, *Secretary of State* v. *District Board of Tanjore.* (14 Cal L J 572 followed.)

See also Note 10 to Section 2 (5), Note 10 to Article 39 and Note 7 to Articles 142 & 144.

[5] ('25) 12 AIR 1925 Bom 335 (335, 337) : 87 Ind Cas 1008, *Bahadurmal Gurumukhrai* v. *Mohanlal Surchand.* (3 Bom 174 and 28 Bom 428, followed.)
[*See also* ('10) 7 Ind Cas 571 (572) (DB) (Mad), *Adinarayanamma* v. *Murtuza.* (A person constructing a buttress over a site belonging to another and enjoying its possession for the statutory period gets title to the site by adverse possession and not only an easement.)]

[6] ('21) 8 AIR 1921 Bom 303 (306, 307) : 45 Bom 694 : 61 Ind Cas 40 (DB), *Sakharam* v. *Trimbakrao.* (5 Cal 949 and 1 Bom 586, followed.)
See also Note 5 to Article 130.

[7] ('23) 10 AIR 1923 Rang 40 (40) : 79 Ind Cas 273, *U Wiseikla* v. *U Parama.*

[8] ('08) 1908 Pun Re No. 34 : 1908 Pun L R No. 163 : 1908 Pun W R No. 96, *Mohan Lal* v. *Janki.*

[9] ('16) 3 AIR 1916 Oudh 129 (132) : 33 Ind Cas 461 : 19 Oudh Cas 49, *Deputy Commissioner, Fyzabad* v. *Jagjiwan Bakhsh Singh.*

[10] (1900) 23 Mad 271 (279) : 27 Ind App 69 : 4 Cal W N 329 : 10 Mad L Jour 29 : 2 Bom L R 597 : 7 Sar 671 (PC), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram.* (Hereditary office.)
('03) 26 Mad 113 (115) (DB), *Raghavachariar* v. *Tirumalai Asari.* (Non-hereditary office.)
('09) 3 Ind Cas 8 (8, 9) (DB) (All), *Dharma Nand* v. *Khema.* (Hereditary office.)
('98) 21 Mad 278 (287) (DB), *Alagirisamy Naicker* v. *Sundareswara Iyer.* (10 I A 90 (PC) followed.)
('09) 3 Ind Cas 408 (414) (DB) (Cal), *Sital Das Babaji* v. *Partab Chandar Sarma.* (The right of any person who might be regarded as lawfully entitled to the shebaitship may be extinguished by adverse possession.)
('20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan* v. *Hazara Begum.* (Hereditary office of mutawalli.)
[But see ('30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375, *Abdul Alim* v. *Abdul Hamid.* (Non-hereditary office — Suit for possession of office is not suit for possession of property.)]

[11] (1900) 23 Mad 271 (279) : 27 Ind App 69 : 4 Cal W N 329 : 10 Mad L Jour 29 : 2 Bom L R 597 : 7 Sar 671 (PC), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram.* (Hereditary office.)
('20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan* v. *Hazara Begum.* (Do.)

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Note 5

(8) A right to cut, appropriate and sell timber in a forest.[11a]

(9) A jagir (right to collect rent). This is an interest in immovable property.[11b]

A "right to property" would include a right to the joint enjoyment of the property as well as a right of survivorship to the property.[12]

It has been held in the undermentioned cases[13] that this section is confined to *immovable* property. This is obviously incorrect.[14]

It has been held that the property referred to in the section must be property capable of being *physically* possessed and that consequently a right to redeem a usufructuary mortgage is not property for the purposes of this section.[15]

See also Articles 142 & 144 Notes 6 and 7.

('98) 21 Mad 278 (287) (DB), *Alagirisamy Naicker* v. *Sundareswara Iyer.*
('03) 26 Mad 113 (115) (DB), *Raghavachariar* v. *Tirumalai Asari.* (Non-hereditary office.)
('05) 28 Mad 197 (200, 201) (DB), *Pydigantham Jagasnnatha Row* v. *Rama Doss Patnaik.* (Hereditary office with property.)
('17) 4 AIR 1917 All 49 (51, 52) : 39 All 636 : 42 Ind Cas 77 (DB), *Ram Piari* v. *Nand Lal.* (Hereditary office.)
[But see ('30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375 (DB), *Abdul Alim* v. *Abdul Hamid.* (Where action for possession of office of mutwalli is statute-barred, right to a particular wakf property is not necessarily extinguished under Section 28 — The decision proceeds on the view that a suit for possession of an office of mutwalli is of a personal character and is not a suit for possession of a property.)]
See also Note 11 to Article 124.

[11a] ('39) 26 AIR 1939 Pat 587 (590): 181 Ind Cas 777 (DB), *Jagadish Chandra* v. *Pratap Chandra.*

[11b] ('41) 28 AIR 1941 Pat 219 (221) (DB), *Padma Kumari* v. *Nanda Padhan.*

[12] ('21) 8 AIR 1921 Mad 24 (25, 27) : 44 Mad 131 : 60 Ind Cas 583 (DB), *Atchamma* v. *Bapiah.* (9 M I A 539 (PC) followed.)
('37) 24 AIR 1937 All 300 (302, 303) : 169 Ind Cas 125, *Mt. Jaidevi Kuari* v. *Dakshini Din.* (26 Bom 146 dissented from.)

[13] ('39) 26 AIR 1939 Bom 494 (496) : ILR (1939) Bom 685 : 185 Ind Cas 366, *Surat Borough Municipality* v. *Sarifa Karunnissa.*
('22) 9 AIR 1922 Pat 346 (349) : 63 Ind Cas 849 : 6 Pat L Jour 408 (DB), *Niamat Ali* v. *Yad Ali Shah.*

[14] *See* ('10) 7 Ind Cas 134 (138) (DB) (Bom), *Ramdas Chabildas* v. *Chabildas.* (Suit for recovery of ornaments barred — Right is extinguished.)

[15] ('97) 20 Mad 305 (309, 310, 311) (DB), *Krishna Menon* v. *Kesavan.* (Defendant in possession of land in Malabar, as ottidar—Plaintiff purchasing the jenmi right — Defendant not suing for pre-emption within the period prescribed — Plaintiff subsequently suing for redemption—Defendant can assert his right of pre-emption and such right is not extinguished by his failure to sue within the period of limitation — 7 Mad 26 and 13 Mad 490 followed.)
[But see ('02) 6 C W N 601 (612) (DB), *Lalla Kanhoo Lal* v. *Manki Bibi.* (Title to immovable property may be affected by S. 28 although the physical possession is not in question — Equity of redemption is capable of being extinguished by adverse possession.)]
See also the Article in 2 Mad L Jour 283 (286, 287).

6. "Shall be extinguished." — Where a person who could have sued for possession of property, allows the period of limitation prescribed for the suit to expire, his title is, under this section, destroyed.[1] The extinguishment of the title of the rightful owner will

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Note 6

[1] ('39) 26 AIR 1939 Lah 455 (457, 458) : 185 Ind Cas 858, *Banwari Lal* v. *Mt. Hussaini.* (Lessee continuing in possession after expiry of term of lease—No payment of rent—Nothing to show landlord's assent—Tenant's possession is adverse and landlord's title will be extinguished if he does not sue for possession within twelve years from expiry of lease.)

('39) 26 AIR 1939 Pat 587 (590) : 181 Ind Cas 777 (DB), *Jagadish Chandra* v. *Pratap Chandra.* (Lessee adversely and openly enjoying timber of adjoining jungle belonging to grantor for more than twelve years—Grantor held lost his right to timber by adverse possession.)

('24) 11 AIR 1924 P C 121 (122) : 51 Ind App 171 : 5 Lah 192 : 80 Ind Cas 788 (PC), *Mt. Lajwanti* v. *Safa Chand.*

('37) 24 AIR 1937 Cal 305 (307, 308) : I L R (1937) 2 Cal 242 : 172 Ind Cas 315 (DB), *Sri Raghunathjieu* v. *Ganga Gobinda.*

('20) 7 AIR 1920 Cal 852 (852) : 59 Ind Cas 719 (DB), *Harish Chandra* v. *Nirpendra Coomar.* (*P* purchasing benami in name of *D* and remaining in possession for more than two years but dispossessed by *D*—*P* sued for possession—*D's* title had become extinguished by Sch. 3, Bengal Tenancy Act of 1885.)

('15) 2 AIR 1915 All 90 (91) : 27 Ind Cas 914, *Balbhaddar Choube* v. *Somaru Rai.* (Failure to sue under section 79 of the Tenancy Act on dispossession extinguishes right.)

('22) 9 AIR 1922 All 124 (125, 126) : 66 Ind Cas 856, *Bhikhari Singh* v. *Jokhan.* (Do.)

('27) 14 AIR 1927 All 551 (552) : 101 Ind Cas 591, *Bhairo Lohar* v. *Abdul Wahab.* (Do.)

('15) 2 AIR 1915 Cal 234 (234) : 27 Ind Cas 250 (DB), *Sachindra Kishore Dey* v. *Rajani Kanta.*

('77) 1 Bom 586 (590) : 1 Ind Jur 849 (DB), *Keval Kuker* v. *Taluqdari Settlement Officer.*

('37) 24 AIR 1937 All 300 (302, 303) : 169 Ind Cas 125, *Mt. Jaidevi Kuari* v. *Dakshini Din.*

('26) 13 AIR 1926 All 62 (63) : 48 All 145 : 92 Ind Cas 414 (DB), *Mt. Ram Kuer* v. *Govind Ram.* (Mortgagee remaining in possession after the redemption of mortgage with possession—Right of mortgagor to recover possession is barred.)

('83) 1883 All W N 178 (178) (DB), *Jaipal Rai* v. *Illahi Bakhsh.* (Redemption of mortgage by person claiming under title adverse to mortgagor—Adverse possession by such person extinguishes mortgagor's right.)

('29) 16 AIR 1929 P C 228 (231) : 51 All 675 : 120 Ind Cas 651 : 56 Ind App 330 (PC), *Abdul Jalil Khan* v. *Obaid Ullah Khan.* (Benami purchaser allowing true owner to be in adverse possession for twelve years—Latter gets a good title.)

('89) 11 All 438 (445, 455) : 1889 All W N 155 (DB), *Parmanand Misr* v. *Sahib Ali.*

('01) 24 Mad 387 (396) : 28 Ind App 81 : 3 Bom L R 303 : 5 Cal W N 545 : 7 Sar 819 (PC), *Vasudeva Padhi Khadangal Garu* v. *Maguni Devan Bakshi Mahapatrulu Garu.*

('77) 1 Mad 343 (348) : 2 Ind Jur 249 (DB), *Chenna Kesavaraya* v. *Mangadu Vaidelinga.*

('20) 7 AIR 1920 Nag 51 (51) : 55 Ind Cas 499 : 16 Nag L R 87, *Laxman* v. *Govind.* (23 All 175 relied on.)

('19) 6 AIR 1919 Oudh 404 (405) : 53 Ind Cas 1005, *Parameswar Din* v. *Ram Nath.*

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Note 6

operate to *give a good title* to the wrongdoer.[2] In *Gunga Gobind*

(1900) 27 Cal 1004 (1011) : 27 Ind App 103 : 4 Cal W N 565 : 7 Sar 718 (PC), *Fatmatabinissa Begum* v. *Sundar Das.* (Suit for redemption of usufructuary mortgage barred by limitation—Right of mortgagor is extinguished.)

('87) 1887 All W N 103 (104) (DB), *Birangi* v. *Ramsaran.*

[*See* ('33) 20 AIR 1933 Oudh 462 (464) : 146 Ind Cas 987, *Ram Shankar* v. *Sheo Dutt.*]

[*See also* ('23) 10 AIR 1923 Rang 40 (40) : 79 Ind Cas 273, *Wiseikla* v. *Parama.*]

[2] ('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Halwant* v. *Deo Narain.*

('40) 27 AIR 1940 Nag 49 (53) : I L R (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba* v. *Ramu Chintoo.*

('39) 26 AIR 1939 Cal 50 (62) : 180 Ind Cas 721 (DB), *Jitendra Kumar* v. *Debendra Chandra.* (Reason is that title to land cannot be in a state of suspense.)

('38) 25 AIR 1938 Lah 369 (373, 385, 386) : 175 Ind Cas 945 (FB), *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar.* (Mosque adversely possessed by Sikhs for the statutory period — Sikhs become owners of the building—All rights of Muhammedans including right to pray are lost.)

('97) 21 Bom 509 (514, 516) (DB), *Budesab* v. *Hanmantha.*

('77) 3 Cal 224 (226, 227) (DB), *Gossain Dass Chunder* v. *Issur Chunder Nath.* (11 Moo Ind App 345 (P C) followed.)

('87) 1887 All W N 92 (92) (DB), *Pir Bakhsh* v. *Mukhan Lal.*

('81) 3 All 435 (436, 437) : 1881 All W N 9 : 5 Ind Jur 652 (DB), *Jagrani Bibi* v. *Ganeshi.*

('06) 28 All 743 (746) : 1906 All W N 216 (DB), *Yakub Ali Khan* v. *Kishun Lal.*

('06) 29 All 133 (136, 137) : 3 All L Jour 760 : 1906 All W N 305 (DB), *Bhadder* v. *Khair-ud-Din Husain.*

('26) 13 AIR 1926 All 697 (698) : 96 Ind Cas 687 (DB), *Sajjad Hussain* v. *Qurbon Ali Beg.*

('28) 15 AIR 1928 All 45 (46) : 49 All 713 : 102 Ind Cas 175 (DB), *Rikhdeo Tewari* v. *Sukhdeo Tewari.*

('31) 18 AIR 1931 All 635 (649) : 54 All 299 : 136 Ind Cas 145 (FB), *Ram Karan Singh* v. *Ram Das Singh.*

('90) 14 Bom 222 (226, 227) (DB), *Hargovindas Lakshmidas* v. *Bajibhai Jijibhai.*

('12) 17 Ind Cas 148 (149) : 37 Bom 37 (DB), *Maganchand Fulchand* v. *Vithalrao.*

('20) 7 AIR 1920 Bom 9 (10) : 58 Ind Cas 326 (DB), *Tayabali Abdullabhai* v. *Dohad Municipality.*

('79) 4 Cal 327 (331) : 2 Shome L R 106 (DB), *Bejoy Chunder* v. *Kally Prosonno Mookerjee.*

('97) 24 Cal 244 (248) (DB), *Suja Hossein* v. *Monahur Das.* (Where an insolvent has been in possession of land from before the date of insolvency and for more than twelve years after the insolvency the Official Assignee not having taken possession, the insolvent will have acquired a right by adverse possession.)

('10) 6 Ind Cas 392 (395) (DB) (Cal), *Nawab Bahadur, Murshidabad* v. *Gopinath Mandal.*

('22) 9 AIR 1922 Cal 193 (194) : 69 Ind Cas 7 (DB), *Satyendra Nath* v. *Krishnasakha Kar.*

('86) 1886 Pun Re No. 16, *Daya Ram* v. *Badri Mal.*

('72) 1872 Pun Re No. 48, *Kurim Khan* v. *Bahadur Khan.*

('22) 9 AIR 1922 Lah 102 (103) (DB), *Lala* v. *Khalas.*

('19) 6 AIR 1919 Pat 447 (451) : 53 Ind Cas 114 (DB), *Badri Chaudhuri* v. *Harbans Jha.* (Fraudulent transferor continuing in possession for more than twelve years is entitled to declaration or recovery of possession even if fraud is carried out.)

Mundul v. *The Collector of 24-Pargunnahs*,[3] Lord Romilly observed as follows :

> "The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in *favour of the party* in possession . . . . . . The High Court had decided that the Prince's title is barred; and the *effect of that bar must operate in* favour of the party in possession."

The acquisition of the title by the wrongdoer is thus the corresponding effect of the right to the property being extinguished ; if the one does not take place, the other does not.[4] That this is so is also clear from the words "whereas it is also expedient to provide rules for *acquiring* by possession, the ownership of easements *and other property*" occurring in the preamble of this Act.

Where the title of a person is under this section extinguished in favour of the wrongdoer, it is not revived by that person again getting into possession. In other words, there is "no remitter to the old title."[5]

('35) 22 AIR 1935 Pat 164 (165) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar* v. *Bhup Narain Singh.*

('14) 1 AIR 1914 Mad 708 (710) : 38 Mad 1064 : 24 Ind Cas 369 (DB), *Prasanna Venkatachala Reddiar* v. *Collector of Trichinopoly.*

('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshmi Narasayya.* (15 Mad L Jour 368 followed.)

('16) 3 AIR 1916 Mad 415 (416) : 29 Ind Cas 168 (DB), *Ratna Bai* v. *Official Assignee of Madras.*

[*See* ('17) 4 AIR 1917 Cal 369 (370) : 36 Ind Cas 11 (DB), *Chandra Ghosh* v. *Nilkamal Mukhopadhyaya.* (*Quære*—Whether Section 28 of the Limitation Act operates only to extinguish the interests of the dispossessed owner and not to assign that interest to the adverse possessor.)]

[But see ('83) 1883 All W N 100 (100) (DB), *Dilsukh Rai* v. *Tika Ram.*]

[3] (1866-67) 11 Moo Ind App 345 (360, 361) : 7 Suth W R 21 : 1 Suther 676 : 2 Sar 284 (PC).

[4] ('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613, *Oudh Behari Lal* v. *Collector of Etah.*

('31) 18 AIR 1931 All 635 (649) : 54 All 299 : 136 Ind Cas 145 (FB), *Ram Karan Singh* v. *Ram Das Singh.*

('10) 6 Ind Cas 881 (883) : 3 Sind L R 228 (FB), *Goverdhan Das* v. *Narain Dass.*

('97) 21 Bom 509 (514) (DB), *Budesab* v. *Hanmanta.* ((1858) 27 L J Ex 297 followed.)

[5] ('35) 22 AIR 1935 Pat 164 (165) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar* v. *Bhup Narain Singh.* (There cannot be a revival of title of which there has been a statutory extinguishment.)

('20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan* v. *Hazra Begum.*

('99) 21 All 204 (208, 209) : 1899 All W N 36 (DB), *Dalip Rai* v. *Deoki Rai.* (Forcible entry by tenant after his right of occupancy of land is extinguished, is not as tenant but as trespasser.)

(1873) 20 Suth W R 114 (115) : 11 Beng L R 237 (DB), *Brindabun Chunder* v. *Tarachand Bindopadhya.* (11 M I A 345 (PC) followed.)

In *Brassington* v. *Llewellyn*,[6] a leading case under the English statute of limitation, which has been followed in this country also, Sir William Channel observed as follows :

> "The title to which, according to the doctrine of remitter, a party can be deemed to be remitted, must be a title on which he could have maintained an ejectment. But in 1842 could William have maintained an ejectment before his re-entry? It must be admitted that he could not have done so. Then, how could his re-entry operate by way of remitter? To hold that it could, would be quite at variance with the true doctrine of remitter, and would practically repeal the statute."

Where a title has been acquired by the operation of this section, a suit can be maintained by the person so acquiring it for a declaration of his title[7] or for possession of the property if he is dispossessed of it.[8]

The right that is extinguished cannot be anything more than what the rightful owner had in the property.[9] Thus, where the

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('30) 17 AIR 1930 Cal 225 (226, 227) : 127 Ind Cas 51 (DB), *Nalini Bhusan Roy* v. *Hiralal Roy.*

('27) 14 AIR 1927 Nag 401 (402) : 105 Ind Cas 835, *Sonaji* v. *Dattu.*

('28) 15 AIR 1928 Nag 280 (280, 281) : 109 Ind Cas 401, *Kapoor* v. *Nanhi.* (A I R 1926 Nag 99 distinguished.)

('07) 6 Cal L Jour 621 (636) (DB), *Lilabati Misrain* v. *Bishun Chobey.*

('35) 22 AIR 1935 Lah 787 (789) : I L R (1937) Lah 517 : 160 Ind Cas 1000 (DB), *Kartar Singh* v. *Kharkha.*

('34) 21 AIR 1934 Pat 485 (489) : 154 Ind Cas 1032 (DB), *Mt. Dharichhna Kuari* v. *Ramyad Kuar.* (But if he is in possession again for twelve years he may get a title.)

('25) 12 AIR 1925 Oudh 20 (23) : 84 Ind Cas 98 (DB), *Mt. Mahmudunnisa* v. *Zahid Raza.* (A I R 1920 Cal 800 followed.)

('76) 25 Suth W R 131 (132), *Kristo Gopal Roy* v. *Roodro Chunder Roy.*

('26) 13 AIR 1926 Rang 95 (96) : 95 Ind Cas 514, *Maung San Shin* v. *Mg. Maung.* (Where the right to bring a suit for land has become barred, the mere fact of a trespasser taking possession does not revive the right.)

See also Note 93 to Articles 142 & 144.

[6] (1858) 114 R R 1038 (1040) : 27 L J Ex 297.

[7] ('77) 2 Cal 418 (421, 422) (DB), *Shiro Kumari Debi* v. *Govind Shaw Tanti.* (6 Mad H C R 420 dissented from.)

('73) 20 Suth W R 104 (105) (DB), *Ram Lochun Chuckerbutty* v. *Ram Soonder Chuckerbutty.* (11 M I A 345 (PC) followed.)

('19) 6 AIR 1919 Pat 447 (451) : 53 Ind Cas 114 (DB), *Badri Chaudhuri* v. *Harbans Jha.* (28 Cal 370 followed.)

('15) 2 AIR 1915 Sind 4 (6, 7) : 9 Sind L R 1 : 30 Ind Cas 13 (DB), *Karachi Municipality* v. *Shamoo Ladha.*

[*See* ('72) 17 Suth W R 490 (492) (DB), *Lallee Singh* v. *Mt. Arit Kooer.*]

[8] ('20) 7 AIR 1920 Pat 538 (540) : 58 Ind Cas 380, *Ram Brich Singh* v. *Mt. Sonjharo Koer.* (A I R 1919 Pat 447 followed.)

[9] ('39) 26 AIR 1939 Cal 50 (62) : 180 Ind Cas 721 (DB), *Jitendra Kumar* v. *Debendra Chandra.* (Right acquired by adverse possession is equal in orbit to that extinguished.)

Section 28
Note 6

person prescribed against is only a person with a limited interest, it is only that interest that will be extinguished. In other words, no one can prescribe for more than what the person against whom he is prescribing is entitled to.[10] Thus, where A mortgages by a simple mortgage his property to X, and A is thereafter dispossessed by B who remains in adverse possession for twelve years, A's title is extinguished. But A's title is only to the equity of redemption in the property and it is only *that right* that will be extinguished. The right of X in the property cannot be extinguished.[11] As was observed by their Lordships in *Sambasiva* v. *Raghava*,[12] "the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession." Where an order under S. 145, Criminal Procedure Code, is passed declaring one of the two parties to be entitled to and in exclusive possession of the property in dispute and no suit for possession by the other party is filed within the time limited by Art. 47 of the Act, his right is extinguished whether such right is for exclusive possession or for joint possession.[13]

The right that is extinguished cannot also be anything more than the wrongdoer purports to prescribe for. Thus, where, though the owner has absolute title to the property the adverse possessor

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('37) 24 AIR 1937 All 300 (303) : 169 Ind Cas 125, ***Mt Jaidevi Kuari*** **v.** ***Dakshini Din.***

('16) 3 AIR 1916 Mad 990 (997, 998, 999) : 39 Mad 811 : 31 Ind Cas 412 (FB), ***Vyapuri*** **v.** ***Sonamma Boi.***

[10] **('15) 2 AIR 1915 Mad 539 (540) : 25 Ind Cas 692,** ***Venkataratnam*** **v.** ***Venkataramiah.*** **(13 Mad 512 followed.)**

[11] **('16) 3 AIR 1916 Mad 990 (997, 998, 999) : 39 Mad 811 : 31 Ind Cas 412 (FB),** ***Vyapuri*** **v.** ***Sonamma Boi.*** **(4 Suth W R 37 (PC) distinguished.)**

('12) 17 Ind Cas 632 (634, 636) : 34 All 640 (DB), ***Nandan Singh*** **v.** ***Jumman.*** **(9 Ind Cas 791 followed.)**

('18) 5 AIR 1918 Cal 933 (935, 937, 938) : 44 Cal 425 : 37 Ind Cas 277 (DB), ***Priya Saki Debi*** **v.** ***Bireshwar Samanta.*** **(33 Cal 1015 followed.)**

[12] **('90) 13 Mad 512 (516) (DB).**

[13] **('12) 15 Ind Cas 24 (25) (DB) (Mad),** ***Devasikhamani Nataraja Desikar*** **v.** ***Muthiah Chetty.***

('11) 9 Ind Cas 285 (286) (DB) (Mad), ***Gangadharam Aiyar*** **v.** ***Sankarappa Naidu.***

('37) 24 AIR 1937 All 300 (303) : 169 Ind Cas 125, ***Mt. Jaidevi Kuari*** **v.** ***Dakshini. Din.***

('35) 22 AIR 1935 Pat 164 (166, 167) : 14 Pat 424 : 155 Ind Cas 1094 (DB), ***Nando Kahar*** **v.** ***Bhup Narain Singh.*** **(6 Cal L R 93 dissented from.)**

('30) 17 AIR 1930 Nag 142 (143) : 26 Nag L R 160 : 122 Ind Cas 270, ***Jagat Ram*** **v.** ***Pitai.***

('30) 17 AIR 1930 Cal 612 (614) : 128 Ind Cas 106 (DB), ***Atale Sunarri*** **v.** ***Talib Hussain Mia.***

('20) 7 AIR 1920 Mad 545 (545) : 56 Ind Cas 675 (DB), ***Solai Ammal*** **v.** ***Jogi Chetty.***

See also Note 10 to Article 47.

claims to be entitled only to a *limited* interest, it is only *such interest* of the owner that is extinguished by the operation of the section, and acquired by the wrongdoer.[14] On the determination of such interest the right of the true owner to possession will again come into operation.[15] The question whether the person in possession prescribes for a limited interest or for a full estate must be gathered from the facts of the particular case.

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[14] ('39) 26 AIR 1939 Pat 587 (590) : 181 Ind Cas 777 (DB), *Jagdish Chandra* v. *Pratap Chandra.* (Adverse possession of the right to the fruits and timber produced in a forest.)

('30) 17 AIR 1930 Lah 504 (505) : 11 Lah 424 : 123 Ind Cas 276 (DB), *Mahajan* v. *Mt. Purbho.* (Widow forfeiting widow's estate but continuing to be in possession for over twelve years after forfeiture — Possession after forfeiture completes her title to widow's estate only.)

('28) 15 AIR 1928 Cal 130 (134) : 55 Cal 448 : 105 Ind Cas 647 (DB), *Rukeya Banu* v. *Nazira Banu.* (If a person takes possession as mutwalli and holds possession on that basis he cannot afterwards turn round and say that the wakf being void he was in possession in his own right and claim the property as his own as against the beneficiaries.)

('27) 14 AIR 1927 All 274 (276) : 99 Ind Cas 578, *Tarif* v. *Phool Singh.* (Forfeiture of widow's estate on remarriage — Widow continuing in possession after forfeiture—Her adverse possession can create title only to limited estate.)

('29) 16 AIR 1929 Lah 327 (328) : 119 Ind Cas 238, *Desa* v. *Dani.* (Do.)

('25) 12 AIR 1925 All 369 (370) : 86 Ind Cas 445, *Umrao Singh* v. *Pirthi.* (Do.)

('08) 35 Cal 470 (476, 477) : 7 Cal L Jour 499 : 12 Cal W N 636 (DB), *Icharan Singh* v. *Nilmoney Balidar.*

('05) 2 Cal L Jour 125 (136) (DB), *Ishan Chandra* v. *Raja Ramranjan.*

('94) 18 Bom 507 (512) (DB), *Vithal Bowa* v. *Narayan Daji.* (Mirasdar on inam estates in Bombay Presidency is only a tenant and adverse possession for the statutory priod by person claiming to be such mirasdar confers on him only the position of such a mirasdar and does not absolve him from liability to pay rent.)

('25) 12 AIR 1925 Cal 1189 (1191, 1192) : 89 Ind Cas 747 (DB), *Swarnamoyi* v. *Sourindra Nath.*

('12) 16 Ind Cas 960 (960) (DB) (Mad), *Sundara Gurukkal* v. *Subramaniya Archakar.* (The office of archaka of a temple and the properties appended thereto were usufructuarily mortgaged and the mortgagee continued in possession for the prescriptive period—*Held* that the mortgagee acquired only a usufructuary mortgagee's right by adverse possession and not the absolute ownership.)

('33) 20 AIR 1933 Oudh 92 (93) : 7 Luck 320 : 141 Ind Cas 831 (DB), *Mt. Parbati* v. *Ram Prasad.* (Possession of former husband's property continuing for more than twelve years—No assertion of absolute ownership—Only widow's estate is obtained by adverse possession.)

('14) 1 AIR 1914 Nag 81 (82) : 10 Nag L R 35 : 23 Ind Cas 719, *Sheo Lal* v. *Sheo Rajia.* (Person entering into possession as heir which is necessarily a limited title—Very cogent evidence is necessary to show that she claimed to be in possession as absolute owner.)

('16) 3 AIR 1916 Oudh 156 (158) : 34 Ind Cas 416, *Sheo Narain Singh* v. *Bisai Singh.* (Under-properietor of one land being in adverse possession of neighbouring land—Character of the possession must be taken to be that of under-proprietorship.)

[*See also* ('24) 11 AIR 1924 P C 121 (122) : 5 Lah 192 : 51 Ind App 171 : 80 Ind Cas 788 (PC), *Lajwanti* v. *Safa Chand.* (Adverse possession of property belonging to third person, by Hindu widow claiming as her husband's heir — Adverse possession enures to benefit of her husband's estate and after her death the property acquired by such adverse possession passes to her husband's heirs.)]

[15] ('08) 8 Cal L Jour 557 (559, 560) (DB), *Raktoo Singh* v. *Sudhram Ahir.* (When tenant takes possession of land outside his tenancy, and professes to do so in his character as tenant, landlord is dispossessed in a limited sense—Landlord

Where the right to property is extinguished under this section, rights *accessory* thereto and inseparable from it would also be extinguished. Thus, a right to property includes a right to its joint enjoyment[15a] and a right of survivorship is incidental to the right to joint possession of property, and where the latter right is extinguished by limitation the right to survivorship also will be lost.[16] A right to partition and recovery of a share cannot be claimed where the right to sue for joint possession is lost.[16a] Similarly, where the right to recover possession of land from a tenant is lost by the failure to sue for twelve years after the termination of the lease, the landlord cannot recover rent for any period *after* the extinguishment of his right to the property.[16b] It has been held that where the right to immovable property is extinguished under this section the right to recover rents and profits of the property even for a period *prior* to such extinguishment will be lost[17] and that the extinguishment operates retrospectively in such cases.[17a]

Where A and B were reversioners of a Hindu widow and A filed a suit against the *alienee* from the widow within twelve years of the death of the widow impleading B as a party defendant, but B filed a

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cannot eject him from *actual* possession, but he is not deprived of *proprietary* possession by receipt of rent.)

[15a] ('30) 17 AIR 1930 Nag 142 (143) : 26 Nag L R 160 : 122 Ind Cas 270, *Jagatram* v. *Pitai.* (A I R 1921 Mad 24 relied on.)

[16] ('21) 8 AIR 1921 Mad 24 (25, 27) : 44 Mad 131 : 60 Ind Cas 583 (DB), *Atchamma* v. *Bapiah.* (9 M I A 539 (PC) followed.)

[16a] ('30) 17 AIR 1930 Cal 612 (614) : 128 Ind Cas 106 (DB), *Atale Sunarri* v. *Talib Hussain.*
See also Article 47 Note 7.

[16b] ('35) 22 AIR 1935 Mad 377 (378): 157 Ind Cas 569 (DB), *Ambalam* v. *Peria Karuppan.*

[17] ('03) 26 Mad 410 (417) (DB), *Rajah of Venkatagiri* v. *Isakapalli Subbiah.*
('30) 17 AIR 1930 Nag 142 (143) : 26 Nag L R 160 : 122 Ind Cas 270, *Jagatram* v. *Pitai.*
[*See also* (1863-66) 10 Moo Ind App 214 (218, 219) : 5 Suth W R (PC) 1 : 2 Sar 119 : 1 Suther 602 (PC), *Chundrabullee Debia* v. *Luckhee Debia.* (Suit for possession barred—Suit for damages for use and occupation also barred although suit relates to period before the time when the suit for possession became barred: NOTE.—The decision was one relating to the construction and application of cl. 3 of Bengal Regulation II of 1805 and was based on the consideration, arising from the absence of any provision corresponding to S. 28, that unless it was held that a suit for damages for use and occupation could be barred if a suit for possession was barred by time the result would be that a person might go on suing year after year for damages for use and occupation although his right to sue for possession had become barred by limitation, because, (there being no provision corresponding to S. 28) his *title* to the property would continue although his right to sue for possession had become barred—It is doubtful if the decision can be held applicable to cases arising after the enactment of Section 28.)]

[17a] ('03) 26 Mad 410 (417) (DB), *Raja of Venkatagiri* v. *Isakapalli Subbiah.*

written statement after twelve years claiming his share also against the alienee, it was held that S. 28 did not apply to the case, and that B's right was not extinguished by his not filing the suit for his share within twelve years.[18]

7. Inalienable property — Acquisition of title by adverse possession. — See Notes under Articles 142 & 144.

8. Plea of title. — Where a plaintiff pleads title, it is not necessary for him to say that the defendant has lost his title by adverse possession inasmuch as it is a matter of evidence.[1] See also O. 6 R. 2 of the Code of Civil Procedure.

9. Onus of proof. — See Notes under Articles 142 & 144.

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[18] ('29) 16 AIR 1929 Bom 345 (347) : 53 Bom 472 : 119 Ind Cas 656, *Rayegavda Hanmantraya* v. *Ramlingappa Shidgavdappa*.

[*See also* ('09) 4 Ind Cas 249 (251) : 34 Bom 91, *Narasimha* v. *Vaman Venkatesh*. (The right of a person, who did not himself bring a suit within the prescribed period cannot be extinguished by the operation of S. 28 of the Limitation Act if he has been made a party (defendant) to a suit instituted by some other person within the period in which his right to the property in suit can be effectually determined.)]

See also Note 21 to Article 141.

Note 8

[1] ('01) 24 Mad 387 (396) : 28 Ind App 81 : 5 Cal W N 545 : 3 Bom L R 303 : 7 Sar 819 (P C), *Vasudeva Padhi Khadangat Garu* v. *Maguni Devan Bakshi Mahapatrulu Garu*.

PART V.

SAVINGS AND REPEALS.

29.* [a][*(1)* Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872.

Savings.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law —

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.]

[b][*(3)*] Nothing in this Act shall apply to suits under the Indian Divorce Act.

[c][*(4)*] Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, may for the time being extend.

a. Sub-sections *(1)* and *(2)* were substituted for the original sub-section *(1)* of S. 29 by S. 3 of the Indian Limitation (Amendment) Act, X of 1922. The original sub-section *(1)* was as follows :—

29. *(1)* Nothing in this Act shall :—

Savings. *(a)* affect the Indian Contract Act, 1872, section 25;

(b) affect or alter any period of limitation specifically prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.

b. The original sub-section *(2)* was re-numbered as *(3)* by S. 3 of the Indian Limitation (Amendment) Act, 1922 (X of 1922).

c. The original sub-section *(3)* was re-numbered as *(4)* *ibid.*

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* **Act of 1877 : S. 6.**

6. When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

Special and local laws of limitation.

Synopsis

1. History of the section.
2. Sub-section (1).
3. Sub-section (2).
4. "Expressly excluded."
5. "The remaining provisions of this Act shall not apply."
6. Special or local law.

6a. Applicability of the Act to periods fixed by the Civil Procedure Code.

7. Applicability of the Act to suits under the Indian Divorce Act — Sub-section (3).

Other Topics (miscellaneous)

Appeals from decrees in suits under Divorce Act—Prohibition in sub-s. (3) not applicable. See Note 7.

Special or local law
  Civil Pro. Code. See Note 6.
  English statutes. See Note 6.
  Letters Patents. See Note 6.
  Provincial Insolvency Act. See Note 6.
  Rules made by High Court. See Note 6.

Suit for dissolution of marriage of person not governed by Divorce Act—Sub-s. (3) not applicable. See Note 7.

1. History of the section. — Section 3 of the Act of 1859 provided that where a *shorter* period than that prescribed by that Act was specially prescribed by any law in force for any suit, such shorter period should be applied and not the period provided by the Limitation Act. See the undermentioned cases[1] where the provisions

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Act of 1871 : S. 6.

Different periods of limitation prescribed by local laws.

6. When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law.

Appeals from decrees of High Courts on Original Side.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

Act of 1859 : S. 3.

Shorter periods of limitation, if prescribed by particular Acts, to prevail.

3. When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

Section 29 — Note 1

[1] ('13) 19 Ind Cas 387 (389) : 37 Bom 231 (DB), *Rangacharya Appacharya* v. *Dasacharya Sankhalpacharya.* (Section 1 of Bombay Regulation V of 1827 not affected by limitation Act of 1859.)

(1864) 1864 Suth W R Act X Rul 13 (13) (DB), *Roy Kally Prosonno Sein* v. *Kisto Nund Dundee.*

(1864) 1864 Suth W R Act X Rul 116 (117) (DB), *Sreemutty Dabee* v. *Nukee Sunnissa Bebee.*

(1864) 1864 Suth W R Act X Rul 120 (121) (DB), *Poorneema Chowdhrain* v. *Rajchunder Roy.*

(1864) 1 Suth W R 349 (349) (DB), *Ranee Asmedh Koonwur* v. *Joykurun Lall.*

(1864) 1 Suth W R 67 (68) (DB), *Ram Sunkur Sanaputty* v. *Gopaul Kishen Deo.*

('73) 5 N W P H C R 30 (31) (DB), *Mt. Nona* v. *Dhoomun Dass.*

(1864) 1864 Suth W R (Gap) 140 (141) (DB), *Modhoosoodun Singh* v. *Rajah Peertee Bullub Paul.*

(1864) 1 Suth W R 265 (265) (DB), *W. Stephen* v. *Gasper.*

(1864) 1 Suth W R 131 (131) (DB), *Nuttoo Nushyo* v. *Soodh Bewa.*

('73) 10 Bom H C R 204 (206) (DB), *Hari Ramchandra* v. *Vishnu Krishnaji.*

of the Limitation Act were held inapplicable in view of the special provisions of other laws.

Section 6 of the Limitation Act of 1871, which corresponded to S. 3 of the Act of 1859, provided that where by any law not mentioned in schedule thereto annexed and in force in any part of British India, a period of limitation *different* from that prescribed by that Act was specially prescribed for any *suits, appeals or applications*, nothing contained in the Limitation Act should *affect* such law. That section also contained another paragraph providing that nothing contained in the Act should affect the periods of limitation for appeals from, or applications to review, any decree, order, or judgment of a High Court in the exercise of its original jurisdiction.

Section 6 of the Act of 1877 omitted the second paragraph of S. 6 of the Act of 1871, but re-enacted the other provisions of the section in a somewhat modified form. It provided that where by any *special or local law* in force in British India, a period of limitation was specially provided for any suit, appeal or application, nothing contained in that Act should affect *or alter* the period so prescribed.

Section 29 sub-section (1) cl. (b) of the Act of 1908 substantially re-enacted the provisions of section 6 of the Act of 1877. Clause (a) of sub-s. (1) and sub-ss. (2) and (3) (corresponding to the sub-ss. (1), (3) and (4) in their present form) were newly introduced.

In the interpretation and application of the provisions of S. 6 of the Acts of 1871 and 1877, and of sub-s. (1) (b) of S. 29 of the Act of 1908 before its amendment in its present form, there was a conflict of judicial opinions. According to one view the general sections of the Limitation Act could not be applied to the periods of limitation fixed by the special or local laws.[2] The reason given in some cases for the

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('74) 21 Suth W R 318 (320) : 1 Ind App 167 : 13 Beng L R 292 : 3 Sar 363 (P C), *Mohummed Buhadoor Khan* v. *The Collector of Bareilly*.

(1864) 1864 Suth W R (Gap) Act X Rul 133 (134) (DB), *Ranee Surnomoyee* v. *Singhroop Bebee*.

('73) 19 Suth W R 5 (7) : 15 Beng L R 60*n* (P C), *Unnoda Persaud Mookerjee* v. *Krishto Coomar Moitro*.

2. ('91) 18 Cal 368 (372) (FB), *Nagendronath* v. *Mathura Mahun*. (Bengal Rent Act X of 1859—Section 14, Limitation Act of 1877, not applicable.)

('97) 20 Mad 476 (478) (DB), *Akkappa Nayanim Bahadur* v. *Sithala Naidu*. (Madras Rent Recovery Act 1865—Section 12 of Act of 1877 not applicable.)

('99) 22 Mad 179 (181) : 8 Mad L Jour 265 (DB), *Sambasivachari* v. *Ramasami Reddi*. (Madras Rent Recovery Act—Section 4 not applicable.)

('17) 4 AIR 1917 Pat 555 (570) : 40 Ind Cas 13 : 2 Pat L Jour 402 (FB), *Krishna Dayal Gir* v. *Abdul Gaffur*. (Bengal Land Revenue Sales Act, XI of 1859 — Section 5 not applicable.)

('09) 4 Ind Cas 70 (71) (Cal), *Panchkouri Ghosh* v. *Pran Gopal Mukerjee*. (Bengal Land Revenue Sales Act—Section 7 not applicable.)

('15) 2 AIR 1915 Mad 1211 (1212) : 39 Mad 646*n* : 21 Ind Cas 595 (DB), *Raja of Pittapore* v. *Venkata Subba Rao*. (Madras Estates Land Act, 1908—Section 7 does not apply.)

said view was that where the special or local law was a *complete* Code, recourse could not be had to the sections of the Limitation Act; other cases supported the view on the ground that, independent of the question whether the special or local law was a complete Code or not, the effect of the application of the general provisions of the Limitation Act would be to "affect or alter" the period so prescribed. According

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('01) 4 Oudh Cas 182 (188) (DB), *Raghubar Dayal* v. *Sheo Charan.* (Oudh Rent Act, 1886—Section 5 not applicable.)

('20) 7 AIR 1920 Cal 70 (70) : 54 Ind Cas 228 (DB), *Khagendra Narayan Roy* v. *Bamni Barmani.* (Indian Registration Act, 1908.)

('20) 7 AIR 1920 Cal 14 (15) : 47 Cal 300 : 54 Ind Cas 705 (FB), *Kalimuddin Mollah* v. *Sahibuddin Molla.* (Do.)

('03) 30 Cal 532 (535) : 7 Cal W N 550 (DB), *Abdul Hakim* v. *Latifunnessa Khatun.* (This case held correctly decided by A I R 1920 Cal 14 (FB).)

('95) 18 Mad 99 (103) (FB), *Veeramma* v. *Abbiah.* (Indian Registration Act, 1877.)

('96) 20 Mad 249 (250) : 7 Mad L Jour 94 (DB), *Appa Rau Sanayi Aswa Rau* v. v. *Krishnamurthi.* (Do.)

('15) 2 AIR 1915 Mad 442 (443) : 23 Ind Cas 23 (DB), *Subramanian Pattar* v. *Krishna Iyer.* (Do.)

('26) 13 AIR 1926 Nag 126 (127) : 89 Ind Cas 884, *Fatelal* v. *Mt. Siti.* (Do.)

('18) 5 AIR 1918 Mad 213 (216) : 41 Mad 169 : 44 Ind Cas 805 (FB), *Lingayya* v. *Chinna Narayana.* (Provincial Insolvency Act, 1907.)

('15) 2 AIR 1915 Mad 360 (360) : 25 Ind Cas 610 (DB), *Duraisami Aiyangar* v. *Meenakshisundara Aiyar.* (Do.)

('16) 3 AIR 1916 Mad 376 (377) : 39 Mad 593 : 30 Ind Cas 703 (DB), *Sivaramayya* v. *Bhujanga Raw.* (Per Oldfield, J.; Sadasiva Aiyar, J., dissenting.)

('15) 2 AIR 1915 Mad 1053 (1054) : 39 Mad 74 : 27 Ind Cas 144 (DB), *Deva Rao* v. *Parameshraya.* (Provincial Insolvency Act, 1907.)

('19) 6 AIR 1919 Cal 949 (950) : 47 Ind Cas 524 (DB), *Gangadar Nanda* v. *Janakimoni Dasi.* (Bengal Tenancy Act, 1885.)

('19) 6 AIR 1919 Cal 819 (821) : 46 Cal 199 : 47 Ind Cas 502 (DB), *Secretary of State* v. *Sahib Narain Hazra.* (Do.)

('19) 6 AIR 1919 Cal 1001 (1002) : 46 Ind Cas 899 (DB), *Secretary of State* v. *Lakhi Narain Das.* (Do.)

('18) 5 AIR 1918 Cal 278 (279) : 45 Cal 934 : 45 Ind Cas 228 (DB), *Secretary of State* v. *Gangadhar.* (Do.)

('21) 8 AIR 1921 Cal 661 (671) : 66 Ind Cas 287 (DB), *Secretary of State* v. *Ananda Mohan.* (Do.)

('14) 1 AIR 1914 Cal 46 (47) : 20 Ind Cas 760 (DB), *Radhe Shyam Kar* v. *Dina Bhandhu Biswal.* (Do.)

('19) 6 AIR 1919 Oudh 349 (350) : 52 Ind Cas 643 : 22 Oudh Cas 147 (DB), *Ram Deo* v. *Dy. Commissioner, Sultanpur.* (U. P. Land Revenue Act, 1901.)

('18) 5 AIR 1918 Oudh 99 (100) : 43 Ind Cas 473, *Nurul Hassan* v. *Sarju Prasad.* (Do.)

('10) 5 Ind Cas 884 (886) : 34 Mad 505 (FB), *Abu Baker* v. *Secretary of State.* (Madras Forest Act, 1882.)

('81) 3 Mad 92 (94) : 5 Ind Jur 242 (DB), *Thir Singh* v. *Venkataramier.* (Madras Boundary Act, 1860.)

('76) 1 All 254 (255) (DB), *Timalkuari* v. *Ablakh Rai.* (Section 15 of Act of 1871 does not affect period fixed by Act XVIII of 1873.)

('89) 1889 Pun Re No. 86, *Buta* v. *Ralla Ram.* (Punjab Courts Act, 1884, as amended in 1888.)

to the second view, the general provisions of the Limitation Act would be applicable to periods prescribed by the special or local law if such laws were not complete Codes in themselves, the reason given being that the words "affect or alter" related only to the period prescribed and not to the *computation* of such period.[3]

('11) 11 Ind Cas 34 (35) (Lah), *Katara* v. *Arjan Singh.* (Punjab Land Alienation Act, 1900.)

('23) 10 AIR 1923 Nag 306 (307) : 73 Ind Cas 1021 (DB), *Lakshman* v. *Keshao Rao.* (Central Provinces Land Revenue Act, 1917.)

('18) 5 AIR 1918 Sind 50 (52) : 11 Sind L R 106 : 45 Ind Cas 168, *Mossaji Ahmad & Co.* v. *Asiatic Steam Navigation Co., Ltd.* (Karachi Port Trusts Act, 1886.)

('80) 4 Cal 50 (52) : 2 Cal L R 543 (DB), *Purran Chunder Ghose* v. *Mutty Lall.* (Bengal Rent Act, 1869.)

('21) 8 AIR 1921 Pat 365 (366) : 59 Ind Cas 179 (DB), *Deoki Lal* v. *Ramanand Lal.* (Patna Letters Patent.)

('21) 8 AIR 1921 Lah 26 (27) : 61 Ind Cas 327 : 2 Lah 127 (DB), *Dyal Singh* v. *Budha Singh.* (Lahore Letters Patent and Hight Court Rules.)

('98) 21 All 22 (24) : 1898 All W N 151, *Muhammad Husen* v. *Muzaffer Husen.* (N. W. P. Rent Act, 1881.)

('10) 6 Ind Cas 752 (753) : 10 Oudh Cas 103 (DB), *Iqbal Narain Pandit* v. *Babu Singh.* (Oudh Rent Act, 1886.)

('09) 4 Ind Cas 872 (873) (Mad), *E. I. Distilleries & Sugar Factories Ltd.* v. *Tinnevelly Sarangapani Sugar Mills Co., Ltd.* (Indian Companies Act, VI of 1882.)

('02) 24 All 402 (412, 419) : 1902 All W N 99 (FB), *Udit Upadhia* v. *Imam Bandi Bibi.* (Indian Registration Act, III of 1877.)

[*See* ('74) 22 Suth W R 17 (21) : 13 Beng L R 445 (DB), *Thakoor Kapilnath* v. *The Government.*]

[*See also* ('16) 3 AIR 1916 Mad 415 (420) : 29 Ind Cas 168 (DB), *Ratna Bai* v. *Official Assignee of Madras.* (Limitation Act has no application to special procedure provided by Presidency Towns Insolvency Act.)]

[3] ('12) 16 Ind Cas 149 (153) : 34 All 496 (FB), *Dropadi* v. *Hira Lal.* (Appeal under the Provincial Insolvency Act, 1907—Section 12 applied — Overruling 11 Ind Cas 197.)

('13) 20 Ind Cas 258 (259) : 9 Nag L R 91, *Ganga Ram* v. *Ramchandra.* (Appeal under Provincial Insolvency Act, 1907—Sections 5 and 12 applied.)

('16) 3 AIR 1916 Lah 307 (308) : 33 Ind Cas 730, *Ram Kishen* v. *Mt. Umrao Bibi.* (Do.)

('80) 5 Cal 314 (316, 317) (DB), *Golachand Nowlukha* v. *Kritso Chnnder Dass.* (Bengal Rent Act, VIII of 1869.)

('80) 5 Cal 303 (308) (DB), *Parbuttinath Roy* v. *Tejomoy.* (Do.)

('81) 7 Cal 690 (693) (DB), *Khoshelal Mahton* v. *Gunesh Dutt.* (Do.)

('05) 9 Cal W N 1025 (1026) (DB), *Hari Har Lal* v. *Gunedar Pershad.* (Bengal Tenancy Act, VIII of 1885.)

('80) 5 Cal 110 (112): 4 Cal L R 371 (DB), *Beharilall Mookerjee* v. *Mungola Nath Mookerjee.* (Bengal Rent Act, VIII of 1869.)

('16) 3 AIR 1916 Mad 1093 (1097) : 38 Mad 92 : 18 Ind Cas 617 (DB), *Srinivasa Iyengar* v. *Secretary of State.* (Madras Revenue Recovery Act, II of 1864.)

('18) 5 AIR 1918 Lah 372 (373) : 46 Ind Cas 588 : 1918 Pun Re No. 89, *Waryam Singh* v. *Wadhava.* (Provincial Insolvency Act, 1907, is not a complete Code.)

('02) 1902 All W N 34 (34, 35), *Joti Sarup* v. *Ramchandar Singh.* (N. W. P. Rent Act, XII of 1881, is not a complete Code—Section 19 applied.)

By the Indian Limitation (Amendment) Act, X of 1922, sub-ss. (1) and (2) were substituted for the old sub-s. (1), and sub-ss. (2) and (3) were renumbered as (3) and (4). This amendment has now set the conflict at rest. The words "affect or alter" have been deleted, and the extent and applicability of the several general provisions of the Act, to the periods prescribed by the special or local laws, specifically laid down.[4]

2. **Sub-section (1).**—Section 20 of the Act of 1871 corresponding to the present S. 19, provided *inter alia* that no *promise* could take the case out of the operation of the Act unless it was, before the expiration of the prescribed period, made in writing signed by the person to be charged therewith or by his agent. Section 25, sub-s. (3) of the Contract Act which was enacted in 1872 provided, however, that a promise to

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('01) 23 All 277 (279, 281) : 1901 All W N 72 (DB), *Beni Prasad Kauri* v. *Dharaka Rai.* (N. W. P. Rent Act, XII of 1881, is not a complete Code.)

('93) 20 Cal 264 (268) (DB), *Girjanath Roy* v. *Ram Narain Das.* (Bengal Public Demands Recovery Act, VII of 1880.)

('87) 10 Mad 210 (211) (DB), *Reference under Section 39 of Act V of 1882, Forest Act.* (Appeal under S. 14 of Madras Forest Act, 1882—Section 5 applied.)

('88) 12 Mad 1 (5) (DB), *Seshama* v. *Sankara.* (Suit under Section 25, Madras Boundary Act, 1860—Benefit of S. 14 allowed.)

('88) 12 Mad 467 (471) (DB), *Kullayappa* v. *Lakshmipathi.* (Suit under S. 78 of Madras Rent Recovery Act, VIII of 1865—Benefit of S. 14 given.)

('93) 3 Mad L Jour 255 (258) (DB), *Iswara Patter* v. *Karuppan.* (Suit under Madras Revenue Recovery Act, II of 1864 — Section 18 applied.)

('91) 14 Mad 365 (372) (DB), *Mahadevi* v. *Vikrama.* (Appeal to Governor-in-Council under Madras Act, XXIV of 1839—Benefit of S. 12 given.)

('92) 2 Mad L Jour 217 (219) : 16 Mad 344 (DB), *N. Ram Row* v. *X. R. Fernand.* (Appeal to District Judge under Madras Rent Recovery Act, VIII of 1865—Benefit of Section 12 given.)

('84) 8 Bom 529 (531) (DB), *Gurucharya* v. *President of the Belgaum Town Municipalities.* (Section 14 applied to a suit under S. 86 Bombay District Municipal Act, VI of 1873.)

('81) 8 Cal 910 (911) : 10 Cal L R 333 : 7 Ind Jur 84 (DB), *Nijabutoolla* v. *Wazir Ali.* (Registration Act, III of 1877.)

('05) 28 All 48 (49) : 1905 All W N 175 : 2 All L Jour 714 (DB), *Suraj Bali Prasad* v. *H. E. Thomas.* (Do.)

('90) 1890 Pun Re No. 74 (FB), *Nigahya* v. *Ballun Mal.* (Do.)

('93) 1893 All W N 117 (117) (DB), *Pem Kunwar* v. *Imrat Kunwar Zemindar.* (N. W. P. Rent Act, XII of 1881.)

('91) 14 Mad 404 (405) (DB), *Abdool* v. *Mahamed.* (Appeal under Insolvency Act filed on day when Court reopened after vacation — *Held*, appeal was not time-barred.)

[*See* ('19) 6 AIR 1919 All 274 (275) : 51 Ind Cas 113 (DB), *Bhairao Prasad* v. *S. P. C. Dass.* (Question not decided but principle approved.)]

[*See also* ('14) 1 AIR 1914 Oudh 255 (255) : 17 Oudh Cas 254 : 25 Ind Cas 703, *Binda Parshad* v. *Ram Bhajan.* (Section 4 applies to appeals under Oudh Rent Act by virtue of S. 119A of that Act : NOTE—After the amendment S. 4 would apply for another reason also viz., that its application has not been expressly excluded by the Act.)]

4. *See* ('39) 26 AIR 1939 All 403 (410) : 183 Ind Cas 242 : ILR (1939) All 647 (FB), *Durag Pal Singh* v. *Pancham Singh.*. (Per Iqbal Ahmad, J.—Necessity for amendment explained.)

pay a *barred debt* was good and enforceable.[1] This would seem to have given room for the contention that the two provisions were contradictory to each other. Section 19 of the Act of 1877 deleted the word "promise" from the section. But it was still possible to argue that that section contradicted S. 25 of the Contract Act, inasmuch as a promise to pay a barred debt was valid while an acknowledgment (which has been held to imply a promise to pay), would not be valid if made after the prescribed period. This sub-section has been introduced in order to make it clear that the substantive provision in S. 25, sub-s. (3) of the Contract Act is not affected by any provisions of this Act. At the same time, this sub-section does not preclude S. 25 of the Contract Act from being *construed* in such a way as not to conflict with the provisions of this Act.

See also section 19 Note 9.

3. Sub-section (2). — This sub-section is only an enactment of the general principle enunciated by the maxim *generalia specialibus non derogant* — general words do not derogate from the special. It accordingly provides that where a special or local law provides for any suit, appeal or application a period different from the period prescribed therefor by the first schedule, the provisions of the Limitation Act will not apply except to the extent expressly specified in this section.[1]

Note 2

[1] *See the undermentioned cases :*
('78) 4 Cal 500 (508) : 3 Cal L R 554(DB), *Heera Lall Mokhopadhya* v. *Dhunput.*
('21) 8 AIR 1921 Pat 29 (29, 30) : 60 Ind Cas 514 : 6 Pat L Jour 121 (DB), *Ram Bahadur Singh* v. *Damodar Prasad Singh.*
('77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghoji Bhikaji* v. *Abdul Karim.*
('08) 30 All 268 (270) : 5 All L Jour 274 : 1908 All W N 129 (DB), *Gobind Das* v. *Sarju Das.* (In order to come under Section 25 (3), there must be a distinct promise to pay and not a mere acknowledgment which may imply a promise.)
('15) 2 AIR 1915 Cal 186 (187) : 25 Ind Cas 89 (DB), *Debi Prosad* v. *Ram Ghulam.* (*Sorkhol* showing merely balance due and not containing promise to pay within the meaning of S. 25 (3) cannot be relied on to recover time-barred debt entered therein.)
See also Note 9 to Section 19.

Note 3

[1] ('40) 27 AIR 1940 Cal 113 (113) : ILR (1939) 2 Cal 358 : 187 Ind Cas 301 (DB), *Smt. Bajroga Khatun* v. *Province of Bengal.* (Suit to recover possession of land claimed by plaintiff as raiyat is governed by S. 184, Bengal Tenancy Act, and not by S. 3 or S. 29 of this Act.)
('40) 27 AIR 1940 Mad 819 (820), *Venkata Suryanarayana* v. *Tirupatayya.* (Madras Local Boards Act — Suit for recovery of cess under S. 89 — Suit falls under S. 77, Madras Estates Land Act—Limitation for suit is governed by Sch. A, Art. 8, Madras Estates Land Act — Limitation Act does not apply.)
('38) 25 AIR 1938 All 213 (215) : 175 Ind Cas 20, *Fakhruddin Husain* v. *Abdul Wahid.* (Provisions of the Indian Limitation Act do not govern suits and applications provided for by the Agra Tenancy Act.)
('37) 24 AIR 1937 Cal 587 (589) : 173 Ind Cas 540 : ILR (1937) 2 Cal 631 (DB), *Munshi Alauddin Ahammed* v. *Tomisuddin Ahammed.*

Section 29
Note 3

Section 3 is expressly mentioned as being applicable to such cases[2] and consequently every suit, appeal or application for which a period of limitation is prescribed by a special or local law, must be dismissed if it is made or filed after the prescribed period, even though limitation is not set up as a defence.[3] Sections 4, 9 to 18 and 22 would apply to such cases only in so far as and to the extent to which they are *not expressly* excluded by such special or local law.[3a] (See also Note 5.)

('36) 23 AIR 1936 Rang 501 (502) : 14 Rang 728 : 166 Ind Cas 148 (DB), *Rattilal Jamnadas* v. *Pragjee.* (Special rule of limitation held *ultra vires*; hence Limitation Act applied.)

('31) 18 AIR 1931 Sind 55 (55) : 131 Ind Cas 181, *Secretary of State* v. *Municipality of Karachi.* (Suit by Secretary of State against Municipality for damages — S. 167, Bombay District Municipal Act, III of 1901, applies in preference to Article 149.)

[*See also* ('07) 30 All 44 (46) : 4 All L Jour 713 : 1907 All W N 282, *Banwari Lal* v. *Gopi.* (Section 199, Agra Tenancy Act, II of 1901.)]

[2] ('29) 16 AIR 1929 Nag 185 (190) : 116 Ind Cas 427 (DB), *Kawdu* v. *Berar Ginning Co. Ltd.*

[*See also* ('29) 16 AIR 1929 Mad 490 (491) : 119 Ind Cas 318, *Chandramauleswara Prasad* v. *Papayya.* (Provisions of Limitation Act made applicable by S. 211 (2), Madras Estates Land Act, are subject to operation of S. 210 and the periods limited by the schedule in Madras Act.)]

[3] ('33) 20 AIR 1933 Cal 132 (133) : 60 Cal 618 : 142 Ind Cas 280 : 34 Cri L Jour 299 (DB), *Manmatha Nath Biswas* v. *Emperor.* (Section 33 (2), Bengal Emergency Powers Ordinance, 1931.)

('24) 11 AIR 1924 Oudh 127 (128) : 26 Oudh Cas 324 : 73 Ind Cas 127 (DB), *Samuel Burge* v. *Improvement Trust, Lucknow.* (U. P. Land Acquisition Act, S. 18—A waiver of the question of limitation under any special or local law is no longer permissible.)

See also Note 23 to Section 3.

[3a] ('39) 26 AIR 1939 All 542 (544), *Chunni Lal* v. *Chandan Gopal.* (Section 18 applies to proceedings under U. P. Encumbered Estates Act.)

('39) 26 AIR 1939 Oudh 227 (228) : 14 Luck 694 : 183 Ind Cas 382 (DB), *Kasim Husain* v. *Mt. Mubarak Jahan Begam.* (Do.)

('38) 25 AIR 1938 Cal 324 (324) : 177 Ind Cas 798 (DB), *Dinesh Chandra* v. *Rajendra Chandra.* (Section 22 applies to application under S. 26F of Bengal Tenancy Act.)

('38) 25 AIR 1938 Nag 454 (455): 178 Ind Cas 479 : ILR (1939) Nag 377, *Balkisan Seth* v. *Bhanuprasad.* (Section 4 applies to application under S. 54, Provincial Insolvency Act.)

('38) 25 AIR 1938 Oudh 186 (188) : 177 Ind Cas 48 : 14 Luck 138 (DB), *Ram Dass* v. *Chhedi Lal.* (Section 4 applies to application under section 12 (2) of the Oudh Courts Act.)

('32) 19 AIR 1932 Bom 259 (266) : 56 Bom 135 : 137 Ind Cas 545 (DB), *Chhaganlal Sakerlal* v. *Municipality of Thana.* (Section 167, Bombay District Municipal Act 1901—S. 15 (2) applies.)

('33) 20 AIR 1933 Cal 782 (784) : 60 Cal 970 : 148 Ind Cas 15 (DB), *Midnapore Zamindari Co. Ltd.* v. *Priyabala Dasee.* (Section 18 applies to application under S. 174 (3), Bengal Tenancy Act, as amended in 1928.)

('29) 16 AIR 1929 Lah 170 (170) : 117 Ind Cas 881 (DB), *Mahomed Hayat Haji Muhammad Sardar* v. *Commissioner of Income-tax, Punjab and N. W. F. P.* (Application under S. 66 (3), Income-tax Act, 1922 — S. 12 applies.)

('30) 17 AIR 1930 Pat 14 (18) : 122 Ind Cas 810 : 9 Pat 172 (DB), *Mohan Lal Hardeo Das* v. *Commissioner of Income-tax, Bihar and Orissa.* (Do.)